



Faculty of Law

Lund University

**Master of European Affairs programme,
Law**

Master thesis

By

Grétar Hannesson

**External competences of the
European Community in relation to
the WTO**

Professor of Law
Dr. Birgitta Nyström

European Law

Spring 2002

Contents

1	INTRODUCTION	5
2	THE URUGUAY ROUND - WORLD TRADE ORGANIZATION	8
2.1	WTO	9
2.1.1	Objectives	9
2.1.2	Structure	10
2.2	Multilateral Trade Agreements	11
2.2.1	The Multilateral Agreements on Trade in Goods - GATT 1994	11
2.2.2	GATS	13
2.2.3	TRIPS	14
2.2.4	Dispute settlement procedural agreements	15
2.2.5	Trade review agreements	17
3	EXTERNAL COMPETENCIES OF THE COMMUNITY	18
3.1	Express external competences	18
3.2	Implied external competences	19
3.2.1	Implied external competences developed by the Court	20
3.2.2	The Courts less expansive approach	22
3.3	Division of external competences between Member States and the Community	22
3.3.1	Exclusive competencies of the Community	23
3.3.2	Mixed agreements	24
3.3.2.1	Different types of mixed agreements	25
3.3.2.2	Mixed agreements - legal and practical problems	26
3.4	Community exclusive competences in the field of common commercial policy	28
3.4.1	Common commercial policy	28
3.4.2	Common commercial policy and GATT 1947	30
4	COMPETENCIES OF THE EUROPEAN COMMUNITY IN RELATION TO THE WTO	32
4.1	Introduction	32
4.2	Opinion 1/94 on the WTO	32
4.2.1	Multilateral Agreement on Trade in Goods	33
4.2.2	Common commercial policy and GATS and TRIPS	35
4.2.2.1	GATS	35
4.2.2.2	TRIPS	36
4.2.3	Implied external powers	38
4.2.3.1	GATS	39
4.2.3.2	TRIPS	41
4.2.3.3	Summary	42
4.2.4	Duty of Co-Operation	44

4.3	Opinion 1/94 - The Aftermath	44
4.3.1	The Critic on the Opinion	44
4.3.2	The competences of the Court to interpret the WTO Agreement	46
4.3.2.1	Case law on the interpretation on the WTO Agreement	48
4.3.2.2	The Hermés case	49
4.3.2.3	The Dior and Assco cases	51
4.3.2.4	Summary	53
4.3.3	The effects of the provisions of the WTO Agreement within the Community	54
4.3.3.1	Portuguese textile	56
4.3.3.2	The Dior case	56
4.3.3.3	Summary	58
5	CONCLUSIONS	60

Summary

In this paper I will discuss the external competences of the Community in general and in relations to the WTO Agreement and the Agreements covered by it. I will limit my discussion to the competences of the Community under pillar I of the European Union.

The WTO Agreement¹ consists of preamble and 16 Articles regulating the scope and functions of the WTO, its institutional structure, legal status and relations with other organizations, decision-making procedures and membership. Its legal complexity derives from the additional 29 Agreements and Understandings listed in the 4 Annexes to the WTO Agreement and from its inclusion into the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations.²

The main aim of the Agreement is to promote welfare through international guarantees of freedom, non-discrimination and rule of law in the field of worldwide economic relations.

The WTO Agreement established the WTO, which is an international organization. It has the purpose of administering trade agreements, act as a forum for trade negotiations, settling trade disputes, reviewing national trade policies, assisting developing countries in trade policy issues, and cooperate with other international organization.³

There is a fundamental difference between the WTO and the Community. The European Community is a supranational body, which is based on the notion that the MS have transferred their sovereignty in certain fields to the Community, while the WTO, on the other hand is an international organisation and no transferral of sovereignty has occurred.

My intention by writing this paper is to cast a light on the competences of the Community regarding the WTO Agreement, contrary to those of the MS, and the position of the WTO rules in the Community's legal system, the judicial control and their effects. I also elaborate on the difference between the WTO Agreement and other international agreements entered into by the Community and its MS.

While writing this paper I took into consideration the very explicit *Opinion 1/94* on the WTO Agreement, which is a book in itself. In addition to the Opinion itself I gathered various articles concerning mixed agreements, external competences of the Community and common commercial policy. I also refer in

¹ When I refer to the WTO Agreement hereafter I am also referring to the various Agreements and Understandings, annexed to it, except where I especially make notice of doing otherwise.

² See Petersmann, Ernst-Ulrich, *The Transformation of the Worlds Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, European Journal of International Law, Vol. 6, No 2, Oxford University Press, [1995], p. 190.

³ Trading Into the Future, *The World Trade Organization*, 2nd ed., revised, [1999], http://www.wto.org/english/res_e/download_e/tif.pdf.

my paper to many articles concerning the *Opinion 1/94* itself, the effects of the WTO Agreements and the impact it has on the Community's legal order.

The structure of the paper is in somewhat similar to the structure of the Opinion itself and many of the articles I refer to in my writing. I outline the Uruguay Round, which lead to the establishment of the WTO Agreement. I also outline the objective of the WTO and its structure. I describe the Multilateral Trade Agreements, which form an integral part of the WTO Agreement and contracting parties must take over if they accede to the WTO. This is the so-called "single pack" concept.

In addition I discuss the external competences of the Community in general. I outline the concept of express external powers and the principle of implied external powers and the development of the concept through case law. The division of external competences between the Community and the MS are also addressed and on what principles that division is based and outline under what condition the exclusive competences of the Community may occur. The concept of mixed agreements is discussed in length, the many types of mixed agreements and the various difficulties and problems relating to such agreements. This discussion is important for, as already stated the Court, in *Opinion 1/94* concluded that most part of the GATS and almost all of the TRIPS fell under the notion of mixed agreement.

I elaborate on the competences of the Court to interpret the provisions of the WTO Agreement. I discuss the judicial control from the perspective of preliminary rulings and action for annulment brought by the MS under Article 230 EC. Those are the most practical possibilities of reviewing the legality of Community acts for it can be very troublesome for legal and natural persons to prove that they are individually and directly concerned parties. If a case, on the other hand, is brought to the Court under Article 234 EC no such analysis has to take place, and under Article 230 EC the MS are a privilege parties and do not have to show that they are individually and directly concerned.

The fact that the Court came to the conclusion that the WTO Agreement was a mixed one evoked many difficult questions regarding the jurisdiction of the Court to interpret its provision, and before long cases concerning that problem were brought under the Court.

Concerning implied powers of the Community the Court made it clear that the MS only lose their power to enter into agreements with third countries to the extent that common rules had been established within the Community, which might be affected by such an agreement. Only where common rules have been laid down internally does the Community's competence become exclusive. The Court also pointed out that there was nothing in the Treaty to prevent the institutions from establishing, within the framework of common rules, a concerted approach to third countries or from laying down the approach to be taken by MS to the outside world. On the contrary, the Court emphasized the duty of co-operation between the Community and the MS, not least because of the nature of the WTO Agreement and the possibility of cross retaliation, which it offers.

In subsequent case law the Court has clarified the jurisdiction of the Court to interpret provisions of the WTO Agreement. In *Portuguese textile case*, *Hermés case* and last but not lastly, in the *Dior case*, one can assume that the Court has jurisdiction to interpret procedural provisions, such as Article 50 of the TRIPS Agreement, which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law. This is based on the need, for practical and legal reasons, that the judicial bodies of the MS and the Community give a uniform interpretation.

The Court on the other hand did not clearly write-off the possibility of the Courts jurisdiction regarding provisions of the WTO Agreement, falling exclusively under MS competences.

The Court has also developed and modified the effects of the WTO Agreement from the GATT 1947, which was bluntly denied of direct effect within the Community's legal order. In the most recent case law concerning Article 50 of the TRIPS Agreement the Court has denied it of direct effect but nevertheless it seems to have accepted "indirect effect" of the provisions of the WTO Agreement, by stating that when judicial authorities of the MS are required by virtues of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the working and purpose of Article 50 of the TRIPS Agreement. Concerning fields not falling within the scope of Community law the Court has ruled that the Community law neither requires nor forbids the national courts to rely directly on the rule laid down by Article 50 of the TRIPS Agreement or to oblige the national courts to apply that rule of their own motion.

Abbreviations

CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
Euratom	European Atomic Energy Community
FAO	Food and Agriculture Organisation
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
JHA	Justice and Home Affairs
MS	Member State
TEU	Treaty on the European Union
TRM	Trade Review Mechanism
TPRM	Trade Policy Review Body
TRIPS	Trade-Related Aspects of Intellectual Property Right
WTO	World Trade Organization

1 Introduction

Since the signing of the Treaty on the European Union (TEU) in 1993 the European Union has been based on three "pillars". The European Community falls under the so-called pillar I. Under the terms of the TEU the two pillars on the Common Foreign and Security Policy (CFSP) and on Justice and Home Affairs (JHA) differ from pillar I for they do not share the institutional structure, law-making processes, or legal instruments of the Community pillar, largely beyond the jurisdiction of the Court and lacking the key Community law characteristics of supremacy and direct effect.⁴ Therefore the two latter pillars are more in line with traditional international law, rather than sharing the supranational characteristics of the European Community.

It is important to note that the European Union itself has no external competences of its own. The Council, on the other hand, exercises the external competences on behalf of the Communities.

In this paper I will discuss the external competences of the Community in general and in relations to the WTO Agreement and the Agreements covered by it. I will limit my discussion to the competences of the Community under pillar I of the European Union.

The WTO Agreement⁵ consists of preamble and 16 Articles regulating the scope and functions of the WTO, its institutional structure, legal status and relations with other organizations, decision-making procedures and membership. Its legal complexity derives from the additional 29 Agreements and Understandings listed in the 4 Annexes to the WTO Agreement and from its inclusion into the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations.⁶

The main aim of the Agreement is to promote welfare through international guarantees of freedom, non-discrimination and rule of law in the field of worldwide economic relations.

The WTO Agreement established the WTO, which is an international organization. It has the purpose of administering trade agreements, act as a forum for trade negotiations, settling trade disputes, reviewing national trade policies, assisting developing countries in trade policy issues, and cooperate with other international organization.⁷

⁴ Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p.3.

⁵ When I refer to the WTO Agreement hereafter I am also referring to the various Agreements and Understandings, annexed to it, except where I especially make notice of doing otherwise.

⁶ See Petersmann, Ernst-Ulrich, *The Transformation of the Worlds Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, *European Journal of International Law*, Vol. 6, No 2, Oxford University Press, [1995], p. 190.

⁷ Trading Into the Future, *The World Trade Organization*, 2nd ed., revised, [1999], http://www.wto.org/english/res_e/download_e/tif.pdf.

There is a fundamental difference between the WTO and the Community. The European Community is a supranational body, which is based on the notion that the MS have transferred their sovereignty in certain fields to the Community, while the WTO, on the other hand is a international organisation and no transferral of sovereignty has occurred.

My intention by writing this paper is to cast a light on the competences of the Community regarding the WTO Agreement, contrary to those of the MS, and the position of the WTO rules in the Community's legal system, the judicial control and their effects. I also elaborate on the difference between the WTO Agreement and other international agreements entered into by the Community and its MS.

While writing this paper I took into consideration the very explicit *Opinion 1/94* on the WTO Agreement, which is a book in itself. In the extensive Opinion the Court⁸ came to the conclusion that all of the Multilateral Agreement on Trade in Goods fell within the common commercial policy and therefore within the exclusive competences of the Community. The Court, on the other hand, concluded that a large part of GATS and almost all of TRIPS fell outside the scope of the common commercial policy and that the Community and the MS had shared the competences to conclude those Agreements.

In addition to the Opinion itself I gathered various articles concerning mixed agreements, external competences of the Community and common commercial policy. I also refer in my paper to many articles concerning the *Opinion 1/94* itself, the effects of the WTO Agreements and the impact it has on the Community's legal order.

The structure of the paper is in somewhat similar to the structure of the Opinion itself and many of the articles I refer to in my writing. In Chapter 2 I outline the Uruguay Round, which lead to the establishment of the WTO Agreement. I also outline the objective of the WTO and its structure. Then I describe the Multilateral Trade Agreements, which form and integral part of the WTO Agreement and contracting parties must take over if they accede to the WTO. This is the so-called "single pack" concept.

In Chapter 3 I discuss the external competences of the Community in general. I outline the concept of express external powers and the principle of implied external powers and the development o the concept through case law.

I also outline the division of external competences between the Community and the MS and on what principles that division is based and outline under what condition the exclusive competences of the Community may occur. I discuss the concept of mixed agreements in length, the many types of mixed agreements and the various difficulties and problems relating to such agreements. This discussion is important for, as already stated the Court, in *Opinion 1/94* concluded that most part of the GATS and almost all of the TRIPS fell under the notion of mixed agreement.

⁸ When I refer to the Court in this paper I do not distinguish between the ECJ and the CFI, except where I especially state otherwise.

In Chapter 4 I discuss and outline in length the very important *Opinion 1/94* on the WTO Agreement. In my discussion I stick to the approach exercised by the Court and draw out the main points of the ruling.

I elaborate on the competences of the Court to interpret the provisions of the WTO Agreement. I discuss the judicial control from the perspective of preliminary rulings and action for annulment brought by the MS under Article 230 EC. Those are the most practical possibilities of reviewing the legality of Community acts for it can be very troublesome for legal and natural persons to prove that they are individually and directly concerned parties. If a case, on the other hand, is brought to the Court under Article 234 EC no such analysis has to take place, and under Article 230 EC the MS are a privilege parties and do not have to show that they are individually and directly concerned.

I outline the effect of WTO Agreement within the Community's legal order and whether the Court has jurisdiction to review the legality of community acts based on the provisions of the WTO Agreement and whether WTO stipulation confer rights upon legal or natural persons which can be based on in the Court or the national courts.

Finally in Chapter 5 I conclude my discussions and draw my earlier discussion together and outline my conclusion.

2 The Uruguay round - World Trade Organization

On the April 15, 1994, the WTO Agreement was signed in Marrakesh,⁹ Morocco, by 124 governments and the Community.¹⁰ The president of the Council and Mr. Leon Brittan, member of the Commission signed the agreement on behalf of the Council of the European Communities and representatives from the MS signed the agreement on their behalf.¹¹ Since the signature in April 1994 many states have joined, and currently the number of MS are 144¹² and there are between twenty and thirty candidate countries.¹³

The signature of the WTO Agreement marked the end of the so called Uruguay round, which spanned the years, from 1986 to 1994. The Uruguay round was the seventh intergovernmental trade negotiations, or rounds held under GATT, since the signing of the GATT Agreement in Havana in 1947.¹⁴ The Uruguay round included a major revision of the original GATT Agreement. The amendments made to the original GATT Agreement were significant and therefore, after the Uruguay Round the amended GATT Agreement has been referred to as GATT 1994 to distinguish it from the original Agreement.¹⁵

The original GATT did only cover trade in goods and there was no international organization that covered the agreement. The fruitful negotiations added other international trade agreements to the GATT and a special agreement on the establishment of the WTO.¹⁶

⁹ Denza, Eileen, *The Community as a Member of International Organization*, The European Union and World Trade Law, After the GATT Uruguay Round, John Wiley & Sons, (1996), p. 3

¹⁰ Petersmann, Ernst-Ulrich, *The Transformation of the World's Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, European Journal of International Law, Vol. 6, No 2, Oxford University Press, [1995], p. 190.

¹¹ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 297 and Denza, Eileen, *The Community as a Member of International Organizations*, The European Union and World Trade Law After the GATT Uruguay Round, ed. by Emiliou, Nicolas, O'Keefe, David, John Wiley & Sons, [1996], 13-14.

¹² As of January 1, 2002.

¹³ Trading Into the Future, *The World Trade Organization*, 2nd ed., revised, [1999], http://www.wto.org/english/res_e/download_e/tif.pdf.

¹⁴ Denza, Eileen, *The Community as a Member of International Organization*, The European Union and World Trade Law, After the GATT Uruguay Round, John Wiley & Sons, (1996), p. 3

¹⁵ In this paper I will refer to GATT 1994 as the GATT, unless further clarification is needed.

¹⁶ Petersmann, Ernst-Ulrich, *The Transformation of the World's Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, European Journal of International Law, Vol. 6, No 2, Oxford University Press, [1995], p. 190.

A number of multilateral trade agreements¹⁷ that are an integral part of the WTO agreement and are designed to be binding on all WTO members, are listed in the first Annexes. The agreements are, in addition to GATT, the GATS,¹⁸ the TRIPS Agreement,¹⁹ the Understanding on Rules and Procedures Governing the Settlement of Disputes,²⁰ and finally the Trade Policy Review Mechanism.²¹ It was also agreed on plurilateral trade agreements,²² which are not an integral part of WTO and are only binding on those WTO members that have accepted them.

The aforementioned multilateral trade agreements are annexed to the WTO Agreement and together it makes immense magnitude of 22.000 pages.²³ Therefore it is understandable that the negotiations have been described as the most complex trade negotiations in the history.

2.1 WTO

2.1.1 Objectives

The main task of the WTO is to increase free flow of trade and remove hindrances to international trade. The WTO encompasses this by administering trade agreements and acting as a forum for trade negotiations. It offers also dispute settlement procedures,²⁴ which is an integral part of the agreement. More than 167 cases were brought to the WTO by March 1999 compared to some 300 disputes dealt with during the entire life of GATT.²⁵ The review of national trade policies plays also a vital role.²⁶ The review, brought out by the WTO secretariat, which is to analyse national policies and insure that they are in uniformity with the agreement.²⁷

The WTO assists the developing countries in trade policy issues to make them more compatible. There are also many other projects designed for the developing countries under the agreement and they have also been granted derogations to take up WTO rules so they can have more time for their economies to adjust to free trade. The WTO is also to use its mandate to "make appropriate arrangements for effective cooperation with other intergovernmental

¹⁷ The Multilateral Trade Agreements will be outlined in chapter 2.2.

