



FACULTY OF LAW Lund University

Per-Axel Frielingsdorf

Shared or Exclusive? - The External Competence of the EU in Regard to TRIPs

Master thesis

Abstract:

This paper argues that the approach to make the external competence regarding TRIPs exclusive, by including it in the common commercial policy under Article 133, is incoherent with the position of intellectual property rights in the internal market. Instead a shared implied competence, where the participation of both the Community and the Member States is legally necessary, should be the preferred approach. This is coherent with the principle of parallelism and permits the interests of the Member States to be secured, as well as safeguarding the unity of action of the EU in the WTO. Intellectual property rights are thus gradually becoming an exclusive Community competence as exhaustive harmonisation develops.

Supervisor
Hans Henrik Lidgard

European Union Law

VT 2008

Contents

SUMMARY	1
ABBREVIATIONS	2
1 INTRODUCTION	3
1.1 Subject Background	3
1.2 Aim and Purpose	4
1.3 Delimitations	5
1.4 Methodology	5
1.5 Structure	6
2 INTELLECTUAL PROPERTY RIGHTS IN INTERNATIONAL TRADE	7
2.1 Comparative Advantage and GATT	7
2.2 Comparative Advantage and TRIPs	7
2.2.1.1 TRIPs	7
2.2.1.1.1 <i>Intellectual Property Rights in the Uruguay Round</i>	7
2.2.1.1.2 <i>The Contents and Objectives of TRIPs</i>	8
2.2.1.2 Comparative Advantage in Innovation v. Comparative Advantage in Adoption	9
2.3 Unity of Action and Intellectual Property Rights	10
3 THE EXTERNAL COMPETENCE OF THE EU	11
3.1 External Competence in the Common Commercial Policy	11
3.1.1 <i>The Origins of the Common Commercial Policy</i>	11
3.1.2 <i>External Competence under Article 133 – From a Pragmatic Arrangement to Exclusivity</i>	11
3.1.3 <i>Defining the Common Commercial Policy – Commission v. Council</i>	13
3.1.3.1 Supranationalism v. Intergovernmentalism	13
3.1.3.2 The Instrumental Approach v. The Finalist Approach	13
3.2 The Doctrine of Implied Powers	14
3.2.1 <i>The Notion of Implied Powers</i>	14
3.2.2 <i>The Existence of Implied Competences</i>	15
3.2.2.1 Case Law on the Existence of an Implied Competence	15
3.2.2.1.1 <i>AETR</i>	15
3.2.2.1.2 <i>Kramer</i>	16
3.2.2.1.3 <i>Opinion 1/76</i>	16

3.2.2.1.4 <i>Opinion 2/91</i>	17
3.2.2.2 The Existence of Parallel Competences	17
3.2.3 <i>The Nature of Implied Competences</i>	17
3.2.3.1 Exclusive Implied External Competence	17
3.2.3.1.1 <i>The AETR Doctrine</i>	17
3.2.3.1.2 <i>The Opinion 1/76 Doctrine</i>	18
3.2.3.2 Shared Implied External Competence	18
3.2.3.3 The Elusive Nature of Parallel Competences	19
4 OPINION 1/94	20
4.1 The Question of Competence in Opinion 1/94	20
4.2 Article 133 and TRIPs	20
4.3 Implied Powers and TRIPs	22
4.3.1 <i>Shared Implied External Competence</i>	22
4.3.2 <i>The 'Obligation to Cooperate'</i>	23
4.4 The Nature of the Shared Competence	23
5 INTELLECTUAL PROPERTY RIGHTS IN THE EU	26
5.1 Intellectual Property Rights Under the ECT	26
5.1.1 <i>Articles 295 and 30</i>	26
5.1.2 <i>Harmonisation of Intellectual Property Rights Under Other Articles</i>	27
5.1.2.1 Harmonisation Before the Single European Act - Article 94	27
5.1.2.2 Harmonisation After the European Single Act – Article 95	27
5.1.2.2.1 <i>Qualified Majority Voting</i>	27
5.1.2.2.2 <i>The Doctrine of Pre-emption</i>	28
5.1.2.2.3 <i>Harmonisation and TRIPs</i>	28
5.2 The Internal Market and External Trade	29
5.2.1 <i>Article 30 and External Competence</i>	29
5.2.2 <i>The Completion of the Single Market and the Uruguay Round</i>	30
6 THE SUCCESSIVE AMENDMENTS TO ARTICLE 133	32
6.1 The Amsterdam Amendment to Article 133	32
6.2 The Nice Amendment to Article 133	33
6.2.1 <i>The Debate at the Intergovernmental Conference</i>	33
6.2.1.1 Including Intellectual Property Rights in the Definition of Paragraph 1 of Article 133	34
6.2.1.2 An Extension of the Scope of Article 133	34
6.2.2 <i>The Final Amendment</i>	35
6.3 Article III-315 in the Unratified Constitutional Treaty	36