¹⁸ Annex 1B WTO.

¹⁹ Annex 1C WTO.

²⁰ Annex 2 WTO.

²¹ Annex 3 WTO.

²² Annex 4 WTO.

²³ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 294.

²⁴ The Understanding on Rules and Procedures Governing the Settlement of Disputes is outlined in chapter 2.2.4.

²⁵ Trading Into the Future, *The World Trade Organization*, 2nd ed., revised, [1999], http://www.wto.org/english/res_e/download_e/tif.pdf.

²⁶ The Understanding on Rules and Procedures Governing the Settlement of Disputes is outlined in chapter 2.2.4.

²⁷ Over 54 members have been reviewed since the WTO came into force as of March 1999.

organizations that have responsibilities related to those of the WTO", and to "make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO". The WTO fulfils this obligation for example by its cooperation with other international organizations such as the World Bank and International Monetary Fund.²⁸

2.1.2 Structure

The WTO is an intergovernmental organisation, contrary to the supranational character of the Community. Its decisions are made by the entire membership, usually by consensus. A majority vote is also possible but it has never been used in the WTO, and as extremely rare under the WTO's predecessor, GATT.

The Ministerial Conference is the top decision making body of the WTO. It meets at least once every two years. The prime ministers or foreign ministers of the MS sit in the Ministerial Conference. Next in line is the General Council, which normally consists of ambassadors and heads of delegation in Geneva, but sometimes officials sent from the MS. The General Council meets several times a year in the WTO headquarters in Geneva.

Then there is the Goods Council, Services Council and Intellectual Property Council, which report to the General Council. Finally there are numerous specialized committees, working groups and working parties dealing with individual agreements and other areas such as the environment, development, membership applications and regional trade agreements.²⁹

The WTO Secretariat is based in Geneva. It has around 550³⁰ staff members and is headed by a Director General.³¹ It does not have any decision-making role since the Contracting Parties themselves take all decisions. The Secretariat's main duty is to supply technical support for the various councils and committees and the ministerial conferences, to provide technical assistance for developing countries, to analyse the world trade, and to explain WTO affairs to the public. The Secretariat also provides some forms of legal assistance in the

²⁸ See further discussion on the WTO cooperation with the Bretton Woods institutions and other UN Institutions, Specialized Agencies and Multilateral Agreements in Petersmann, Ernst-Ulrich, *The Transformation of the Worlds Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, European Journal of International Law, Vol. 6, No 2, Oxford University Press, [1995], p. 211-214.

²⁹ Petersmann, Ernst-Ulrich, *The Transformation of the Worlds Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, European Journal of International Law, Vol. 6, No 2, Oxford University Press, [1995], p. 193-195 and *Trading Into the Future, The World Trade Organization*, 2nd ed., revised, [1999], http://www.wto.org/english/res_e/doload_e/tif.pdf.

³⁰ *Trading Into the Future, The World Trade Organization*, 2nd ed., revised, [1999], http://www.wto.org/english/res_e/doload_e/tif.pdf.

³¹ The current Director General is Mr. Mike Moore.

dispute settlement process and advises governments wishing to become members of the WTO.³²

2.2 Multilateral Trade Agreements

As discussed the WTO agreement and connected agreements can be described as two folded.

Firstly there are the multilateral trade agreements, which are an integral part of the WTO agreement and are designed to be binding on all WTO Contracting Parties. This can be described as a "single package".³³

Then there are the plurilateral trade agreements, which are not an integral part of WTO and are only binding on those WTO members that have accepted them. The latter type of agreement relates respectively to Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement and International Bovine Meat Agreement.³⁴ I will not discuss the plurilateral agreements further in this paper.

2.2.1 The Multilateral Agreements on Trade in Goods - GATT 1994

The GATT 1994 is to a large extent based on the provisions of GATT 1947. Even though the WTO Agreement does not formally amend the GATT 1947, the legal substance of GATT 1994 differs from that of GATT 1947 in many respects for a number of reasons.³⁵

The GATT Agreement is based on few basic principles that the MS must follow. These principles are the fundamental rules that apply for international trade between the MS of the WTO.

Firstly, there is the Most-Favoured-Nation (MFN) Treatment, which is the fundamental principle of the GATT.³⁶ According to the principle each contracting

³² Trading Into the Future, *The World Trade Organization*, 2nd ed., revised, [1999], http://www.wto.org/english/res_e/doload_e/tif.pdf.

³³ See Petersmann, Ernst-Ulrich, *The Transformation of the Worlds Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, *European Journal of International Law*, Vol. 6, No 2, Oxford University Press, [1995], p. 191, and Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* *Common Market Law Review*, Vol. 36, No 2, Kluwer Law International, [1999], p. 389.

³⁴ Emiliou, Nicholas, *The Death of Exclusive Competence?* *European Law Review*, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 297.

³⁵ See Petersmann, Ernst-Ulrich, *The Transformation of the Worlds Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, *European Journal of International Law*, Vol. 6, No 2, Oxford University Press, [1995], p. 195-200, where he discusses what differs in GATT 1994 from the GATT 1947, and the objectives of the GATT 1994 and the other Agreements falling under Annex 1A.

³⁶ GATT Article 1.

party to the GATT is required to provide to all other contracting parties the same conditions of trade as the most favourable terms it extends to any one of them. This means that each contracting party is required to treat all contracting parties in the same way that it treats its "most-favoured-nation". One first sight one could assume that the Community were infringing those principles by not applying the same terms in trade with third countries as the common commercial policy and the internal market, offers to trade within the Community.

This is not the case for there are exemptions from those important principles.³⁷ An extremely important exception as far as the Community is concerned is the exception in Article XXIV(4)-(8) GATT and Article 5V and 5a GATS, relating to the formation of customs unions and free trade areas, which satisfy certain conditions. According to those exceptions the Community is not obliged to grant the advantages they accord each others through the common commercial policy and the internal market to all their GATT/WTO partners.³⁸

Secondly, there is the national treatment principle.³⁹ It condemns discrimination between foreign and national goods. According to the principle imported goods, once duties have been paid, must be given the same treatment as domestic products, in relation to any charges, taxes, and administrative rules and other regulations.

Thirdly, there is the principle of Transparency.⁴⁰ If barriers to trade are to be reduced through the process of negotiations, the system of trade must be transparent. Therefore the use of quotas is limited. There are though exemptions, e.g. in the some specific sectors such as agriculture. In addition, notifications from contracting parties, are required, on their agricultural and trade policies so that these policies can be examined by other contracting parties to ensure that they are compatible to the Agreement.

Fourthly, there is the Tariff binding and reduction principle. When GATT was established, tariffs were the main form of trade protection, and negotiations in the early years focused primarily upon tariff binding and reduction. The text of the GATT lays out the obligations of the contracting parties in this regard.

Finally, there is the principle of prohibition on quantitative restrictions. However, in some cases, such as safeguard action, quantitative restrictions can be introduced under strictly defined criteria.

Under Annex 1A to the WTO Agreement there are other 12 Multilateral Trade Agreements, which interpret, modify and supplement GATT 1994 in various respects.⁴¹ I will though not discuss these Agreements further.

³⁷ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1286.

³⁸ Id.

³⁹ GATT Article 3.

⁴⁰ GATT Article 10.

⁴¹ See Petersmann, Ernst-Ulrich, *The Transformation of the Worlds Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, *European Journal of International Law*, Vol. 6, No 2, Oxford University Press, [1995], p. 196-200, and Hyett, Stephen, *The Uruguay Round of the GATT: The United Kingdom Standpoint*, in Emiliou, Nicolas, O'Keefe, David (eds.),

2.2.2 GATS

GATS, which stands for general agreement on trade in services, is a manifestation of an attempt to expand the principles of GATT into the field of services.⁴² The motivation for the agreement came mainly from the developed countries, as with TRIPS, for the export of those countries are more and more switching over to services with high value added knowledge component, instead of the traditional industrial products.⁴³

According to Article I(3)(b) and (c) of GATS the concept of service is very wide since it covers "any service in any sector except services supplied in the exercise of governmental authority", but that is any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.

Trade in services is divided in four types or varieties, according to Article I(2) of GATS. The types are as follows: 1. Cross-border supply: the supply of a service from the territory of one member country into the territory of any other member country;⁴⁴ 2. Consumption abroad: the supply of a service in the territory of one member country to the service consumer of any other member country;⁴⁵ 3. Commercial presence: the supply of a service by a service supplier of one member country, through commercial presence in the territory of any other member country;⁴⁶ 4. The movement of persons: the supply of a service by a service supplier of one member country through the presence of natural persons of that member country in the territory of any other member country.⁴⁷

The nature of the obligations on the Contracting Parties of GATS are basically two folded. There are the general obligations on one hand and the specific commitments on the other.

The general obligations of GATS are up to a point parallel to the main principles of GATT. The most important obligation is for example the most-

The European Union and World Trade Law After the GATT Uruguay Round, John Wiley & Sons, [1996], p. 91-92.

⁴² Petersmann, Ernst-Ulrich, *The Dispute Settlement of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1947*, Common Market Law Review, Vol. 31, No 6, Kluwer Law International, [1994], p. 200-201.

⁴³ See Arnall, Anthony, *The Scope of the Common commercial policy: A Coda on Opinion 1/94*, in Emiliou, Nicolas, O'Keefe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996], p. 344.

⁴⁴ See opinion 1/94 where the Council gives the following example: A firm of architects established in country A supplies an electrical installation project to a firm of engineers established in country B.

⁴⁵ See opinion 1/94 where the following example is given: Services supplied in country A to tourists from country B.

⁴⁶ See opinion 1/94 where the Council gives the following example: A supply and establishment of services in country B by undertakings or professionals from country B. Banking service is an example of this.

⁴⁷ See opinion 1/94 where the Council gives the following example: An undertaking from country A supplies services in country B by means of workers coming from country A, such as in construction work.

favoured-nation treatment.⁴⁸ There are though exemptions from the principle, both permanent and limited in time. The GATS, deals however with national treatment under Part III, due to the special nature of trade in services. According to those rules national treatment becomes a negotiated concession and may be subject to conditions or qualifications that Contracting Parties have inscribed in their schedules on specific commitments in trade in services.⁴⁹

Another set of principles, which are parallel to GATT are the obligation of transparency and to provide for judicial, arbitral or administrative procedures (remedies) for the review of administrative decisions affecting trade in services.⁵⁰ Contracting Parties are also to ensure that any monopoly supplier of a service in its territory does not act in a manner inconsistent with the principle of most-favoured nation treatment or with its specific commitments. Finally, there are obligations in respect of the recognition of the authorisation, licensing or certification of services suppliers.

2.2.3 TRIPS

The TRIPS Agreement is the most important treaty, worldwide, concerning intellectual property and it sets the relatively high standard of intellectual right protection throughout the world.

Some of the world's largest industries (pharmaceutical, agri-food, computer software, entertainment, luxury goods) depend on effective protection of their intellectual property rights. The drafters of the TRIPS Agreement realized that and also that a fundamental alternation of the intellectual property could therefore have serious aftermath for those industries and the transition cost would be enormous. The TRIPS negotiators therefore choose to look at the existing rules and update them instead of creating new ones. The Paris Convention, the Bern Convention, the International Convention on the Protection of Performers, Producers of Phonograms and the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits (which never entered into force) were taken under scrutiny while drafting the TRIPS Agreement⁵¹ and the negotiators used the existing conventions as a logical point of departure.⁵² The TRIPS only sets the minimal standard of Intellectual Property Rights protection and individual MS are allowed to implement legislation guaranteeing higher level of protection.⁵³

⁴⁸ GATS Article II(1),

⁴⁹ GATS Article XVII.

⁵⁰ GATS Article VI(2).

⁵¹ However, individual Member States are not required under the TRIPS Agreement to accede to these intellectual propriety conventions.

⁵² Gervais, Daniel, *The TRIPS Agreement, Drafting History and Analysis*, Sweet & Maxwell, [1998]. See discussion on the logic of TRIPS p. 25-28.

⁵³ See *Intellectual Property and the Knowledge Gap*, Oxfam Policy Papers, Oxfam Discussion Paper 12/1., where it is stated that bilateral trade agreements such as the Free Trade Area of the Americas (FTAA) are also being used to ratchet up national IP standards to even higher levels than those required by TRIPS.

The Agreement is divided into seven parts and preamble and annexes. In the first part the general provisions and basic principles of the Agreement are outlined.

The TRIPS Agreement is extremely wide in scope, since it covers both literary and artistic property and industrial property.⁵⁴ It also lays down the principles⁵⁵ of national treatment⁵⁶ and most-favoured-national treatment.⁵⁷ There are certain exceptions to those two principles. The principle of national treatment is subject to the exceptions already provided in the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits. Furthermore, the national treatment obligation is restricted, as regards performers of phonograms and broadcasting organizations, to the rights provided by the TRIPS itself.

The TRIPS Agreement attempts to achieve its objects by applying two methods. In its provisions it refers to international conventions, which up to a point have achieved a wide acceptance as a customary international law. On the other hand it is equipped with certain substantive provisions in the field of intellectual property rights.

As stated above the fundamental principles of national treatment and most-favoured-national treatment, are not without an exemption. According to Article 6 of the TRIPS Agreement the dispute settlement provisions of the TRIPS cannot be invoked in the case of a TRIPS Contracting Party applying the principle of "national" exhaustion or regionally exhaustion for customs unions or free trade areas. This exemption is parallel to the exhaustion from the principles of national treatment and most-favoured-national treatment in the GATT and GATS Agreements.

2.2.4 Dispute settlement procedural agreements

The DSU (Dispute Settlement Understanding)⁵⁸ offers a unified system for dispute settlements arising under the agreements covered by WTO, both the multilateral

⁵⁴ Opinion 1/94, p. I-5295. The Agreement covers industrial property rights such as trademarks, geographical indications of provenance and origin, patents, designs and models and know-how.

⁵⁵ See Petersmann, Ernst-Ulrich, *The Transformation of the World's Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, *European Journal of International Law*, Vol. 6, No 2, Oxford University Press, [1995], p. 205-206, and Hyett, Stephen, *The Uruguay Round of the GATT: The United Kingdom Standpoint*, in Emiliou, Nicolas, O'Keeffe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996], p. 92-93.

⁵⁶ TRIPS Article 3.

⁵⁷ TRIPS Article 4.

⁵⁸ See Article 1 and Appendix 1 of the DSU.

and plurilateral trade agreements. In that way the WTO differs from all other worldwide organizations by its mandatory and effective system for the legally binding settlement of disputes among its Contracting Parties.⁵⁹ In addition it introduces a number of innovations to ensure that WTO dispute settlement proceedings lead to a legally binding ruling by the Dispute Settlement Body (DSB) within 9 months after the establishment of a panel or, in case of an appeal to the new Appellate Body, within 12 months.⁶⁰

The DSU is an integrated dispute settlement system applicable to the WTO Agreement, and all the multilateral as well as the plurilateral trade Agreements. The integrated system enables WTO Contracting Parties to base their complaints on any of the covered Agreements. It also establishes the method of the so-called "cross-retaliation", which can be used as a last resort.⁶¹ That offers the possibility to a Contracting Parties to redress a breach of any one element of the agreements as a whole,⁶² by retaliation in a different sector or under another Agreement.

In *Opinion 1/94* the Court stated that the duty to cooperate is all the more imperative in the case of agreements such as those annexed to the WTO Agreement, in view of the cross-retaliation measures established by the Dispute Settlement Understanding. Thus, in the absence of close cooperation, where a MS duly authorized within its sphere of competence to take cross-retaliation measures, considered that they would be ineffective if taken in the fields covered by GATS or TRIPS, it would not, under Community law, be empowered to retaliate in the area of trade in goods, since that is an area which on any view falls within the exclusive competence of the Community under Article 133 EC.⁶³

According to the DSU rules unilateral reprisals are prohibited. The primary obligation to withdraw illegal measures, the only subsidiary nature of compensation pending the withdrawal of illegal measures, and the legal inadmissibility of unilateral reprisals without prior authorization by the DSB are explicitly confirmed in the DSU. The WTO legal and dispute settlement system therefore limits the scope for unilateral power politics.⁶⁴

⁵⁹ Petersmann, Ernst-Ulrich, *The Dispute Settlement of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1947*, Common Market Law Review, Vol. 31, No 6, Kluwer Law International, [1994], p. 157.

⁶⁰ Petersmann, Ernst-Ulrich, *The Transformation of the World's Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, European Journal of International Law, Vol. 6, No 2, Oxford University Press, [1995], p. 208.

⁶¹ Id.

⁶² Can be a breach of an element covered by GATT, GATS or TRIPs.

⁶³ Opinion 1/94, para. 109.

⁶⁴ Petersmann, Ernst-Ulrich, *The Transformation of the World's Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, European Journal of International Law, Vol. 6, No 2, Oxford University Press, [1995], p. 210.

2.2.5 Trade review agreements

The Trade review mechanism is codified in Annex 3 to the WTO Agreement.⁶⁵ Its objective is to:⁶⁶ a) provide greater transparency of national laws and practices; b) to contribute to improved adherence by all members to rules, disciplines and commitments, and: c) to examine the impact of a Member's trade policies and practices on the multilateral trading system.

The Trade review mechanism is not intended to serve as a "basis for the enforcement of specific obligations under the Agreements, or for dispute settlement procedures, or to impose new policy commitments on Members."⁶⁷ Nevertheless its objective is to increase transparency of national trade.

The so-called TPRB,⁶⁸ which is a permanent organ under the WTO Agreement, was established to administer the Trade review mechanism. It reports to the WTO General Council and is responsible for the implementation of the TPRM and for reporting to the General Council, each year, and information concerning the developments in the international trading system.⁶⁹

⁶⁵ Petersmann, Ernst-Ulrich, *The Transformation of the World's Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, *European Journal of International Law*, Vol. 6, No 2, Oxford University Press, [1995], p. 211.

⁶⁶ Emiliou, Nicholas, *The Death of Exclusive Competence?* *European Law Review*, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 296.

⁶⁷ Para. A.i.

⁶⁸ *Trading Into the Future*, The World Trade Organization, 2nd ed., revised, [1999], p. 37, http://www.wto.org/english/res_e/download_e/tif.pdf. See Article IV:4 WTO.

⁶⁹ Emiliou, Nicholas, *The Death of Exclusive Competence?* *European Law Review*, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 297.

3 External Competences of the Community

3.1 Express external competences

As already stated the European Union has no external competences. This is for its lack of legal personality.⁷⁰ The Council of the European Communities has on the other hand a legal personality, and therefore it exercises the external competences of the Community.⁷¹

The Community has always had a range of relatively detailed express Treaty powers in the internal sphere, the same is not true of its external competence, that is the Community's power to engage in relations with other States and international associations outside the Community.⁷² The concept of express powers can be described as when the exact words of Treaty provision, allocates specific power to the Community. According to Article 300 EC the Commission shall conduct and enter into international agreements, where the Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations.⁷³ The external competences appears therefore, at first glance, to be restricted to expressed external powers in Treaty provision.⁷⁴

Two of the most significant express treaty-making powers relate to, firstly, commercial agreements under Article 133 EC and secondly, association agreements under Article 310 EC.⁷⁵

Under the original EEC Treaty the express external competences were limited to the common commercial policy⁷⁶ in Article 133 EC, which the scope of

⁷⁰ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1254. Only the Communities are in a position to conclude external agreements, as they are all equipped with legal personality and the competences to conclude treaties.

⁷¹ See Case C-327/91, *France v. Commission* [1994] ECR I-3641., where the Court declared void the Agreement entered into by the Vice-President of the European Commission, Sir Leon Brittan, and the United States on enforcement of their respective competition laws. The Court held that the Council, not the Commission, has the authority to enter into international agreements, and that there are no general powers in the field of external relations vested in the European Commission.

⁷² Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p.115.

⁷³ See Articles 111, 133, 170, 144(4), 181 and 310 EC.

⁷⁴ Emiliou, Nicholas, *The Death of Exclusive Competence?* *European Law Review*, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 305.

⁷⁵ Emiliou, Nicholas, *The Allocation of Competence Between the EC and its Member States in the Sphere of External Competences*, in Emiliou, Nicolas, O'Keeffe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996], p. 31.

⁷⁶ The common commercial policy will be discussed further in chapter 5.2.

has been interpreted broadly.⁷⁷ In addition the Community can under Article 310 EC conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Trough the years the express external competences of the Community has been extending. The Community has today a wide range of external competences in various policy areas such as development policy,⁷⁸ the environment,⁷⁹ research and technology,⁸⁰ monetary and foreign exchange matters, and the development of co-operation with third countries in a range of areas such as education, culture, health, and trans-European network.⁸¹

The Community can exercise these external competences by two types of measures. The Community can, on one hand, act out unilateral and independently, be setting up rules, which concern third countries. On the other hand it can accede to agreements and international contracts with third countries or international bodies.

3.2 Implied external competences

The above-mentioned doctrine of express powers is not the only foundation for external competences of the Community. The Court has developed through its ruling the principle of implied external competences.⁸² The principle first emerged in relation to internal competences of the Community but has been extended by the Court to external policy. The implied external competences of the Community are tough very much connected to, or parallel to, the internal competences.

Articles 308, 94 and 95 EC may, along with a range of other Treaty Articles, which expressly establish competence in the internal sphere, have been used as legal base for the Community's entry into international relations in fields in which it has implied external competence, although Article 308 EC in particular is subject to limits.⁸³

The Court began developing the doctrine of implied external competences in the famous *ERTA case*⁸⁴ and continued its development in the *Kramer cases*,⁸⁵ *Opinion 1/75*⁸⁶ and *Opinion 1/76*.⁸⁷

⁷⁷ Opinion 1/94 on the WTO Agreement [1994] ECR I-5267.

⁷⁸ Article 181 EC.

⁷⁹ Article 174(4) EC.

⁸⁰ Article 170 EC.

⁸¹ Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p.116.

⁸² Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p.116.

⁸³ Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p.116.

⁸⁴ Case 22/70 Commission v. Council [1971] ECR 263.

⁸⁵ Cases 3,4, and 6/76, Kramer [1976] ECR 1279.

⁸⁶ Opinion 1/75 Re Local Cost Standard [1975] ECR 1355.

⁸⁷ Opinion 1/76 on the Draft Agreement Establishing a Laying-up fund for Inland Waterway Vessels [1977] ECR 741.

3.2.1 Implied external competences developed by the Court

In the *ERTA case*⁸⁸ the Court stated that when the Community has acted out to implement a common policy under the Treaty, the MS no longer have the right to take external action in an area, which would affect that common policy. This means that the Community treaty power is co-extensive with its internal powers and thus it cuts across all area of its internal competence listed in Article 3 of the EC Treaty.⁸⁹ This is the so-called ERTA doctrine.

In the judgement the Court established four important principles, which were further developed and outlined in subsequent rulings. The principles are the following:⁹⁰

Firstly there is the principle of general powers. Article 281 EC provides that the Community shall have legal personality and that means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty.⁹¹

Secondly, there is the principle of implied powers, which means that the powers to enter into a contractual link with third countries as described above, arises not only from an express conferment by the Treaty.⁹² Therefore, to determine in individual case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions.⁹³

Thirdly, there is the principle of exclusivity. The essence of the principle is that each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the MS no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.⁹⁴

This means that as long as an implied treaty-making power has not been used, MS retain residual authority to enter into international agreements necessary

⁸⁸ Case 22/70 *Commission v. Council*. The Commission requested the annulment of the Council's proceedings regarding the negotiation and conclusion by the Member States of an international agreement concerning the work of crews of vehicles engaged in international road transport (AETR).

⁸⁹ Emiliou, Nicholas, *Towards a clearer demarcation line? The division of external relations power between the Community and Member States*, *European Law Review*, Vol. 19, February, Sweet & Maxwell, [1994], p. 79.

⁹⁰ See Emiliou, Nicholas, *Towards a clearer demarcation line? The division of external relations power between the Community and Member States*, *European Law Review*, Vol. 19, February, Sweet & Maxwell, [1994], p. 79-81, and Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1257-1260.

⁹¹ Case 22/70, para. 13.

⁹² Case 22/70, para. 16.

⁹³ Case 22/70, para. 15.

⁹⁴ Case 22/70, para. 17.

to achieve a Community aim subject to certain conditions.⁹⁵ On the other hand, it is clear that express external competences conferred on the Community, excludes the MS external competences, whether or not the Community has exercised those powers or not.⁹⁶

Fourthly, the ruling established the principle of parallelism, which means that with regard to the implementation of the provisions of the Treaty the system of internal community measures may not be separated from that of external relations.⁹⁷ In other words external competences co-exist with the internal competences and cannot be separated from them.

In the *Kramer cases*⁹⁸ the Court affirmed earlier decision and added that that while implied external powers could exist even though no internal measures had been adopted, until Community competences had been exercised, the MS retained transitional competence to act so long as their actions were compatible with Community objectives.

The ruling in *Opinion 1/76*⁹⁹ extended the implied external competences doctrine by stating the exclusive external competence could arise when exercised, without any prior exercise of internal powers, if external action by the MS would jeopardize that objective. The case was brought up by the Commission with a reference to Article 300(1) EC, and asked for the opinion of the Court concerning an international agreement, which Switzerland was a party to along with the Community and specific MS.

The Court concluded that it had been necessary to bring Switzerland into the scheme in question by means of an international agreement.¹⁰⁰ The power of the Community to conclude such an agreement is not expressly laid down in the Treaty. Then the Court cited to the *Kramer case* by stating that authority to enter into international commitments "may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions. The Court has concluded inter alia that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion."¹⁰¹

Then the Court continued by stating that this is the situation, particularly in "all cases in which internal power has already been used in order to adopt measures, which come within the attainment of common policies. It is however, not limited to that eventuality. Although the internal Community measures are only adopted

⁹⁵ See Emiliou, Nicholas, *Towards a clearer demarcation line? The division of external relations power between the Community and Member States*, European Law Review, Vol. 19, February, Sweet & Maxwell, [1994], p. 80.

⁹⁶ See Opinion 1/75 Local Cost Standard [1975] ECR 1355.

⁹⁷ Case 22/70, para. 19.

⁹⁸ Cases 3,4, and 6/76 Kramer [1976] ECR 1279.

⁹⁹ Case 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977] ECR 741.

¹⁰⁰ Case 1/76, para. 2.

¹⁰¹ Case 1/76, para. 3.

when the international agreement is concluded and made enforceable, as is envisaged in the present case by the proposal for a regulation to be submitted to the Council by the Commission, the power to bind the Community vis-s-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community."¹⁰²

3.2.2 The Courts less expansive approach

Following *Opinion 1/94* on the WTO Agreement,¹⁰³ a less expansive approach to the Community's exclusive external competence emerged.¹⁰⁴ The Opinion was not in full harmony with the previous case law of the Court on the scope and the dynamically evolving nature of Community powers in the sphere of the common commercial policy.¹⁰⁵

In the Opinion the Court came to the conclusion that the Community did not have exclusive competences regarding several components of the GATS and TRIPS, since those fields where the international action envisaged was not necessary for the attainment of some internal Community objective, nor would it further the aims of some internal Community measures. It is stated that the opinion has to be considered in the light of the present political climate in many of the MS and that the Court has is increasingly accepting the concerns of the MS concerning their sovereignty.¹⁰⁶ I will discuss *Opinion 1/94*, further in Chapter 4.

3.3 Division of external competences between Member States and the Community

In most instances the external competences of the Community are shared with the MS. That is though far from absolute and on many occasions the Community has exclusive competences or the MS has exclusive competences.

It is often difficult to determine, under whose competence a given subject falls. To answer that question calls for a close scrutiny of the issue in question as the internal and external competences of the Community. Below I discuss in details the different approaches.

¹⁰² Case 1/76, para. 3.

¹⁰³ Opinion 1/94 is discussed in details in chapter 4.

¹⁰⁴ Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p.117.

¹⁰⁵ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 294.

¹⁰⁶ Id.

3.3.1 Exclusive competences of the Community

The existence of expressly or implied external competences of the Community does not mean that the Community competences are exclusive.¹⁰⁷ As stated above the most common arrangement is some kind of a mixed agreement where both the Community and the MS have the competences to conclude an agreement.

The question of exclusivity depends on whether a transfer of powers to the Community flows from the Treaty or its application. Thus the exclusive character of the external competences of the Community, which is expressly conferred by the Treaty in the field of the common commercial policy¹⁰⁸ has been confirmed by the Court.¹⁰⁹

Implied external competences can also have an exclusive character if competence has been transferred to the Community in the internal sphere. As stated, a Treaty provision can confer exclusive competences with effect from a particular time and thereby also for the hallmark of exclusivity for external powers derived from them. The exercise of internal competences, as discussed in Chapter 3.2.1 can also lead to the exclusivity of the implied external competence linked to it.

In *Opinion 2/91 ILO*¹¹⁰ the Court held that there is no question of complete cession of competence to the Community, whether internal or external, if internal Community competence is exercised through the adoption of provisions laying down minimum requirements.¹¹¹ This is the case in the fields of social policy;¹¹² consumer protection,¹¹³ and environmental protection,¹¹⁴ and in practice is quite often the case in harmonization of laws in the technical field.¹¹⁵

Opinion 2/91 did however confirm that the so-called ERTA doctrine¹¹⁶ is not limited to Community rules in the framework of common policies, such as

¹⁰⁷ See Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1259.

¹⁰⁸ In chapter 3.4 I discuss the common commercial policy in details.

¹⁰⁹ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1259.

¹¹⁰ *Opinion 2/91* on the International Labour Organization concerning safety in the use of chemicals at work (1993) ECR I-1061 at 1082.

¹¹¹ Emiliou, Nicholas, *Towards a clearer demarcation line? The division of external relations power between the Community and Member States*, *European Law Review*, Vol. 19, February, Sweet & Maxwell, [1994], p. 85, the Community common rules would only be affected if the Member States would agree on more lenient measures than the minimum requirements.

¹¹² Article 138 EC.

¹¹³ Article 153 EC.

¹¹⁴ Article 176 EC.

¹¹⁵ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1259.

¹¹⁶ See detailed discussion on the case (ERTA Case) in chapter 3.2.1.

transport policy.¹¹⁷ What matters is whether the intensity of the arrangement, whatever its denomination, is such as to involve a cession of national powers in favour of Community competence in the field of application of the rules concerned.¹¹⁸ The Court also made clear, that exclusivity cannot be based: i) on any difficulties that may arise for the legislative function of the Community should the MS retain concurrent competence in an area where the Community has adopted minimum requirements; and ii) on Community measures adopted under Article 94 EC.¹¹⁹

It must also be addressed that according to the *Kramer cases* the mere existence of implied competence does not, or so it appears, lead to exclusivity as long as and in so far as no transfer of powers in the internal sphere has yet taken place by or by virtue of the Treaty.¹²⁰ Except where internal powers can only be effectively exercised at the same time as external powers, internal competence may give rise to external competence only if it is exercised.¹²¹

The fact that the MS have to implement or amend their legislation does not affect the exclusive competence of the Community, and the Community remains competent to act in the international level.¹²²

3.3.2 Mixed agreements

The complex nature of the EU and the Communities as actors on the international arena can be illustrated by the notion of mixed agreement. That is an agreement, which includes among their Contracting Parties not only one or more of the European Communities but also one or more of their MS.¹²³

This complexity is further illustrated by the fact that we are faced not only with the Communities and the notion of three pillars, but also with a blend of intergovernmental cooperation, functional integration, supranational powers and federalist aspirations. Third States will be faced with a confusing menu of competences and actors.¹²⁴

¹¹⁷ See Emiliou, Nicholas, *Towards a clearer demarcation line? The division of external relations power between the Community and Member States*, European Law Review, Vol. 19, February, Sweet & Maxwell, [1994], p. 84-86.

¹¹⁸ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1260.

¹¹⁹ Emiliou, Nicholas, *Towards a clearer demarcation line? The division of external relations power between the Community and Member States*, European Law Review, Vol. 19, February, Sweet & Maxwell, [1994], p. 85.

¹²⁰ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 126, where they cite to Cases 3,4, and 76 Kramer et al (1976) ECR at 1309.

¹²¹ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], 1261.

¹²² Opinon 2/91 (1993) ECR I-1061 at 1082.

¹²³ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskeniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.125.

¹²⁴ Id.

Allan Rosas divides the notion of mixed agreements into a few types of agreements, which all have their distinctive characteristics.¹²⁵ I will base my discussion on mixed agreement on his categorization of the various types.

3.3.2.1 Different types of mixed agreements

There is a basic division between mixed agreements prescribing parallel competence of the Communities and MS, on one hand, and shared competence, on the other hand.

A parallel competence can be described as when the Community may adhere to an agreement, with full rights and obligations as any other Contracting Party, having no direct effect on the rights and obligations for MS being parties to the same treaty.¹²⁶ Shared competence on the other hand implies that there is some division between the obligations and rights contained in the agreement between the Community and the MS.¹²⁷ By following Dolmans,¹²⁸ one can distinguish between mixed agreements with "coexistent" competence and mixed agreements with "concurrent competence".

The former is the case when an agreement contains provisions, which fall under the exclusive competence of the Community and/or the MS, and it is possible to identify separate parts which either the Community or the MS are responsible for. The latter type is when the agreement in question forms a certain whole, which cannot be separated into two parts.¹²⁹

It is also possible to distinguish between facultative and obligatory mixity. The mixed agreement is facultative when the competence of the Community is non-exclusive and there are no competences reserved for MS. If the MS has some competences then it is an obligatory mixity.

Finally one can divide between mixed agreement of bilateral and multilateral character. An example of bilateral agreement is an agreement between the

¹²⁵ See also Dolmans, Maurits J.F.M., *Problems of Mixed Agreements, Division of Powers Within the EEC and the Rights of Third States*, Asser Instituut, [1985].

¹²⁶ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.129. In his discussion Rosas refers to Dolmans. See Dolmans, Maurits J.F.M., *Problems of Mixed Agreements, Division of Powers Within the EEC and the Rights of Third States*, Asser Instituut, [1985], p. 39.

¹²⁷ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.129.

¹²⁸ See Dolmans, Maurits J.F.M., *Problems of Mixed Agreements, Division of Powers Within the EEC and the Rights of Third States*, Asser Instituut, [1985], p. 25.

¹²⁹ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.131 and Dolmans, Maurits J.F.M., *Problems of Mixed Agreements, Division of Powers Within the EEC and the Rights of Third States*, Asser Instituut, [1985], p. 39. See for example Cases 3,4, and 6/76 Kramer, Opinion 2/91 (ILO), and Opinion 1/94 (WTO Agreement).

Community and the MS on the one hand, and a third country on the other hand. A multilateral agreement would be one involving parallel competences between the Community and the MS, meaning that the Community's adherence would not, in principle, be different from the separate participation of some or all of the MS.

3.3.2.2 Mixed agreements - legal and practical problems

Rosas divides the legal and practical problems relating to mixed agreements into two separate parts. The former concerns the problems relating to the very existence and scope of the agreements rights and obligations. The latter part concerns the problem relating to the application and interpretation of the rights and obligations.¹³⁰

Concerning the existence and the scope of the agreement it can cause problems when the conclusion by the Community and the MS, of a mixed agreement, must go hand in hand. Usually the Council has decided that the Community conclusion comes only after all the MS have ratified the agreement in question.¹³¹ This requirement can cause problems for it can take many years before all the MS ratify a signed agreement.