6.4 The Nature of the Exclusivity in the Amendments to Article 133	37
6.4.1 <i>The Scope of the Reference to Intellectual Property Rights</i>	37
6.4.2 <i>Separating External and Internal Competence</i>	38
6.4.3 <i>Towards an Exclusive Competence with Unanimous Decision-making in the Council</i>	38
7 THE PRACTICE OF SHARED COMPETENCE IN THE WTO	40
7.1 Mixed Agreements – the Modus Operandi of Shared Competence	40
7.2 The 'Duty of Cooperation' under the DSU	41
7.3 The Negotiation of a Mixed Agreement under TRIPs	41
7.3.1 <i>The Formula Used in the Uruguay Round</i>	41
7.3.2 <i>Reaching a Common Position</i>	42
7.3.2.1 The Common Position of the Member States	42
7.3.2.2 The Community Position	42
7.3.2.3 Coordinating the Community Position and the Common Position of the Member States	42
7.3.2.4 The 'Solemn' Procedure of Conclusion	43
7.4 The Idea of a Code of Conduct	43
7.5 Accepting Amendments to TRIPs	44
7.6 General Assessment of the Shared Competence	44
8 CONCLUSIONS	46
SUPPLEMENT - THE AMENDMENTS TO ARTICLE 133 (EX ARTICLE 113)	48
BIBLIOGRAPHY	52
TABLE OF CASES	55

Summary

The purpose of this paper is to examine whether an exclusive or a shared external competence of the Community is to be preferred regarding matters falling under the TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights).

In Opinion 1/94, the ECJ (European Court of Justice) stated that the Community's external competence regarding TRIPs is shared. This provoked concerns that the unity of action of the EU in the multilateral trade talks in the WTO would be damaged if the Community did not have an exclusive external competence concerning TRIPs, as it had in regard to GATT.

Two approaches have been attempted in relation to the external competence regarding TRIPs, an exclusive external competence based on Article 133 or a shared external competence based on the doctrine of implied powers. This paper analyses these two approaches to the external competence regarding TRIPs. Firstly, from a historical perspective, analysing relevant case law and the successive amendments made to Article 133. Secondly, the practice of the EU in the WTO is examined.

This is contextualised by an examination of intellectual property rights in the internal market under the ECT. This highlights the assumption that it would be incoherent with the status of intellectual property rights in the EU to make the external competence regarding intellectual property rights under TRIPs exclusive by its inclusion in Article 133.

The shared competence regarding TRIPs is interpreted as making the participation of both the Community and the Member States legally necessary. This means that there is no risk that the Member States will negotiate separate agreements with third countries if no common position is reached. The greatest threat that a shared competence could lead to is then avoided. The conclusion of this paper is that a shared external competence should be the method of choice regarding TRIPs as it permits the unity of action to function while preserving the national interests of the Member States. However, as intellectual property rights are gradually exhaustively harmonised, they become the exclusive competence of the Community, as a result of the principle of parallelism.

Abbreviations

CDE	Cahiers de droit européen
CMLR	Common Market Law Review
Constitutional Treaty	Treaty establishing a Constitution for Europe
COREPER	Comité des représentants permanents
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
ECJ	European Court of Justice
ECT	Treaty Establishing the European Community
EIPR	European Intellectual Property Review
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
OJ	Official Journal of the European Union/Communities
RAE	Revue des affaires européennes
RMCUE	Revue du Marché Commun et de l'Union européenne
RTDE	Revue trimestrielle de droit européen
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization
WTO Agreement	Agreement establishing the World Trade Organization
YEL	Yearbook of European Law

1 Introduction

1.1 Subject Background

This paper will deal with the external competence of the EC (European Community)¹ in regard to the TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights), an annex to the WTO Agreement (Agreement establishing the World Trade Organization). The external competence represents the Community's capacity and power to engage in relations with other States and international associations.

Although the powers conferred to the Community by the ECT (Treaty establishing the European Community) were originally mostly internal, the Community has always been nurturing important relations with the GATT (General Agreement on Tariffs and Trade) System and later with its successor the WTO System.