The termination or a suspension of a mixed agreement can also cause problems. If a part of the agreement, which is only of a concern to the Community, is suspended, then the Council can take that decision independently and without separate decision by the MS.¹³² The situation is more complex if the suspension affects the whole agreement, also the part of it which is under the competence of the MS.

As stated above the application and implementation of mixed agreements can cause some problems. Since it is very difficult to determine where legal powers lie between the Community and the MS, the most convenient conclusion for the third party is that the Community and the MS assume joint obligations and that they are required to assure these joint obligations.¹³³ The external representation and uncertainty of who is responsible for the day-to-day management of an agreement have though occasionally arisen. An example of this is the problem

¹³⁰ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.133. See also Björklund, Martin, *Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?* *Nordic Journal of International Law*, Volume 70, No 3, Kluwer Law International, [2001], where he discusses the problems relating to responsibility under international law for mixed agreements, and stresses the difficulties involved for third parties.

¹³¹ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.134.

¹³² An example of such a partial suspension is the Council Regulation no. 3300/91 of 11 November 1991, OJ No. L 315 of 15.11.91, p.1, suspending the trade concessions provided for by the Cooperation Agreement between the EEC and the Socialist Federal Republic of Yugoslavia of 1983, OJ No. L 315 of 15.11.91, p.1. The legal base for this Regulation was Article 133.

¹³³ Leal-Arcas, Rafael, *The European Community and Mixed Agreements*, *European Foreign Affairs Review*, Vol. 6, No 4, Kluwer Law International, [2001], p. 497.

encountered in the FAO, to which the Community is a member, as illustrated by the controversy over the right to vote in the FAO Conference on the adoption of an Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.¹³⁴

The problems facing mixed agreement are no private internal matter of the Community for it affects the third parties, which are contracting parties.¹³⁵ It is therefore obvious that with respect to the interests of third parties, the question arises as to the extent of the whether the Community is responsible for the implementation of the whole agreement. This again touches upon the categorisation of mixed agreement outlined in Chapter 3.3.2.1 for the situation varies whether the mixed agreement consists of parallel competences or shared competences. In the case of the former each party alone bears the responsibility for the fulfilment of the entire agreement. If the latter applies the situation is more complex.¹³⁶

If competences are coexistent, the each party, Community or MS, bears its own responsibility and may escape responsibility for breaches outside of the scope of its competence, on the condition that the third party is aware of the lack of competence.¹³⁷ If the competences are concurrent then the Community and the MS are jointly responsible for the implementation of the whole agreement.¹³⁸

Mixed agreements also invite the question as to the responsibility of MS towards each other for the fulfilment of the agreement. In the case of parallel competences, it is clear that such responsibility exists. If competences are shared, and especially in the case of a predominantly bilateral agreement involving concurrent competences, it is doubtful whether MS, are under public international law, responsible *inter se*.¹³⁹

The method of national implementation of a mixed agreement can produce some problems.¹⁴⁰ Some of the EU countries base upon a dualist system in respect of the status of international agreements in relation to domestic legislation.

¹³⁴ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.138.

¹³⁵ Björklund, Martin, *Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?* *Nordic Journal of International Law*, Volume 70, No 3, Kluwer Law International, [2001], p. 374-375.

¹³⁶ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.142.

¹³⁷ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.142, and Dolmans.

¹³⁸ Dolmans, Maurits J.F.M., *Problems of Mixed Agreements, Division of Powers Within the EEC and the Rights of Third States*, Asser Instituut, [1985], p. 82.

¹³⁹ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.142.

¹⁴⁰ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.142.

The dualist approach is based on the idea that the domestic legislation and the international acts are two separate sets of acts and special measures are needed on behalf of the legislator to make the international act binding according to domestic legislation.¹⁴¹ Additionally there may be concerns regarding constitutional problems if the agreement involves transfer of national competences to an international body.¹⁴² Finally, when the distribution of competences is not clear for third states, they may send claims to both Community and MS. Disagreement between Community and MS on division of powers should also result in joint and several liability.¹⁴³

In addition to the aforementioned there are problems concerning the judicial control of mixed agreements. In Chapter 4.3 I address the judicial control of the WTO Agreement, which is as discussed a mixed agreement.

3.4 Community exclusive competences in the field of common commercial policy

3.4.1 Common commercial policy

In Article 3 EC it is stated that for the purposes set out in Article 2 EC, the activities of the Community shall include, as provided in the Treaty and in accordance with the timetable set therein a common commercial policy.¹⁴⁴ The common commercial policy is discussed in Article 131-134 under Title IX of the EC Treaty.

The common commercial policy is not defined in the Treaty¹⁴⁵ but the main elements are outlined in Article 133 EC where it is stated that it shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those taken in the event of dumping or subsidies. The enumeration in Article 133 EC of subjects covered by the common commercial policy is a non-exhaustive enumeration.¹⁴⁶

It has been stated that no definition of the concept "common commercial policy" was needed for it is not a term of Community law, but instead it refers to

¹⁴¹ Stefánsson, Stefán M., *Evrópusambandið og Evrópska Efnahagssvæðið*, Bókaútgáfa Orators, [2000], p. 160.

¹⁴² This problem mainly concerns the domestic legislation and political reluctance to transfer sovereignty from domestic bodies to intergovernmental or supranational bodies.

¹⁴³ Dolmans, Maurits J.F.M., *Problems of Mixed Agreements, Division of Powers Within the EEC and the Rights of Third States*, Asser Instituut, [1985], p. 86.

¹⁴⁴ Article 3(1)(b) EC.

¹⁴⁵ Arnall, Anthony, *The Scope of the Common commercial policy: A Coda on Opinion 1/94*, in Emiliou, Nicolas, O'Keeffe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996], p. 343.

¹⁴⁶ See Opinion 1/78 International Agreement on Natural Rubber [1978] ECR 2871, para. 45.

international law, similar to the concept of "custom union" in Article 23 of the EC Treaty, which the full definition it to be found in Article XXIV:8 GATT.¹⁴⁷

It is an inevitable consequence of the internal market that the MS need a common commercial policy in relation to third countries.¹⁴⁸ As a result of the internal market goods from third countries are in a free flow as soon as they have been lawfully imported into one of the MS. If the conditions, such as custom duties, where lower in one MS, there would be a tendency to import goods from third countries, into the Community through the MS with the lowest barrier, and distribute the goods from there. This would upset the competitiveness of other MS.

The common commercial policy covers both the relationship between the MS and also exports to third countries.¹⁴⁹ In Article 131(1) EC it is stated that by establishing a customs union between themselves MS aim to contribute, in the common interest, to the harmonious development of worlds trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers. It is therefore clear that the aim of the common commercial policy extends further than simply to the Community markets.¹⁵⁰

Article 132(1) EC relates to third countries by stating that without prejudice to obligations undertake by the MS within the framework of international organisations, MS shall progressively harmonise the systems whereby they grant aid for exports to third countries, to the extent necessary to ensure that competition between undertakings of the Community is not distorted. It is important to harmonise the export aid for if they were not harmonised there would not be a competitive balance between the MS and the competitiveness would be determined by the aid but not by quality and the real price of the product.

According to Article 132(2) EC the Council shall, acting by a qualified majority, on a proposal from the Commission, issue any directives needed for the application of the common commercial policy and pursuant to Article 133(4) EC the Council shall act by a qualified majority.

It is important to define the common commercial policy and whether a subject is covered by it for the Community has exclusive competences in all fields falling under it.¹⁵¹ As outlined exclusive competences of the Community mean that the MS cannot engage in any activities or acted out any measures. The principle of subsidiary is for example inapplicable when the subject falls under

¹⁴⁷ Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* Common Market Law Review, Vol. 36, No 2, Kluwer Law International, [1999], p. 397.

¹⁴⁸ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 298.

¹⁴⁹ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1276.

¹⁵⁰ Id.

¹⁵¹ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1280, and for example Opinion 1/94.

exclusive competences of the Communities. I will discuss further the effects of the common commercial policy in Chapter 3.4.

In *Opinion 1/78* the Court dealt with the scope of the common commercial policy in connection with international agreement on rubber. The Court stated that Article 133 EC could not be interpreted so as "to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade to the exclusion of more highly developed mechanisms such as appear in the agreement envisaged. A common policy understood in the sense would be destined to become nugatory in the course of time."¹⁵² Then the Court continued by stating that "[a] restrictive interpretation of the concept of 'common commercial policy' would risk causing disturbances in intra-community trade by reasons of the disparities which would then exist in certain sectors of economic relations with non-member countries."¹⁵³

In the light of the above mentioned many argued that the new agreements introduced by the Uruguay Round should fall under the scope of the common commercial policy for it was to be interpreted as extending to other modes of trade than the traditional one and certainly to follow the international trends.¹⁵⁴

3.4.2 Common commercial policy and GATT 1947

According to Article 307 EC the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more MS on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaty. The GATT, which was concluded in 1947, is one of the most important international agreements covered by this provision.

In the International *Fruit Company case*¹⁵⁵ the Court confirmed that the Community was bound by the provisions of GATT 1947 by stating that "in so far as under the EEC Treaty the Community has assumed the powers previously exercised by the MS in the area covered by the General Agreement".¹⁵⁶ According to the ruling the binding effect upon the Community was not the result of Article 307 EC, but the result of the take over of the Community as a party to the Agreement, instead of the MS.¹⁵⁷

As outlined in Chapter 2 the GATT 1947 was transformed into the World Trade Organisation as a result of the Uruguay Round. The GATT 1994 and connected Agreements are today annexed to the WTO Agreement under Annex

¹⁵² See Opinion 1/78, para. 44.

¹⁵³ See Opinion 1/78, para. 45.

¹⁵⁴ Arnall, Anthony, *The Scope of the Common commercial policy: A Coda on Opinion 1/94*, in Emiliou, Nicolas, O'Keeffe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996], p. 344.

¹⁵⁵ Case 21-24/72 International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit (1972) ECR 1219 at 1227.

¹⁵⁶ Case 21-24/72, para. 18.

¹⁵⁷ Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998], p. 1284.

1A, alongside the GATS¹⁵⁸ and TRIPS.¹⁵⁹ The Community and MS competences concerning the two latter ones are mixed and they will participate together in the activities of the WTO, even though in practise the Commission will usually act as their representative.¹⁶⁰

¹⁵⁸ Annex 1B WTO.

¹⁵⁹ Annex 1C WTO.

¹⁶⁰ Petersmann, Ernst-Ulrich, *The Transformation of the Worlds Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, *European Journal of International Law*, Vol. 6, No 2, Oxford University Press, [1995], p. 196.

4 Competences of the European Community in relation to the WTO

4.1 Introduction

As stated above the Court confirmed, in 1971 that the GATT 1947 fell under the exclusive competences of the Community. After the Uruguay Round the WTO Agreement emerged and now the GATT was an annex to that Agreement along with two new agreement concerning services, GATS and intellectual property, the TRIPS Agreement.

There were conflicting opinions on the competences of the Community to conclude these Agreements, and to what extent the Agreements fell under the MS competences. To eliminate these uncertainty the Commission asked the Court with reference to Article 300(6) EC (ex Article 228(6)) to clarify the matter.

It can be said, that the conclusion, even though it was clear in itself, was all but clear in reality, for it defined the most parts of the GATS and almost all of the TRIPS Agreement under shared competences of the Community, on one hand, and the MS, on the other. Therefore these two annexes to the WTO Agreement can be described as mixed agreements, but as has been discussed mixed agreements can be extremely troublesome in implementation.

4.2 Opinion 1/94 on the WTO

In spite of the signing of the WTO Agreement the division of competences between the Community and the MS to conclude the Agreement remained unresolved.¹⁶¹

The Commission's opinion was that the WTO Agreement and the Final Act fell within the exclusive competences of the Community.¹⁶² The Commission based its opinion on the case law concerning the wide scope of competences and treaty making powers regarding the common commercial policy. The Commission also referred to the fact that the WTO Agreement and its annexes were considered to be a "single package" and therefore the competences should not be divided. It also pointed out the expansion of GATT into other fields, that is trade in services and intellectual property rights, and that it was justified by

¹⁶¹ Denza, Eileen, *The Community as a Member of International Organizations, The European Union and World Trade Law After the GATT Uruguay Round*, ed. by Emiliou, Nicolas, O'Keefe, David, John Wiley & Sons, [1996], 13-14.

¹⁶² See Kuijper, Pieter J., *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, *European Journal of International Law*, Vol. 6, No. 2., Oxford University Press, [1995], p. 223.

development in international economy. In addition it argued that the creation and smooth operation of the Single European market called for a comprehensive common commercial policy.¹⁶³

Following the signing of the Agreement the Commission, submitted a request to the Court,¹⁶⁴ requesting for an Opinion, pursuant to Article 300(6) EC. The questions submitted to the Court, by the Commission were the following:¹⁶⁵

"(1) Does the European Community have the competence to conclude all parts of the Agreement establishing the WTO concerning trade in Services (GATS) and the trade-related aspects of intellectual property rights including trade in counterfeit goods (TRIPs) on the basis of the EC Treaty, more particularly on the basis of Article [133] EC alone, or in combination with Article [95] EC and/or Article [308] EC?

(2) Does the European Community have the competence to conclude alone also those parts of the WTO Agreement which concern products and/or services falling exclusively within the scope of application of the ESCS and the EAEC Treaties?

(3) If the answer to the above two questions is in the affirmative, does this affect the ability of MS to conclude the WTO Agreement, in the light of the agreement already reached that they will be original Members of the WTO?"¹⁶⁶

The subject of the above mentioned questions are basically two folded. Firstly, the Court is requested to ascertain whether or not the Community had exclusive competence to conclude the Multilateral Agreements on Trade in Goods, in so far as those Agreements concern ECSC products and Euratom Products. Secondly, whether the Community had exclusive competences to conclude the GATS and the TRIPS.

4.2.1 Multilateral Agreement on Trade in Goods¹⁶⁷

In its Opinion the Court states that the Commission and the parties who have submitted observations agree that the Multilateral Agreement on Trade in Goods are for the most part covered by the exclusive competence conferred on the Community in matters concerning the common commercial policy by Article 133 EC.¹⁶⁸ No claim was though brought that the Agreement should also apply to Euratom products.

According to Article 305(2) EC the provisions of the Treaty shall not derogate from those of the Eurotom Treaty. Therefore the Court concluded that since the Euratom Treaty contained no provisions relating to external trade, there

¹⁶³ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 298.

¹⁶⁴ The Commission submitted its request on April 6, 1994.

¹⁶⁵ Opinion 1/94 (1994) ECR I-5389.

¹⁶⁶ See Opinion 1/94, para. 110, where the Court states: "The Commission's third question having been put only on the assumption that the Court recognized that the Community had exclusive competence, it does not call for reply."

¹⁶⁷ See detailed discussions in chapter 2.2.1.

¹⁶⁸ Opinion 1/94, para. 22.

was nothing to prevent agreements concluded pursuant to Article 133 EC from extending to international trade in Euratom products.¹⁶⁹

Concerning the ECSE Treaty the Court stated that the Community has sole competence pursuant to Article 133 EC to conclude an external agreement of a general nature, that is to say, encompassing all types of goods, even where those goods include ECSC products.¹⁷⁰ Then the Court cited *Opinion 1/75*¹⁷¹ and said that the ECSC Treaty cannot "render inoperative Articles [133] and [134] of the EEC Treaty and affect the vesting of power in the Community for the negotiation and conclusion of international agreements in the realm of common commercial policy".¹⁷² Then the Court said: "In the present case, it appears from an examination of the Multilateral Agreements on Trade in Goods that none of them relates specifically to ECSC products. It follows that the exclusive competence of the Community to conclude those agreements cannot be impugned on the ground that they also apply to ECSC products."¹⁷³

The Council maintained that Article 37 EC, on the common agricultural policy was the right basis for its decision to conclude the WTO Agreement and its annexes in respect of the Agreement on Agriculture.¹⁷⁴ The Court did not accept that and stated that the fact that the commitments entered into under the Agreement on Agriculture annexed to the WTO Agreement required "internal measures to be adopted on the basis of Article [37] of the EC Treaty does not prevent the international commitments themselves from being entered into pursuant to Article [133] EC alone."¹⁷⁵

The same arguments were put forward concerning the Agreement on the Application of Sanitary and Phytosanitary Measures¹⁷⁶ and the Court also rejected that claim by stating that the agreement could be concluded on the basis of Article 133 EC alone for the agreement was confined in its preamble to measures aimed at minimizing negative effects on trade.¹⁷⁷

It must also be addressed that the Court ruled that the Agreement on Technical Barriers to Trade,¹⁷⁸ falls within the ambit of the common commercial policy for it is designed merely to ensure that technical regulations and standards do not create unnecessary obstacles to international trade.¹⁷⁹

In accordance with the aforementioned the Court, in paragraph 34 of the Opinion, concluded that the Community, following the above-mentioned arguments, has "exclusive competence, pursuant to Article [133] of the EC Treaty, to conclude the Multilateral Agreements on Trade in Goods."

¹⁶⁹ Opinion 1/94, para. 24.

¹⁷⁰ Opinion 1/94, para. 27.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ Opinion 1/94, para. 28. See Annex 1A WTO.

¹⁷⁵ Opinion 1/94, para. 29.

¹⁷⁶ Annex 1A WTO.

¹⁷⁷ Opinion 1/94, para. 31.

¹⁷⁸ Annex 1A WTO.

¹⁷⁹ Opinion 1/94, para. 33.

4.2.2 Common commercial policy and GATS and TRIPS

The Commission's main contention was that the conclusion of both GATS and TRIPS fell within the exclusive competence conferred on the Community by Article 133 EC. The Council, MS and the Parliament vigorously disputed that reasoning.

4.2.2.1 GATS

The MS have always, as discussed, interpreted the concept of common commercial policy in a narrow way. The Court, in the other hand, stated that the common commercial policy must be interpreted as having a wide scope and stated that services cannot immediately, and as a matter of principle, be excluded from the scope of Article 133 EC.¹⁸⁰ Nevertheless the Court did not come to the conclusion that all of the GATS fell under the scope of the common commercial policy.

The Court referred to Article I(2) of GATS, where trade in services is defined. The Article distinguished between four modes of supply of services.¹⁸¹ The Court ruled in its Opinion that only one of the four modes of supply of services, fell within the concept of common commercial policy.

The Court argued that cross-frontier supplies does not involve any movement of persons, and that it does not require the supplier to move to the consumer's country, nor, the consumer to move to the supplier's country. In that case the situation is therefore, not unlike trade in goods, which is unquestionably covered by the common commercial policy. Therefore there is "no particular reason why such a supply should not fall within the concept of the common commercial policy."¹⁸²

The Court concluded by stating that the other modes of supply of service referred to by GATS as "consumption abroad", "commercial presence" and the "presence of natural persons," were not covered by the common commercial policy.¹⁸³

Regarding particular services comprised in transport the court referred firstly, to the fact that transport is covered by a different title¹⁸⁴ in the Treaty than common commercial policy.¹⁸⁵ Secondly the Court referred to the *ERTA case*, where the Court for the first time acknowledged the doctrine of implied powers, by stating that the underlying reason for that ruling of the Court was that international agreements in transport matters are not covered by Article 133

¹⁸⁰ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 304.

¹⁸¹ See detailed discussions on the GATS Agreement in chapter 2.2.2 where the four modes are outlined.

¹⁸² See Opinion 1/94, para. 44.

¹⁸³ See Opinion 1/94, para. 47.

¹⁸⁴ Title V EC.

¹⁸⁵ Title IX EC.

EC.¹⁸⁶ In other words, because international agreements in transport were not covered by common commercial policy the Court in the *ERTA case*¹⁸⁷ came up with the doctrine of implied powers.

The Commission argued that one must divide between agreements dealing with safety rules, as in the *ERTA case*, and commercial agreements. The Court rejected that argument and stated that *ERTA case* draws no such distinction. The Court also stated that the Court had confirmed that analysis in *Opinion 1/76*¹⁸⁸ concerning an agreement indented to rationalize the economic situation in the inland waterways sector, where the Court was dealing with an economic agreement, not connected to safety rules as in the *ERTA case*.¹⁸⁹

The Commission in support of its view that transport service should be covered by the common commercial policy referred to series of embargoes which were based on Article 133 EC, which involved the suspension of transport services. That showed that the Community had dealt with transport matters under common commercial policy.

Firstly, the Court rejected that argumentation and stated that the embargoes had been aimed primarily to the export and import of goods, but the suspension of transport service was a necessary means to that principal objective. Accordingly the Court stated that the suspension was to be seen as "a necessary adjunct to the principal measure".¹⁹⁰

Secondly, the Court rejected that argument saying that a "mere practise of the Council cannot derogate form the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis."¹⁹¹

Following this the Court stated that only cross-frontier supplies are covered by the common commercial policy according to Article 133 of the EC Treaty.¹⁹²

4.2.2.2 TRIPS

The Court noted that the part of TRIPS, which concerns the means of enforcement of intellectual property rights, contains specific rules as to measures to be applied at border crossing points. These stipulations have its counterpart in the provisions of Council Regulation laying down measures to prohibit the release

¹⁸⁶ See Opinion 1/94, para. 48.

¹⁸⁷ Case 22/70 Commission v. Council (1971) ECR 263.

¹⁸⁸ Opinion 1/76 on the Draft Agreement Establishing a Laying-up fund for Inland Waterway Vessels [1977] ECR 741.

¹⁸⁹ See Opinion 1/94, para. 50.

¹⁹⁰ See Opinion 1/94, para. 51.

¹⁹¹ See Opinion 1/94, para. 52, where the Court refers to Case 68/86 United Kingdom v. Council [1988] ECR 855, para 24, where the court stated that in the context of the organization of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. A mere practise on the part of the Council cannot derogate from the rules laid down in the Treaty and such a practise cannot create a precedent binding on the Community.

¹⁹² See Opinion 1/94, para. 53.

for free circulation of counterfeit goods.¹⁹³ Following the Court stated: "Inasmuch as that regulation concerns the prohibition of the release into free circulation of counterfeit goods, it was rightly based on Article [133] of the EC Treaty: it relates to measures to be taken by the customs authorities at the external frontiers of the Community. Since measures of that type can be adopted autonomously by the Community institutions on the basis of Article [133] of the EC Treaty, it is for the Community alone to conclude international agreements on such matters."¹⁹⁴

Concerning the TRIPs Agreement the Court recognised that there is a connection between intellectual property rules and trade in goods.¹⁹⁵ Those connections are though not enough to bring them within the scope of Article 133 EC. The Court also pointed out that, intellectual property rights do not relate only to international trade. They affected to an equal extent, to say the least, domestic trade.¹⁹⁶

The Court also confirmed that the Community is competent, in the field of intellectual property, to harmonise national laws pursuant to Article 94 and 95 EC and may use Article 308 EC as a basis.¹⁹⁷ The Court however pointed out that under those Articles certain voting rules apply (rules of procedure) and they are not identical to those under Article 133 EC. Then the Court concluded by stating that if the Community were to be recognized as having exclusive competence to enter into agreements with non-member countries to harmonize the protection of intellectual property and, at the same time, to achieve harmonization at Community level, the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.¹⁹⁸ Then the Court stated that "institutional practice in relation to autonomous measures or external agreements adopted on the basis of Article [133] EC cannot alter this conclusion."¹⁹⁹

The Court adopted a similar approach with regard to the application of the so-called new commercial policy instruments, adopted under Article 133 EC.²⁰⁰ Such measures, even though they have ancillary provisions for the organization of purely consultative procedures or clauses calling on the other party to raise the level of protection of intellectual property does not mean that the Community has

¹⁹³ See Opinion 1/94, para. 55, where the Court referred to Regulation (EC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods, OJ 1986 L 357, p. 1.

¹⁹⁴ See Opinion 1/94, para. 55.

¹⁹⁵ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 304.

¹⁹⁶ See Opinion 1/94, para. 57.

¹⁹⁷ The Council used this legal base for its Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark OJ 1994 L 11, p. 1.

¹⁹⁸ See Opinion 1/94, para. 60.

¹⁹⁹ See Opinion 1/94, para. 61.

²⁰⁰ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 304.

exclusive competence to conclude an international agreement of the type and scope of TRIPS.²⁰¹

The Court, with reference to the foregoing, concluded that apart from those of its provisions, which concern the prohibition of the release into free circulation of counterfeit goods, TRIPS does not fall within the scope of the common commercial policy.²⁰²

4.2.3 Implied external powers

As discussed, the Court, in its first major judgement on the matter in the *ERTA case* accepted the existence of implied external powers but found them to be co-extensive with its internal powers.²⁰³ The activities, which fall under the Community internal powers, according to Article 3 of the EC Treaty are expanding, and numerous new activities have been included in the last two decades.

In addition the Court stated in its ruling in the *ERTA case* that each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts common rules, whatever form these may take: "the MS no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such common rules come into being the Community alone is in a position to assume and carry out contractual obligations affecting the whole sphere of application of the Community legal system."²⁰⁴

As stated, the Court, in *Opinion 1/76*, ruled that the external competence is not dependent on the actual adoption of internal measures.²⁰⁵ Therefore the Community appears to enjoy exclusive external competences even though internal measures in a specific area have not been enacted, provided that and in so far as "the participation of the Community in the international agreement is ... necessary for the attainment of one of the objectives of the Community."²⁰⁶

As outlined in Chapter 4.2 the Commission submitted three questions to the Court. The Commission asked, in question number one, whether the European Community had the competence to conclude all parts of the Agreement

²⁰¹ See Opinion 1/94, para. 68. This is a similar argumentation as the Court applied concerning the series of embargoes, decided under Article 133, which were aimed primarily to the export and import of goods, but the suspension of transport service was a necessary means to that principal objective.

²⁰² See Opinion 1/94, para. 71.

²⁰³ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 305 and Emiliou, Nicholas, *Towards a clearer demarcation line? The division of external relations power between the Community and Member States*, European Law Review, Vol. 19, February, Sweet & Maxwell, [1994], p. 79.

²⁰⁴ Case 22/70, para. 17.

²⁰⁵ Opinion 1/76, para. 4.

²⁰⁶ Id.

establishing the WTO concerning GATS and TRIPS, on the basis of Article 133 EC, or in combination with Article 95 EC and/or Article 308 EC?

The latter segment of the question related to the opinion of the Commission that if the Court would come to the conclusion that the Community did not have adequate power on the basis of specific provisions of the Treaty or legislative acts of the institutions, it had exclusive competence by virtue of the above mentioned Articles.

In Chapter 3.2 I discuss in general the implied external competences of the Community. The discussions in this Chapter are from the perspective of the Opinion and how one can interpret the views expressed by the Court in the Opinion.

4.2.3.1 GATS

The Commission referred to three types of sources for the exclusive competences of the Community regarding GATS.²⁰⁷ Firstly, the powers conferred on the Community institutions by the Treaty at internal level, and that the external competence flows from those internal powers.²⁰⁸ Secondly, the need to conclude the agreement in order to achieve a Community objective.²⁰⁹ And finally, it referred to Articles 95 EC and 308 EC.

The Court rejected the first argument that the source for the Communities external competences to conclude the GATS flowed from its internal competences.

Firstly, the Commission argued that there were no specific provision in GATS, which were not reflected by corresponding powers by the Community to adopt measures at internal level. According to the Commission, those powers are set out in the chapters on the right of establishment, freedom to provide service and transport.²¹⁰

The Court referred to the *ERTA case* where it had stated that "the powers of the Community extended to relationship arising from international law, and hence involved the need in the sphere in question for agreements with the third countries concerned."²¹¹ The Court then stated that in the *ERTA case*²¹² the Court ruled that whether the MS are acting individually or collectively they only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Then the Court concluded by stating that "[o]nly in so far as common rules have been established at internal level does the external competence of the Community become exclusive. However, not all transport matters are already covered by common rules."²¹³

²⁰⁷ Opinion 1/94, para. 73.

²⁰⁸ Here the Commission was referring to the *ERTA case* 22/70.

²⁰⁹ Here the Commission is referring to Opinion 1/76, para. 3.

²¹⁰ Opinion 1/94, para. 74.

²¹¹ Case 22/70, para. 27.

²¹² Here the Court was referring to Case 22/70, paras. 17 and 18.

²¹³ Opinion 1/94, para. 77.

Secondly, the Court dismissed the arguments put forward by the Commission that the MS capabilities to conclude and conduct an external policy based on bilateral agreements with non-member countries would inevitably lead to distortions in the flow of service and will progressively undermine the internal market.²¹⁴ The Court pointed out that nothing in the Treaty prevents concerted action in relation to non-member countries.²¹⁵

Thirdly, the Court stated that the sole objective of the chapters on the right of establishment, freedom to provide service and transport, were to secure the right of establishment and freedom to provide services for nationals of MS. Therefore the Court concluded that one cannot "infer from those chapters that the Community has exclusive competence to conclude an agreement with non-member countries to liberalize first establishment and access to service markets, other than those which are the subjects of cross-border supplies within the meaning of GATS, which are covered by Article 133."²¹⁶

Concerning the second argument put forward as a source for exclusive competence of the Community, the need to conclude the agreement in order to achieve a Community objective, the Court referred to *Opinion 1/76*. In the Opinion it was stated that the Community's exclusive external competences are not confined to cases in which use has already been made of internal powers to adopt measures for the attainment of common policies.²¹⁷

The Commission based on the argument that there were both internal and external reasons to justify exclusive competences of the Community.²¹⁸ Concerning the internal reasons, the Commission stated that without such participation the homogeneity and harmonization of the internal market would be impaired. Concerning external reasons, which were political, the Commission stated that the Community could not allow itself to remain inactive on the international stage.

The Court did not accept those arguments and reasoned that the issue in question in *Opinion 1/76* was different. The Court then discussed the case and stated that it was understandable that the external powers were exercised and thus become exclusive, without any internal legislation having first been adopted for the intention was to achieve the objective of establishing autonomous common rules, and such an objective were not possible to achieve without the participation of Switzerland.²¹⁹

Then the Court stated that this is not the situation in the sphere of services and that the "attainment of freedom of establishment and freedom to provide services for nationals of the MS is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of MS of the Community."²²⁰

²¹⁴ Opinion 1/94, para. 78.

²¹⁵ Opinion 1/94, para. 79.

²¹⁶ Opinion 1/76, para. 81.

²¹⁷ Opinion 1/76, paras. 3 and 4.

²¹⁸ Opinion 1/94 para. 83.

²¹⁹ Opinion 1/76, para. 2.

²²⁰ Opinion 1/94 para. 86.

Thirdly, as an argument for the third possible source of Community exclusive competences, the Commission referred to Articles 95 EC and 308 EC.

Regarding Article 95 EC the Court stated that an internal power to harmonize, which has not been exercised, cannot confer exclusive external competence on the Community. On the other hand it concluded that it is undeniable that, where harmonizing powers have been exercised, the harmonization measures thus adopted may limit, or even remove, the freedom of the MS to negotiate with non-member countries.²²¹

Concerning Article 308 EC the Court stated that it enables the Community, "to cope with any insufficiency in the powers conferred on it, expressly or by implication, for the achievement of its objectives, cannot in itself vest exclusive competence in the Community at international level". The Court also discussed *Opinion 1/76* and stated that where internal powers can only be effectively exercised at the same time as external powers, internal competence can give rise to exclusive external competence only if it is exercised, and that applied a fortiori to Article 308 EC.²²²

Finally, the court concluded by stating that whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, or in the case of an absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules, it acquires exclusive external competences.

To confirm this the Court referred to the *ERTA case* where it was stated that the common rules in question could be affected if the MS retain freedom to negotiate with non-member countries.²²³

The Court accepted that the Community had achieved complete harmonization of the rules governing access to a self-employed activity, and based on that fact the MS were deprived of the freedom to negotiate with non-member countries, but that is not the case in all service sectors.

Following the Court concluded that the competence to conclude GATS Agreement is shared between the Community and the MS.

4.2.3.2 TRIPS

The Commission, in its argumentation for its exclusive competence of the Community to conclude the TRIPS Agreement, referred to similar arguments as for the exclusive competence to conclude the GATS. Firstly, the Commission referred to the existence of legislative acts of the institutions, which could be affected within the meaning of the *ERTA case* if MS were to participate in its conclusion. Secondly, the need for the Community to participate in the agreement

²²¹ Opinion 1/94 para. 88.

²²² Opinion 1/94 para. 89.

²²³ Opinion 1/94 para. 96.

in order to achieve one of the objectives set out in the Treaty.²²⁴ Finally the Commission referred to Article 95 EC and 308 EC.

The Court stated that the reference to *Opinion 1/76* was just as disputable in the case of the TRIPS Agreement as in the case of GATS for the unification or harmonization of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective. And moreover the Court stated that Article 95 EC and 308 EC "cannot in themselves confer exclusive competence on the Community."²²⁵

Concerning the reference to the *ERTA case* the Court, argued that the harmonisation achieved within the Community in certain areas covered by the TRIPS Agreement is only partial and that, in other areas, no harmonisation has been envisaged. Then the Court pointed out that the Community is competent to harmonize national rules in accordance with Article 95 EC, in so far as, the rules "directly affect the establishment or functioning of the common market".²²⁶ Despite the aforementioned the Court concluded by stating that the fact remains that the Community institutions have not exercised their powers in the field of the enforcement of intellectual property rights, except by laying down measures to prohibit the release for free circulation of counterfeit goods.²²⁷ By this argumentation the Court confirmed earlier rulings that if the Community does not exercise its internal competences it cannot claim exclusive external competences, except if certain conditions are fulfilled which was not the case here.²²⁸

The Court then concluded by stating that the Community and its MS are jointly competent to conclude the TRIPS Agreement.²²⁹

4.2.3.3 Summary

Regarding GATS the Court came to the same conclusion as in the *ERTA case* that the MS lose their right to take on international obligations with non-member countries as and when common rules come into effect, which could be affected by international obligations.²³⁰ The Court accepted also that the Community might use powers conferred on it under the Treaty provisions on the right of establishment and the freedom to provide services, in order to lay down internal rules, concerning nationals of non-member countries.²³¹

²²⁴ This argumentation is based on Opinion 1/76.

²²⁵ Opinion 1/94 para. 101.

²²⁶ Opinion 1/94 para. 104.

²²⁷ Opinion 1/94, para. 105.

²²⁸ See Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 307, where he says that internal competences may only give rise to exclusive treaty-making powers when: 1) they have been exercised; or 2) whenever legislative provisions have been laid down; 3) whenever they confer express powers to the Community institutions to negotiate with third countries.

²²⁹ Opinion 1/94, para. 105.

²³⁰ Opinion 1/94, para. 77.

²³¹ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 306.

The Court therefore concluded that the Community would acquire exclusive external powers whenever it included in internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries or again where the Community had achieved complete harmonization of the rules governing access to a self-employed activity. As harmonization was not yet complete in all these fields, the Court held that the power to conclude the GATS was shared between the Community and the MS.²³²

Concerning the TRIPS Agreement the Court came to the conclusion that the Community and its MS were jointly competent to conclude the agreement for the Community had not exercised its powers to harmonize national rules in the field of the enforcement of intellectual property rights, except in the field of counterfeit goods, which fell within the scope of the common commercial policy.²³³ External competences of the Community in the field of intellectual property rights, other than those falling within the scope of Article 133 EC, are depended upon the extent of internal harmonization.²³⁴

In effect the Court reached the following conclusion:²³⁵

a) Exclusive implied treaty-making powers for the Community do not flow automatically from EC Treaty powers to lay down rules at internal level such as for example Articles 95 EC and 308 EC.²³⁶

b) Exclusive Community treaty-making powers under *Opinion 1/76* can be claimed only in cases where envisaged internal Community legislation cannot function effectively unless a third country is brought into the scheme envisaged by means of an international agreement.²³⁷ The Community must therefore demonstrate that the exercise of an attributed internal power is "inextricably linked" to the exercise of implied treaty making powers at the same time.²³⁸

c) Only when internal Community rules have achieved complete harmonization, an implied exclusive treaty-making power has to be recognized in order to avoid such common rules being affected, within the meaning of the *ERTA case*, if the MS retained freedom to negotiate with third countries.²³⁹

According to the aforementioned exclusivity based on implied powers was ruled out by the Court. The Community may though acquire exclusive implied powers, if common rules have been adopted as a result of the exercise of express

²³² Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 306-307.

²³³ Arnall, Anthony, *The Scope of the Common commercial policy: A Coda on Opinion 1/94*, in Emiliou, Nicolas, O'Keefe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996], p. 356.

²³⁴ Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p. 307.

²³⁵ See Hilf, Meinhard, *The ECJ's Opinion 1/94 on the WTO - Not Surprise, but Wise?* European Journal of International Law, Vol. 6, No. 2, Oxford University Press, [1995], p. 253-254.

²³⁶ Opinion 1/94, para. 77.

²³⁷ Opinion 1/94, para. 85.

²³⁸ Opinion 1/94, para. 86.

²³⁹ Opinion 1/94, para. 96.

internal powers. Accordingly internal competences may only give rise to exclusive treaty-making powers when:²⁴⁰

a) They have to be exercised;²⁴¹ b) or whenever legislative provisions have been laid down, which for example in the field of treatment of third country nationals;²⁴² c) or whenever they confer express powers to the Community institutions to negotiate with third countries.²⁴³

4.2.4 Duty of Co-Operation

At the hearing of the case the Commission draw the attention of the Court to the fact that most likely problems would arise concerning the administration and management of the WTO Agreement, and the Agreements covered by it, if the Community and the MS were to share competences in relation to the GATS and TRIPS.

Firstly, the Court responded, by stating that problems may arise concerning the administration of the Agreements and the coordination necessary to ensure unity in Communities and the MS actions. These potential problems cannot, however, modify the answer to the question of competence, that being a prior issue.²⁴⁴

Secondly, the Court stated that it is vital to "ensure close cooperation in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community."²⁴⁵

The Court also emphasised on the importance of close cooperation in the light of the cross-retaliation system provided for by the DSU, and that in the absence of close co-operation the MS and the Community might be unable to apply the measures provided by that system.

4.3 Opinion 1/94 - The Aftermath

4.3.1 The critique on the Opinion

The Opinion of the Court was badly criticised by many as a "missed opportunity"²⁴⁶ to clarify the issues relating to the common commercial policy and

²⁴⁰ See Emiliou, Nicholas, *The Death of Exclusive Competence?* European Law Review, Vol. 21, No 4, August, Sweet & Maxwell, [1996], p.308.

²⁴¹ Opinion 1/94, para. 104.

²⁴² Opinion 1/94, para. 95.

²⁴³ Opinion 1/94, para. 96.

²⁴⁴ Opinion 1/94, para. 107.

²⁴⁵ Opinion 1/94, para. 108. See also Opinion 1/78 [1978] ECR 2151, paras. 34 to 36, and Opinion 2/91, para. 36.

²⁴⁶ Hilf, Meinhard, *The ECJ's Opinion 1/94 on the WTO - Not Surprise, but Wise?* European Journal of International Law, Vol. 6, No. 2, Oxford University Press, [1995], p. 258.

worse, as some stated, the "former practise and case law have suffered a severe setback."²⁴⁷

Pescatore cited George Friden, where he summed up the situation in the following words:²⁴⁸ "It is particularly regrettable and illogical that at a time when the multilateral trade system was accomplishing its most important advance since 1947, by merging into a coherent whole the rules relating to services and the rules relating to goods, demonstrating thus the close link between both fields and making clear the fact that one could not conceive at present international trade law without taking account off the rules applicable to services, the Court made the Community take a step in exactly the opposite direction."

The critics based its critique on many different arguments. Many argued that the Opinion was obviously inspired by political rather than legal considerations.²⁴⁹ The MS are not eager to give up their competences or sovereignty in the field of external competences and therefore there was a pressure on the Court not to go too far. The moderate views taken by the Court are also, up to a point, in line of the development that has occurred in the last decade that the role of the Court as the prime impetus of European integration is decreasing.

As stated the WTO Agreement purposes a so-called "single package" scheme. That means that a party to the Agreement must take over all the Agreement falling under Annex 1 that is the Multilateral Trade Agreements.²⁵⁰ Critics say that the Community does not fulfil this requirement for the Court has only ruled that the Multilateral Trade agreement in goods, one of four modes of trade in services and a small part of the TRIPS Agreement falls under its competences.

Critics also point out the devastating consequences that the Opinion is likely to have on the "unitary representation" of the Community interests.²⁵¹ This critique is made, in spite of the fact that the Court addressed the Commissions argument concerning potential difficulties concerning the unitary in representation and coordination necessary to ensure unity in Communities and the MS actions. As stated above the Court, in its answer, referred to the requirement of unity in the international representation of the Community.²⁵²

²⁴⁷ Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* Common Market Law Review, Vol. 36, No 2, Kluwer Law International, [1999], p. 387.

²⁴⁸ Id.

²⁴⁹ See Hilf, Meinhard, *The ECJ's Opinion 1/94 on the WTO - Not Surprise, but Wise?* European Journal of International Law, Vol. 6, No. 2, Oxford University Press, [1995], p. 259, and Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* Common Market Law Review, Vol. 36, No 2, Kluwer Law International, [1999], p. 388.

²⁵⁰ Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* Common Market Law Review, Vol. 36, No 2, Kluwer Law International, [1999], p. 389.

²⁵¹ Id.

²⁵² Opinion 1/94, para. 108.

Pescatore states that the Opinion of the Court has truly created a lot of pressure on the MS.²⁵³ He considers this pressure to be three folded. Firstly, a MS can during the phase of internal concentration force the application of the unanimity rule, in its capacity as a sovereign WTO signatory, and thus either block the deliberation process or obtain some compensation. Secondly, a MS may use its capacity as a WTO Contracting Party to oppose the position of the Community, during the phase of discussion at WTO level. Thirdly, third states can see an opportunity in coming between the MS or by seeking a connivance of a MS, by offering or accepting some advantages for the MS in question.

Concerning the common commercial policy it is argued that the Court exercised an inward-looking approach to the policy by not accepting the new dimension of trade policy, as it appears in the WTO Agreement, inside of the spare of common commercial policy. As Pescatore states it "The mischief done by *Opinion 1/94* is to have split artificially the trade policy into a 'traditional' compartment, imposed to the Community like a straightjacket, an extensible concept for the use of MS."²⁵⁴

It has also been argued that the concept "common commercial policy" must be viewed and interpreted in the light of international law for that is where it is derived from.²⁵⁵ Therefore, some have stated that the Court made a mistake in interpreting these new trends in international trade as falling, largely, outside the scope of the concept, and therefore not covered by the exclusive competences of the Community based on Article 133 EC.

In the next Chapter I will discuss important disputes that were brought under the Court, and how the Court dealt with them. I will also, to some extent, discuss how the disputes and merits in the cases reflect the points of arguments discussed above.

4.3.2 The competences of the Court to interpret the WTO Agreement

In short, there are three forms of actions against the Community Institutions, which may be of assistance in obtaining correction from the European Court of Justice and the Court of First Instance.²⁵⁶

²⁵³ See ²⁵³ Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* Common Market Law Review, Vol. 36, No 2, Kluwer Law International, [1999], p. 389, where he says: "the Court Opinion has indeed created three possibilities of pressure (not to use the term of outright blackmail) on individual Member States."

²⁵⁴ Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* Common Market Law Review, Vol. 36, No 2, Kluwer Law International, [1999], p. 391.

²⁵⁵ See Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* Common Market Law Review, Vol. 36, No 2, Kluwer Law International, [1999], p. 397.

²⁵⁶ In addition a Member State may, according to Article 227, if it considers that another Member State has failed to fulfil an obligation under the Treaty, bring the matter before the

Firstly, actions can be brought for annulment of Community acts under Article 230 EC.²⁵⁷ That Article is the principal Treaty provision in which the Community norms can be challenged.²⁵⁸ The Court has held in its judgements that where it has been held that, just as the fourth paragraph of Article 230 EC allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct²⁵⁹ and individual²⁶⁰ concern to them, the third paragraph of Article 232 EC must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure that would have concerned them in the same way.

Secondly, actions under Article 232 EC in respect of failure to act. Even though the Court will only declare that the Commission has failed to act, it gives rise to immediate legal obligation to take necessary action required.

Thirdly, actions for damages under Articles 235 EC and 288 EC. Article 288 EC states that in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the MS, make good any damage caused by its institutions or by its servants in the performance or their duties. Article 235 EC confers the jurisdiction in such cases on the Court and, while it does not state that this jurisdiction is exclusive, this is implied by Article 240 EC.²⁶¹

In addition national courts may refer questions to the Court under Article 234 EC for a preliminary ruling. If questions are referred to the Court by the national court for a preliminary ruling, the parties do not have to show that the measure is of direct and individual concern to them. Therefore preliminary rulings

Court, and Article 236 gives the Court a jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Condition of Employment.

²⁵⁷ Four broad conditions have to be satisfied before an act can successfully be challenged: the act has to be of a kind which is open to challenge at all; the institution or person making the challenge must have standing to do so; there must be a procedural or substantive illegality of a type mentioned in Article 230(1); and the challenger must be brought within the time limits indicated in Article 230(5).

²⁵⁸ Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p. 453.

²⁵⁹ It can be troublesome for an individual to prove that a legal act is of direct concern to it. In the Cases 41-44/70, *NV International Fruit Company v. Commission* [1971] ECR 411, [1975] 2 CMLR 515, the Court concluded that a Community regulation which was of individual concern brought an action for annulment against, for it was in breach of GATT obligations, was of direct concern to him for "the national authorities do not enjoy any discretion in the matter if the issue of licences and the conditions on which applications by the parties concerned should be granted."

²⁶⁰ It can also be extremely troublesome for legal or natural persons to prove that an act is of individual concern to them. The Court held that private plaintiffs harmed by Regulation 404/93 could not challenge it under Article 230 of the Treaty, because they were not sufficiently individually concerned. Germany is on the other hand a privileged applicant under the Article and therefore it was able to bring an action against the Regulation. See Case-280/93 *Germany v. Council* 1994 ECR I-4973 (The Banana case).

²⁶¹ Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p. 540.

have been showed to be the most practical procedure for non-privileged parties to bring a case for the Court.

It is also settled case law that international agreements concluded by the Council on behalf of the community under Article 300 EC are covered by the concept and the Court has therefore jurisdiction to give preliminary rulings on its interpretations and validity.²⁶²

Below I mainly discuss cases where the national court has referred legal questions to the Court for a preliminary ruling or cases brought up by a privileged applicant against a Community act. The question concerning jurisdiction to interpret provisions of international law, under those rules of procedure apply also for other actions, brought up under other provisions of the Treaty. I will discuss the jurisdiction of the Court to give preliminary rulings on the interpretation of the WTO Agreement and Agreements covered by it. I will also address the rights which the WTO Agreement confer to legal and natural persons and to what extend the Agreement can be relied upon in national courts and in the Court.

4.3.2.1 Case law on the interpretation on the WTO Agreement

Mixed agreements have always played an important role in Community's external relations. The Court early on confirmed its jurisdiction to interpret trade provisions of association agreements, which were within the Community's competences.²⁶³

In the *Demirel case*²⁶⁴ where the Court came to the conclusions that the provisions of an association agreement fell within the competences of the Community under Article 310 EC and therefore the Court had jurisdiction to interpret the provisions in question. It has though been widely accepted that the judgement leaves open the question on the Court's jurisdiction to interpret the part of a mixed agreement falling under the competences of the MS.²⁶⁵

Heliskoski on the other hand points out that the Court did not consider that the competence of the Community under Article 310 EC is not exclusive and that,

²⁶² Case 181/73 Haegman v. Belgium [1974] ECR 449, paras. 4-6. The Court stated that an international agreement was an act of one of the Community's institutions within the meaning of subpara. (b) of Article 234. Then the Court continued by stating that within the framework of Community law, the Court accordingly had jurisdiction to give preliminary rulings concerning the interpretation of the agreement.

²⁶³ Case 181/73 Haegman v. Belgium [1974] ECR 449, paras. 4-6.

²⁶⁴ Case 12/86 Demirel v. Stadt Schwäbisch Gmünd [1987] ECR 3719. Germany and the UK challenged the Court's authority to interpret certain provisions of the 1963 Agreement of Association between the Community and its Member States, on the one hand and Turkey, on the other. The two Governments argued that in the case of mixed agreement, the Courts jurisdiction did not extend to provisions whereby Member States had entered into international commitments in the exercise of their own powers.

²⁶⁵ See Heliskoski, Joni, *The Jurisdiction of the European Court of Justice to Give Preliminary Ruling on the Interpretation of Mixed Agreements*, Nordic Journal Of International Law, Vol. 69, No 4, Kluwer Law International, [2000], p. 400 and Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p.140-141.

consequently, the commitments concerning the free movements of workers may well have been concluded under MS powers. Heliskoski is therefore of the opinion that a better view would be that the judgement leaves open the question whether the Court may interpret provisions of a mixed agreement concluded under MS powers, either because the commitments concerned go beyond Community competences, or because it has been decided not to exercise the powers of the Community.²⁶⁶

4.3.2.2 The Hermés case

In the *Hermés case*²⁶⁷ the Court was requested to interpret a provision of the TRIPS Agreement. This was also the first time the Court was requested to interpret a mixed agreement, other than association agreements.²⁶⁸

The Court was requested to interpret the notion of "provisional measures" in Article 50 of the TRIPS Agreement in the context of proceedings concerning the infringement of trademark rights.²⁶⁹

Concerning the question of jurisdiction the Court referred, firstly, to the fact that the Final Act and the WTO Agreement, was signed by the Community and its MS and during that time Regulation No 40/94²⁷⁰ had been in force for one month.²⁷¹

Secondly, the Court stated that under Article 50(1) of the TRIPS Agreement, judicial authorities of the contracting parties are required to be authorised to order "provisional measures" to protect the interests of proprietors of trademark rights conferred under the laws of those parties.²⁷² Then it pointed out that according to Article 99 of Regulation No 40/94, rights arising from a Community trademark may be safeguarded by the adoption of "provisional, including protective measures."²⁷³

Thirdly, the Court stated that since the Community is a party to the TRIPS Agreement and since that agreement applies to the Community trade mark the courts referred to in Article 99 of Regulation No 40/94, when called upon to apply national rules with a view to ordering provisional measures do so, as far as

²⁶⁶ See Heliskoski, Joni, *The Jurisdiction of the European Court of Justice to Give Preliminary Ruling on the Interpretation of Mixed Agreements*, Nordic Journal Of International Law, Vol. 69, No 4, Kluwer Law International, [2000], p. 400 and Dashwood, Alan., *Preliminary Rulings on the Interpretation of Mixed Agreements*, in D. O'Keefe and A. Bavasso (eds.), *Judicial Review in European Union Law: Liber Amicorum in honour of Lord Slynn Of Hadley*, Vol. 1, Kluwer Law International, The Hague, [2000], P. 167.

²⁶⁷ Case C-53/96 *Hermés v. FHT* [1998] ECR I-3603.

²⁶⁸ Heliskoski, Joni, *The Jurisdiction of the European Court of Justice to Give Preliminary Ruling on the Interpretation of Mixed Agreements*, Nordic Journal Of International Law, Vol. 69, No 4, Kluwer Law International, [2000], p. 401.

²⁶⁹ Case C-53/96 *Hermés v. FHT* [1998] ECR I-3603, paras. 34-35.

²⁷⁰ Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade-mark.

²⁷¹ Case C-53/, para. 25.

²⁷² Case C-53/96, para. 26.

²⁷³ Case C-53/96, para. 27.

possible, in the light of the working and purpose of Article 50 of the TRIPS Agreement.²⁷⁴

The Court, according to the aforementioned concluded that the Court has, in any event, jurisdiction to interpret Article 50 of the TRIPS Agreement.²⁷⁵

According to the Court, it was immaterial that the dispute in the main proceedings concerned trade-marks whose international registrations designate the Benelux:

First, it is solely for the national court hearing the dispute, which must assume responsibility for the order to be made, to assess the need for a preliminary ruling so as to enable it to give its judgment. Consequently, where the question referred to it concerns a provision, which it has jurisdiction to interpret, the Court of Justice is, in principle, bound to give a ruling.²⁷⁶

Second, where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply.²⁷⁷ Then the Court continued by stating that it had been pointed out,²⁷⁸ that Article 50 of the TRIPS Agreement applies to Community trade-marks as well as to national trade marks.²⁷⁹

The Court therefore concluded it had jurisdiction to rule on the question submitted by the national court.

Based on the ruling it can be assumed that the Court has jurisdiction to interpret all provisions of the WTO Agreement and other mixed agreements, which fall within the exclusive or non-exclusive competences of the Community.²⁸⁰

The above mentioned reasoning of the Court does not answer, on the other hand, whether the Court has jurisdiction to interpret provisions of a mixed agreement falling only under the competences of the MS, or whether the Court's jurisdiction under Article 234 EC extends to provisions of Article 50 of the TRIPS Agreement in cases other than those concerning provisional measures aiming at the protection of trade-mark rights.²⁸¹

²⁷⁴ Case C-53/96, para. 28. The Court then referred to the Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, para. 9 and Case C-61/94 Commission v. Germany [1996] ECR I-3989, para. 52.

²⁷⁵ Case C-53/96, para. 29.

²⁷⁶ Case C-53/96, para. 31, where the Court, to that effect, referred to joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR I-3763, paras. 34 and 35, and Case C-231/89 Gmurzynska-Bscher [1990] ECR I-4003, paras. 19 and 20.

²⁷⁷ See, to that effect, Case C-130/95 Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I-4291, para. 28, and Case C-28/95 Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen [1997] ECR I-4161, para. 34.

²⁷⁸ See Case C-53/96, para. 28.

²⁷⁹ Case C-53/96, para. 32.

²⁸⁰ See Heliskoski, Joni, *The Jurisdiction of the European Court of Justice to Give Preliminary Ruling on the Interpretation of Mixed Agreements*, Nordic Journal Of International Law, Vol. 69, No 4, Kluwer Law International, [2000], p. 404-408.

²⁸¹ See Heliskoski, Joni, *The Jurisdiction of the European Court of Justice to Give Preliminary Ruling on the Interpretation of Mixed Agreements*, Nordic Journal Of International Law, Vol. 69, No 4, Kluwer Law International, [2000], p. 403 and Helioskoski,

4.3.2.3 The Dior and Assco cases

In the *Dior case*²⁸² the question of the interpretation of Article 50 of the TRIPS Agreement was raised again, in a proceedings between the companies Parfums Christian Dior SA and Tuk Consultancy BV. The former was the owner of the trademarks for perfumery products, and it offered its products in the European Community through a selective distribution system. In the proceedings before the Dutch court, the company submitted that Tuk had infringed the Dior trade-marks by selling perfumes bearing those marks, since the perfume had not been put on the market in the European Economic Area by Dior or with its consent. The national court, considered that the main proceedings raised the issue of the direct effect of Article 50(6) of the TRIPS Agreement and referred the following question to the Court for a preliminary ruling: "Is Article 50(6) of the TRIPS Agreement to be interpreted as having direct effect in the sense that the legal consequences set out therein take effect even in the absence of any corresponding provision of national law?"²⁸³

The dispute in the *Dior case*, on the other hand related to the protection enjoyed under the law of the Netherlands concerning wrongful acts, by a type of scaffolding, designed and produced by Layher Germany but imported to the Netherlands by Layher Netherlands. Both companies applied to the District Court for interim measures prohibiting the importing into the Netherlands, selling, offering for sale or otherwise trading in another type of scaffolding system manufactured in Germany by Assco Gerüste GmbH and marketed in the Netherlands by Mr. Van Dijk, who traded under the name of Assco Holland Stegers Plettac Nederlands (hereafter referred to as Assco)

The District Court granted the application and ruled that the period referred to in Article 50(6) of the TRIPS Agreement was to be one year. An appeal was lodged to the Regional Court, which in substance upheld the interim decision. Then Assco lodged an appeal for the Hoeg Raad der Nederlanden, which decided to refer the following three questions to the Court for a preliminary ruling:²⁸⁴ "(1) Does the jurisdiction of the Court of Justice to interpret Article 50 of the TRIPS Agreement also extend to the provisions of that article where they do not concern provisional measures to prevent infringement of trade-mark rights?; (2) Does Article 50 of the TRIPS Agreement, in particular Article 50(6) have direct effect?; (3) Where an action lies under national civil law against the copying of an industrial design, on the basis of the general rules concerning wrongful acts, in particular those relating to unlawful competition, must the protection thus

Joni, *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, Common Market Law Review, Vol. 39, No. 1, Kluwer Law International, [2002], p. 159.

²⁸² *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV. [2000] ECR p. I-11307.*

²⁸³ *Joined Cases C-300/98, and C-392/98, para. 19.*

²⁸⁴ *Joined Cases C-300/98, and C-392/98, para. 27.*

afforded to the holder of the right be regarded as and intellectual property right within the meaning of Article 50(1) of the TRIPS Agreement?"

The Court summed up the questions submitted by the two national courts into the following three points concerning respectively:²⁸⁵ a) the jurisdiction of the Court of Justice to interpret Article 50 of the TRIPS and the condition for exercising that jurisdiction;²⁸⁶ b) whether Article 50(6) of TRIPS has direct effect;²⁸⁷ and the interpretation of the term "intellectual property right."²⁸⁸

The Court recalled the *Hermés case* and repeated the key substance of it. It stated that in particular, the Court has jurisdiction to interpret Article 50 of the TRIPS Agreement in order to meet the needs of the courts of the MS when they are called upon to apply national rules with a view to ordering provisional measure for the protection of rights arising under Community legislation falling within the scope of the TRIPS Agreement.²⁸⁹ Likewise, where a provision such as Article 50 of the TRIPS Agreement can apply both to situations falling within the scope of national law and to situations falling within that of Community law, as is the case in the field of trade marks, the Court has jurisdiction to interpret it in order to forestall future differences of interpretation.²⁹⁰ That principle, which was originally brought up by the Court in the *Hermés case* was, however, not based on the close connection that existed between the situations concerning the Community trademark and those concerning the national trademarks, but rather on the nature of Article 50(6) of the TRIPS Agreement itself.²⁹¹

The Court based its ruling on the fact that since Article 50 of the TRIPS Agreement constitutes a procedural provision, which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law, that obligation requires the judicial bodies of the MS and the Community, for practical and legal reasons, to give it a uniform interpretation.²⁹²

The Court also addressed the obligation of close cooperation between the MS and the Community institutions, in fulfilling the commitments undertaken by them under joint competence and cited paragraph 108 of *Opinion 1/94* that regard.

Then the Court stressed its opinion that only the Court of Justice acting in cooperation with the courts and tribunals of the MS, pursuant to Article 234 EC, is in position to ensure such uniform interpretation.

²⁸⁵ Joined Cases C-300/98, and C-392/98, para. 28.

²⁸⁶ The first question in Case 392/98.

²⁸⁷ The only question in Case C-392/98 and the second question in Case C-392/98. I will discuss this question in chapter 4.3.3.2.

²⁸⁸ The third question in Case C-392/98. I will discuss this question in chapter 4.3.5.2.

²⁸⁹ Para 43, where the Court is citing to *Hermés* paras. 28-29.

²⁹⁰ Para 35, where the Court is citing to *Hermés* paras. 32-33.

²⁹¹ *Helioskoski, Joni, Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr., Common Market Law Review, Vol. 39, No. 1, Kluwer Law International, [2002], p. 159.*

²⁹² Joined Cases C-300/98, and C-392/98, para. 37.

The Advocate General based its opinion on the close link between the situations concerning the Community trademark and those concerning the national trademarks.²⁹³ The Court, on the other hand based its ruling on the nature of the provision in question, the fact that Article 50 of the TRIPS Agreement "constitutes a procedural provision which should be applied in the same way in every situation falling within its scope" and that where one and the same provision of a mixed agreement applied to both areas of Community and MS competence, the Court was thus entitled to rule on its interpretation, irrespective of whether the dispute in the main proceedings concerned a matter within the competence of the MS.²⁹⁴

4.3.2.4 Summary

The *Dior case* clarified the ruling of the Court in the *Hermés case*, which some had understood as the Court had jurisdiction to rule on all provisions of mixed agreements falling within the Community's exclusive or non-exclusive competence in general²⁹⁵ and on all provisions of the TRIPS Agreement in particular.²⁹⁶

From the ruling in the *Dior case* one can come to different conclusions. It is possible to argue that the judgement gives no guidance on the question whether the Court has jurisdiction to interpret the provisions of a mixed agreement falling within the non-exclusive competence of the Community. It is also possible to argue that according to the ruling the Court does not have jurisdiction to interpret provisions of mixed agreements, in fields where the Community has not exercised its competences, save where the provision whose interpretation is sought is a procedural provision applicable to both situations covered by Community law and to situations covered by national law.²⁹⁷

From the ruling one can, on the other hand, conclude that the Court has jurisdiction under Article 234 EC to interpret mixed agreements whenever they contain provisions such as Article 50 of the TRIPS Agreement that are capable of applying both to situations within Community competence and to situations within

²⁹³ Opinion of Mr Advocate General Cosmas delivered on 11 July 2000, [2000] ECR I-1307, para. 40.

²⁹⁴ Helioskoski, Joni, *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, Common Market Law Review, Vol. 39, No. 1, Kluwer Law International, [2002], p. 168.

²⁹⁵ Dashwood, Alan., *Preliminary Rulings on the Interpretation of Mixed Agreements*, in D. O'Keefe and A. Bavasso (eds.), *Judicial Review in European Union Law: Liber Amicorum in honour of Lord Slynn Of Hadley*, Vol. 1, Kluwer Law International, The Hague, [2000], p. 173.

²⁹⁶ Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskeniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p. 104.

²⁹⁷ Helioskoski, Joni, *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, Common Market Law Review, Vol. 39, No. 1, Kluwer Law International, [2002], p. 171.

MS competence, irrespectively of whether the dispute before the national court falls within Community or MS Competences.²⁹⁸

4.3.3 The effects of the provisions of the WTO Agreement within the Community

The Court in general declined the provision of GATT 1947 from having direct effect. In the *International Fruit case*²⁹⁹ the Court outlined two conditions for an incompatibility of a Community measure with provisions of an international agreement can affect the validity of the measure. Those conditions are; a) Community must be bound by the provisions of the international law in question, b) the provision of international law must also be capable of conferring rights on citizens of the Community, which can be invoked before the Courts.

The Court answered the first question by stating that in so far as the Community has assumed the powers previously exercised by the MS in the area covered by the GATT 1947 it has the effect of binding the Community.³⁰⁰ Concerning the latter question, on the other hand, the Court came to the conclusion that the provision of GATT 1947 in question, where not capable of conferring on citizens of the Community rights which they could invoke before the Courts.³⁰¹

In the *Banana case*³⁰² Germany challenged a Community act,³⁰³ which restricted its previously liberal banana import regime, claiming it breached GATT 1947 rules.³⁰⁴

Germany tried to distinguish its claim from prior jurisprudence in the *International Fruit case* arguing that compliance with GATT 1947 rules was a condition of the lawfulness of Community acts, regardless of any question as to

²⁹⁸ See Helioskoski, Joni, *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV, and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, Common Market Law Review, Vol. 39, No. 1, Kluwer Law International, [2002], p. 171-172 and Heliskoski, Joni, *Mixed Agreements as a Techniques for Organizing the International Relations of the European Community and its Member States*, Kluwer Law International, 2001, p. 59-61.

²⁹⁹ Case 21-24/72 *International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit* (1972) ECR 1219.

³⁰⁰ Case 21-24/72, para. 18.

³⁰¹ Case 21-24/72, para. 27.

³⁰² Case C-280/93 *Germany v. Council* [1994] ECR I-4973.

³⁰³ Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas.

³⁰⁴ See Peers, Steve, *Constitutional Principles and International Trade*, European Law Review, Vol. 24, April, Sweet & Maxwell, [1999] and Trachtman, Joel P., *Bananas, Direct Effect and Compliance*, European Journal of International Law, Vol. 10, No 4, Oxford University Press, [1999], p. 662. Where he also points out that the Court had held that private plaintiffs harmed by the Community act could not challenge it under Article 230 of the Treaty, for they were not sufficiently individually concerned.

the direct effect of GATT 1947, and that the Regulation infringed certain basic provisions of GATT 1947.³⁰⁵

The Court nevertheless rejected Germany's claim referring to its ruling in *International Fruit case* by stating the GATT 1947 rules were not unconditional and that an obligation to recognize them as rules of international law, which are directly applicable in the domestic legal systems of the Contracting Parties could not be based on the spirit, general scheme or terms of GATT 1947.³⁰⁶

It cannot be denied that the provisions of GATT 1947 were more flexible and conditional than for example certain provisions of the Treaty, or most of the domestic legislation of the MS.³⁰⁷ However, the GATT 1994 is, by any measure, less flexible and conditional than the GATT 1947.³⁰⁸

Some have argued that the granting of direct effect to the GATT rules is really a political question,³⁰⁹ which the Court should refrain from and must be looked upon in context of the approach taken by Community's trading partners and fellow contracting parties in the WTO, such as the USA. Based on this it is argued that this refusal is at least partly because other states and trading partners of the Community and its MS, did not accord direct effect, to the provisions of the GATT 1947, nor do they to the WTO Agreement and the Agreements covered by it. It would therefore create a bargaining disparity, which would have to be adjusted if the trading partners of the Community denied direct effect to these obligations while the Community accorded them direct effect.³¹⁰

This notion of reciprocity was addressed in the *Kaupferberg case*,³¹¹ which concerned association agreement. In that case the Court rejected the argument of reciprocity, as a basis, for rejection of direct effect by stating that the fact that the Court of one of the parties to an international agreement, "consider that certain of the stipulation in the agreement are of direct application whereas the courts of the other party do not recognize such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement."³¹²

³⁰⁵ See Peers, Steve, *Constitutional Principles and International Trade*, European Law Review, Vol. 24, April, Sweet & Maxwell, [1999], p. 190.

³⁰⁶ Case C-280/93, para. 110. See further on the "Banana Conflict" Smith, Fiona, *Renegotiating Lomé: the impact of the World Trade Organisation on the European Community's development policy after the Bananas Conflict*, European Law Review, Vol. 25, June, Sweet & Maxwell, [2000].

³⁰⁷ See Cheyne, Ilona, *International Agreements and the European Community Legal System*, European Law Review, Vol. 19, December, Sweet & Maxwell, [1994], p. 595 where she states that there are two characteristics of the GATT 1947 provisions so far considered by the Court, which have allowed it to avoid direct conflict with the executive institutions.

³⁰⁸ Trachtman, Joel P., *Bananas, Direct Effect and Compliance*, European Journal of International Law, Vol. 10, No 4, Oxford University Press, [1999], p. 664.

³⁰⁹ *Id.*

³¹⁰ Trachtman, Joel P., *Bananas, Direct Effect and Compliance*, European Journal of International Law, Vol. 10, No 4, Oxford University Press, [1999], p. 657.

³¹¹ Case 104/81 Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.. ECR [1982] p. 3641.

³¹² Case 104/81, para. 18.

4.3.3.1 Portuguese textile

In the *Portuguese textile case*,³¹³ the Court cited the *Kaupferberg case* concerning the rejection of the argument of reciprocity.³¹⁴ However, the Court continued by stating that the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO Agreement, which are based on 'reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from the agreement in question in the *Kaupferberg case*, may lead to disuniform application of the WTO rules.³¹⁵

To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community's judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.³¹⁶

The Court then concluded by stating that following those considerations, and having regard to their nature and structure, the WTO Agreements, are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.³¹⁷

4.3.3.2 The Dior case

As already mentioned the Court in the *Dior case* was asked to clarify whether Article 50(6) of TRIPS has direct effect,³¹⁸ and to interpret the term "intellectual property right" in Article 50(1) of the TRIPS Agreement.³¹⁹

The Court after having accepted the admissibility of the reference for a preliminary ruling and declared that it had jurisdiction to interpret Article 50 of the TRIPS Agreement, where the judicial authorities of the MS are called upon to order provisional measures for the protection of intellectual property rights falling within the scope of the TRIPS Agreement and a case is brought before the court of Justice in accordance with the provisions of the Treaty in particular Article 234 EC thereof.

³¹³ Case C-149/96 Portuguese Republic v. Council [1999] ECR I-8395. In this case, Portugal challenged a Council Decision adopted in 1996 concluding two Memoranda of Understanding, with India and Pakistan respectively, which had the effect of increasing access for certain textile products to the EU market in advance of the EU's commitments under the Agreement on Textile and Clothing, one of the Annex 1A WTO Agreements. See further Cremona, Marise, *Rhetoric and Reticence: EU External Commercial Policy in a Multilateral Context*, Common Market Law Review, Vol. 38, No 2, Kluwer Law International, [2001].

³¹⁴ Case C-149/96, para. 44, where the Court cites to the *Kaupferberg case*, para. 18.

³¹⁵ Case C-149/96, para. 45. See Zonnekeyn, Geert A., *The status of WTO law in the Community legal order: some comments in the light of the Portuguese Textile case*, European Law Review, Vol. 25, June, Sweet & Maxwell, [2000], where he discusses he states the Court upheld its "old case law" according to which the GATT 1947 were devoted of direct effect, but its reasoning was partly based on the new arguments.

³¹⁶ Case C-149/96, para. 46.

³¹⁷ Case C-149/96, para. 47.

³¹⁸ The only question in Case C-392/98 and the second question in Case C-392/98

³¹⁹ The third question in Case C-392/98.

First the Court recalled its earlier rulings on the effects of agreements entered into by the Community with non-member countries, by stating that it is settled case law that provisions of such agreements must be regarded as being directly applicable when, regard being had to the wording, purpose and nature of the agreement, it may be concluded that the provisions contain a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures.³²⁰

Secondly, the court recalled its ruling in the *Portuguese textile case* where it was stated that the provisions of TRIPS, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.³²¹

The Court therefore concluded that the provisions of TRIPS do not have direct effect in that sense, but admitted that that conclusion did not resolve the problem raised by the national court.

In an effort to resolve the problem the Court continued by referring to its earlier judgement in the *Hermés case*, by stating that Article 50(6) of the TRIPS Agreement is a procedural provision intended to be applied by Community and national courts in accordance with obligations assumed, both by the Community and by the MS.

Then it stated that it follows from the judgement in *Hermés*,³²² that the judicial authorities of the MS are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within a field to which TRIPS applies and the Community has already legislated, to do so as far as possible in the light of the wording and purpose of Article 50 of the TRIPS Agreement.³²³ Therefore it can be concluded from this ruling that in fields, where the Community has already legislated, Article 50 of the TRIPS Agreement can have the so-called "indirect effect."³²⁴

The logic is, presumably, that in fields which the Community has exercised its legislative powers and the TRIPS Agreement applies, it is to be regarded as falling within the exclusive competences of the Community and constituting common rules depriving the MS of the right to act individually or even collectively

³²⁰ See Joined Cases C-300/98, and C-392/98, para. 42, where the Court referred to Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, para. 14, and Case C-162/96 *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655, para. 31.

³²¹ Joined Cases C-300/98, and C-392/98, para. 44, where the court referred to paras. 42 and 46 of the judgement in *Portugal v. Council*.

³²² See Case C-53/96, particular para. 28.

³²³ Joined Cases C-300/98, and C-392/98, para. 47.

³²⁴ See *Helioskoski, Joni, Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV, and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, *Common Market Law Review*, Vol. 39, No. 1, Kluwer Law International, [2002], p. 169, where he cites for the application of the doctrine of "indirect effect" in cases involving international obligations binding upon the Community Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9 and Case C-61/94 *Commission v. Germany* [1996] ECR I-3989, para. 52.

in the sense of the *ERTA case*,³²⁵ which must not be affected by different interpretations by courts of the MS.³²⁶ Concerning fields in respect of which the Community has not yet legislated and which consequently fall within the competence of the MS, the Community law neither requires nor forbids that the legal order of a MS accords to individuals the right to rely directly on the rule laid down by Article 50(6) of the TRIPS Agreement or whether it obliges the courts to apply that rule of their own motion.³²⁷

Concerning the last question, the interpretation of the term "intellectual property right" the Court, after having confirmed that no Community legislation existed in the field of the protection of industrial design, concluded by stating that Article 50 of the TRIPS Agreement leaves to the Contracting Parties, within the framework of their own legal systems, the task of specifying whether the right to sue under general provisions of national law concerning wrongful acts, in particular unlawful competition, in order to protect an industrial design against copying is to be classified as an "intellectual property right" within the meaning of Article 50(1) of the TRIPS Agreement.³²⁸

4.3.3.3 Summary

In the *Dior case* the Court stated that it is settled Case law that a provision of an agreement entered into by the Community with non-member countries can be directly applicable under certain conditions.³²⁹

The Court then referred to the *Portuguese textile case* where the Court came to the conclusion that the WTO Agreement and its annexes, having regard to their nature and structure, are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.³³⁰ In other words based on the general characteristics of the WTO system the direct effect of the rules within the Community legal system is ruled out.

The *Dior case* confirmed this conclusion and in particular made it clear that the WTO Agreement and the annexes, including the TRIPS Agreement, are denied of direct effect.³³¹ On the other hand the, judgement recalled its earlier ruling in the *Hermès case* and stated that when judicial authorities of the MS are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the working and

³²⁵ Case 22/79 Commission v. Council, [1971], ECR 263, paras. 17 and 22.

³²⁶ See Helioskoski, Joni, *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV, and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, Common Market Law Review, Vol. 39, No. 1, Kluwer Law International, [2002], p. 169.

³²⁷ *Joined Cases C-300/98, and C-392/98*, para. 48.

³²⁸ *Joined Cases C-300/98, and C-392/98*, para. 63.

³²⁹ In that regard the Court referred Case 12/86 Demirel, para. 12, and Case 162/96 Kaupmann, para. 31.

³³⁰ Case C-149/96, paras. 47-48.

³³¹ *Joined Cases C-300/98, and C-392/98*, para. 44.

purpose of Article 50 of the TRIPS Agreement. In other words, even if the provision concerned is not directly effective, the national courts are required to take account of it when interpreting national legislation.³³²

This has been called an "indirect effect"³³³ of Article 50 of the TRIPS Agreement. However, as the Court stated this obligation on the national courts, is only applicable when dealing with measures for the protection of rights falling within a field, which the Community has already legislated, and falls therefore under the scope of Community law.

Concerning fields not falling within the scope of Community law the Community law neither requires nor forbids the national courts to rely directly on the rule laid down by Article 50 of the TRIPS Agreement or to oblige the national courts to apply that rule of their own motion.³³⁴

This conclusion opens up the question of the jurisdiction of the Court in areas where not Community legislation exists and which therefore fall within the MS competences. As Heliskoski continues,³³⁵ the more coherent strategy would seem to have been to initially exclude them from the Court's jurisdiction, as proposed by the Advocate General.³³⁶

³³² See Helioskoski, Joni, *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, *Common Market Law Review*, Vol. 39, No. 1, Kluwer Law International, [2002], p. 172.

³³³ See note 325 and discussion in Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998], p. 198-206.

³³⁴ *Joined Cases C-300/98, and C-392/98, para. 48.*

³³⁵ See Helioskoski, Joni, *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, *Common Market Law Review*, Vol. 39, No. 1, Kluwer Law International, [2002], p. 173-174.

³³⁶ *Opinion of Mr Advocate General Cosmas Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV.*, delivered on 11 July 2000, [2000] ECR I-11307.

5 Conclusions

In the extensive *Opinion 1/94* on the WTO Agreement, the Court came to the conclusion that all of the Multilateral Agreement on Trade in Goods fell within the common commercial policy and therefore within the exclusive competences of the Community. The Court, on the other hand, concluded that a large part of GATS and almost all of the TRIPS Agreement fell outside the scope of the common commercial policy and that the Community and the MS had shared the competences to conclude those Agreements.

The GATS and the TRIPS Agreement are therefore what is called mixed agreements. In Chapter 3.3.2.1 I discuss the types of mixed agreements, and as stated there the WTO Agreement can be described as a concurrent mixed agreement for a part of the agreement fall within the exclusive competence of the Community, but they share their competences in other fields, and it is not possible to distinguish between their competences in those fields.³³⁷

As stated there are a numerous problems linked to mixed agreements and it is likely, that the importance of the WTO Agreement for world trade as for the interest of the Community and individual MS will underline these problems.

The critique on the Opinion was for one, based on the need of "unitary representation" of the Community interests within the WTO for there are 15 MS and in many fields they have different interest, which their governments will be tempted to pursue, possibly on the cost of unified representation of the MS. This will also make the position of the Community weaker within the WTO, for third countries will most certainly, try to come up between the MS if that may possibly serve their own interests.

This is not the only critique. The most serious one by my opinion relates to the vague argumentation of the Court for the ruling.³³⁸ The critics also pointed out that the Court had missed an opportunity to develop the Community's common commercial policy by defining the concept narrowly while the international trade system was expanding in scope and therefore the concept within the Community did not follow the international trends. Critics also looked at the Opinion as a missed opportunity for the Community and Europe to represent itself externally in the WTO as a unified entity.

Concerning implied powers of the Community the Court made it clear that the MS only loose their power to enter into agreements with third countries to the extent that common rules have been established within the Community, which

³³⁷ Leal-Arcas, Rafael, *The European Community and Mixed Agreements*, *European Foreign Affairs Review*, Vol. 6, No 4, Kluwer Law International, [2001], p. 490, and Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998], p. 131.

³³⁸ Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* *Common Market Law Review*, Vol. 36, No 2, Kluwer Law International, [1999], p. 387-390.

might be affected by such agreement. Only where common rules have been laid down internally does the Community's competence become exclusive. The Court also pointed out that there was nothing in the Treaty to prevent the institutions from establishing, within the framework of common rules, a concerted approach to third countries or from laying down the approach to be taken by MS to the outside world. On the contrary, the Court emphasized the duty of co-operation between the Community and the MS, not least because of the nature of the WTO Agreement and the possibility of cross retaliation, which it offers.

In subsequent case law the Court has clarified the jurisdiction of the Court to interpret provisions of the WTO Agreement. In *Portuguese textile case*, *Hermès case* and last but not lastly, in the *Dior case*, one can assume that the Court has jurisdiction to interpret procedural provisions, such as Article 50 of the TRIPS Agreement, which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law. This is based on the need, for practical and legal reasons, that the judicial bodies of the MS and the Community give a uniform interpretation.

The Court on the other hand did not clearly write-off the possibility of the Courts jurisdiction regarding provisions of the WTO Agreement, falling exclusively under MS competences.

The Court has also developed and modified the effects of the WTO Agreement from the GATT 1947, which was bluntly denied of direct effect within the Community's legal order. In the most recent case law concerning Article 50 of the TRIPS Agreement the Court has denied it of direct effect but nevertheless it seems to have accepted "indirect effect" of the provisions of the WTO Agreement, by stating that when judicial authorities of the MS are required by virtues of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the working and purpose of Article 50 of the TRIPS Agreement. Concerning fields not falling within the scope of Community law the Court has ruled that the Community law neither requires nor forbids the national courts to rely directly on the rule laid down by Article 50 of the TRIPS Agreement or to oblige the national courts to apply that rule of their own motion.

It is clear that the Community is perpetually extending its legislation to new fields and harmonizing fields, which are under its competences according to Article 3 EC. This new legislation, can, according to the case law, extend the implied exclusive external competences of the Community. Nevertheless, it is likely that problems concerning the implementation of the WTO Agreement, and questions concerning the compatibility of Community acts with the WTO stipulations will arise. Questions concerning the effects of the provisions of the WTO Agreement, within Community's legal order will arise for the notion of indirect effect is somewhat unclear. It is though unlikely in my opinion that the Court will extend the effects further in the foreseeable future, to a direct effect, for

that calls for a significant changes in the political attitude towards the WTO Agreement, which are not within the purview of the Court to change.

Bibliography

Arnall, Anthony, *The Scope of the Common commercial policy: A Coda on Opinion 1/94*, in Emiliou, Nicolas, O'Keefe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996].

Björklund, Martin, *Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?* *Nordic Journal of International Law*, Volume 70, No 3, Kluwer Law International, [2001].

Cheyne, Ilona, *International Agreements and the European Community Legal System*, *European Law Review*, Vol. 19, December, Sweet & Maxwell, [1994].

Craig, Paul, de Búrca, Gráinne, *EU Law, Text, Cases, and Materials*, sec.ed., Oxford University Press, [1998].

Cremona, Marise, *Rhetoric and Reticence: EU External Commercial Policy in a Multilateral Context*, *Common Market Law Review*, Vol. 38, No 2, Kluwer Law International, [2001].

Dashwood, Alan., *Preliminary Rulings on the Interpretation of Mixed Agreements*, in D. O'Keefe and A. Bavasso (eds.), *Judicial Review in European Union Law: Liber Amicorum in honour of Lord Slynn Of Hadley*, Vol. 1, Kluwer Law International, The Hague, [2000].

Dolmans, Maurits J.F.M., *Problems of Mixed Agreements, Division of Powers Within the EEC and the Rights of Third States*, Asser Instituut, [1985].

Emiliou, Nicholas, *The Allocation of Competence Between the EC and its Member States in the Sphere of External Competences*, in Emiliou, Nicolas, O'Keefe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996].

Emiliou, Nicholas, *The Death of Exclusive Competence?* *European Law Review*, Vol. 21, No 4, August, Sweet & Maxwell, [1996].

Emiliou, Nicholas, *Towards a clearer demarcation line? The division of external relations power between the Community and Member States*, *European Law Review*, Vol. 19, February, Sweet & Maxwell, [1994].

Gervais, Daniel, *The TRIPS Agreement, Drafting History and Analysis*, Sweet & Maxwell, [1998].

Hilf, Meinhard, *The ECJ's Opinion 1/94 on the WTO - Not Surprise, but Wise?* European Journal of International Law, Vol. 6, No. 2, Oxford University Press, [1995].

Helioskoski, Joni, *Joined Cases C-300/98, Parfums Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV, judgement of 14 December 2000, nyr.*, Common Market Law Review, Vol. 39, No. 1, Kluwer Law International, [2002].

Heliskoski, Joni, *The Jurisdiction of the European Court of Justice to Give Preliminary Ruling on the Interpretation of Mixed Agreements*, Nordic Journal Of International Law, Vol. 69, No 4, Kluwer Law International, [2000].

Hyett, Stephen, *The Uruguay Round of the GATT: The United Kingdom Standpoint*, in Emiliou, Nicolas, O'Keefe, David (eds.), *The European Union and World Trade Law After the GATT Uruguay Round*, John Wiley & Sons, [1996].

Kapteyn, P.J.G., VerLoren, P. van Themaat, *Introduction to the Law of the European Communities*, 3rd ed., Kluwer Law International, [1998].

Kuijper, Pieter J., *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, European Journal of International Law, Vol. 6, No. 2., Oxford University Press, [1995].

Leal-Arcas, Rafael, *The European Community and Mixed Agreements*, European Foreign Affairs Review, Vol. 6, No 4, Kluwer Law International, [2001].

Peers, Steve, *Constitutional Principles and International Trade*, European Law Review, Vol. 24, April, Sweet & Maxwell, [1999].

Pescatore, Pierre, *Opinion 1/94 on "Conclusion" of The WTO Agreement: Is There an Escape From a Programmed Disaster?* Common Market Law Review, Vol. 36, No 2, Kluwer Law International, [1999].

Petersmann, Ernst-Ulrich, *The Dispute Settlement of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1947*, Common Market Law Review, Vol. 31, No 6, Kluwer Law International, [1994].

Petersmann, Ernst-Ulrich, *The Transformation of the World's Trading System through the 1994 Agreement Establishing the World Trade Organization*, Symposium, The World Trade Organization and the European Union, *European Journal of International Law*, Vol. 6, No 2, Oxford University Press, [1995].

Rosas, Allan, *Mixed Union-Mixed Agreements, International Law Aspects of the European Union*, in Koskenniemi, M., (ed.), *International Law Aspects of the European Union*, Kluwer Law International, [1998].

Smith, Fiona, *Renegotiating Lomé: the impact of the World Trade Organisation on the European Community's development policy after the Bananas Conflict*, *European Law Review*, Vol. 25, June, Sweet & Maxwell, [2000].

Stefánsson, Stefán M., *Evrópusambandið og Evrópska Efnahagssvæðið*, Bókaútgáfa Orators, [2000].

Thomas, Jeffrey S., Meyer, Michael A., *The New Rules of Global Trade, A Guide to the World Trade Organization*, Carswell Thomson Professional Publishing, [1997].

Trading Into the Future, *The World Trade Organization*, 2nd ed., revised, [1999], http://www.wto.org/english/res_e/doload_e/tif.pdf.

Trachtman, Joel P., *Bananas, Direct Effect and Compliance*, *European Journal of International Law*, Vol. 10, No 4, Oxford University Press, [1999].

Zonnekeyn, Geert A., *The status of WTO law in the Community legal order: some comments in the light of the Portuguese Textile case*, *European Law Review*, Vol. 25, June, Sweet & Maxwell, [2000].

Legislation

The Treaty of the European Community

Articles:

3
23
37
94
95
111
122
131
131(1)
132
132(1)
132(2)
133
133(4)
134
138
144(4)
153
170
174(4)
176
181
230
232
234
235
240
281
288
300(1)
300(6)
305(2)
307
308
310

Regulations:

1. Council Regulation (EEC) No 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation

Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia.

2. Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods.
3. Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas.
4. Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark.

The WTO Agreement:

Annex 1A Multilateral Agreements on Trade in Goods:

Article I
Article I(2)
Article I(3)(b)
Article I(3)(c)
Article X
Article XXIV
Article XXIV(4)
Article XXIV(5)
Article XXIV(6)
Article XXIV(7)
Article XXIV(8)

Annex 1B GATS:

Article 5V
Article 5a
Article I(2)
Article II(1)
Article VI(2)
Article XVII

Annex 1C TRIPS:

Article 6
Article 50
Article 50(1)
Article 50(6)

Annex 2 DSP:

Annex 3 TRM:

Annex 4 Plurilateral Trade Agreements:

Table of Cases

1. Case 22/70 Commission v. Council [1971] ECR 263.
2. Case 21-24/72 International Fruit Company NV et al. v. Produktschap voor Groenten en Fruit (1972) ECR 1219.
3. Case 181/73 Haegman v. Belgium [1974] ECR 449.
4. Opinion 1/75 Re Local Cost Standard [1975] ECR 1355.
5. Cases 3,4, and 6/76 Kramer [1976] ECR 1279.
6. Opinion 1/76 on the Draft Agreement Establishing a Laying-up fund for Inland Waterway Vessels [1977] ECR 741.
7. Case 104/81 Hauptzollamt Mainz v C.A. Kaupferberg & Cie KG a.A. [1982] ECR 3641.
8. Case 12/86 Demirel v. Stadt Schwäbisch Gmünd [1987] ECR 3719.
9. Case 68/86, United Kingdom v. Council [1988] ECR 855.
10. Case C-231/89 Gmurzynska-Bscher [1990] ECR I-4003.
11. Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR I-3763.
12. Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019.
13. Case C-327/91 France v. Commission [1994] ECR I-3641.
14. Case C-280/93 Germany v. Council [1994] ECR I-4973.
15. Case C-61/94 Commission v. Germany [1996] ECR I-3989.
16. Case C-28/95 Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen [1997] ECR I-4161.
17. Case C-130/95 Giloy v Hauptzollamt Frankfurt am Main-Ost [1997] ECR I-4291.
18. Case C-53/96 Hermés v. FHT [1998] ECR I-3603.
19. Case C-149/96 Portuguese Republic v. Council [1999] ECR I-8395.
20. Case C-162/96 Racke v. Hauptzollamt Maintz [1998] ECR I-3655.
21. Joined Cases C-300/98, Parfumes Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV. [2000] ECR p. I-11307.
22. Opinion of Mr Advocate General Cosmas Joined Cases C-300/98, Parfumes Christian Dior Sa V. Tuk Consultancy BV. and C-392/98, Assco Gerüste GmbH and R. van Dijk v. Wilhelm Layher GmbH & co and Layher BV., delivered on 11 July 2000, [2000] ECR I-11307.