The EC was set up as a customs union in accordance with the rules of the GATT Agreement of 1947. Although the Community was never a party to the GATT Agreement, it was the Commission that negotiated on behalf of the Member States. As the GATT Agreement was covered by the common commercial policy, the external competence of the Community was exclusive under Article 133 (ex Article 113).² In the famous AETR³ case the ECJ (European Court of Justice) developed the theory of implied powers that was to give the Commission an exclusive external competence in many areas not covered by the common commercial policy as well.

When the Community has an exclusive external competence in one field, it follows that the Member States cannot act in that field. In the GATT Rounds the Community negotiated with one voice, backed by the power of all the Member States. This unity of action has made the European Union⁴ (EU) one of the most powerful actors on the international trade arena.

When the Uruguay Round leading to the creation of the WTO was negotiated, the Commission saw it as a vital objective that this exclusive external competence should comprise the whole of the WTO Agreement as it had comprised the old GATT Agreement, especially as the Community was to become a member of the WTO, alongside the Member States.

The WTO Agreement, however, entailed a lot more than the GATT Agreement. Among the new agreements annexed to the WTO Agreement were the TRIPs. The position of intellectual property rights under the ECT and in the internal market is very different from that of goods. Indeed, the

¹ The term 'European Community' (EC) and 'Community' is hereafter used in this paper also to refer to the 'European Economic Community', the situation before the entry into force of the Treaty on the European Union of 7 February 1992 in 1993.

² Unless otherwise stated all references to Articles are hereafter to Articles in the '*Consolidated Version of the Treaty Establishing the European Community*', OJ C 325/33, 24/12/2002. The new numerotation of the Amsterdam Treaty is used, when it has been thought helpful to the reader the old number is given within brackets.

³ Judgment of 31/03/1971, Commission / Council (Rec.1971,p.263). Also known as *EATR* this paper refers to the judgment as *AETR*, the more famous French acronym, which is used by the ECJ in the English version of Opinion 1/94.

⁴ This paper generally refers to the Community when trade and other matters that fall under the first pillar are concerned. When reference is made to the EU it is a reference to the Community and the Member States.

only reference to intellectual property rights was as an exception to the prohibition of quantitative restrictions between Member States concerning the free movement of goods in Article 30 (ex Article 36). This is to a great extent a consequence of the Member States protecting their often-differing national interests when it comes to intellectual property rights.

The Council and the Member States thus disputed that the Commission had an exclusive external competence to conclude the TRIPs Agreement. The Commission then asked the ECJ to deliver an opinion on the nature of the EU's external competence with regard to the WTO Agreement arguing, firstly, that trade related intellectual property rights were part of the exclusive external competence under the common commercial policy, and secondly, that it was an exclusive implied external competence.

To the great astonishment of the Commission, the European Court of Justice (ECJ) stated in its binding Opinion 1/94⁵ that the external competence regarding TRIPs was essentially a shared competence between the Commission and the Member States. But the ECJ left many questions unanswered regarding the nature of the shared external competence and how it should be exercised. The Court only remarked that the Community and the Member States were under an 'obligation to cooperate'.

The ruling of the ECJ in Opinion 1/94 raised concern that a shared competence would lead to a division between the Community and the Member States, creating problems, which would greatly obstruct their successful participation in the WTO.

Hence, ever since Opinion 1/94, every treaty has made amendments to Article 133 in order to change the situation of shared competences determined in Opinion 1/94. Due to their complexity and the differing interpretations these amendments have been subject to, they have only added to the confusion. So far the ECJ has not delivered any clear ruling on them. The unratified Constitutional Treaty (Treaty establishing a Constitution for Europe) has far reaching implications for the scope of the exclusive external competence of the common commercial policy that might soon be relevant again within the framework of a new 'mini treaty'.

Meanwhile, the EU's and the Member States' negotiations with third countries in the WTO have continued, on the insecure legal basis of mixed agreements, guided by the elusive 'obligation to cooperate'.

Despite the fact that 13 years have passed since the ECJ determined the competence of the Community and the Member States in regard to TRIPs, the external competence concerning TRIPs remains an enigma.

1.2 Aim and Purpose

The purpose of this paper is to examine whether an exclusive or a shared external competence of the Community is to be preferred regarding matters falling under TRIPs.

In essence, this amounts to examining how the external competence of the EU under TRIPs should function in order to allow the Community to participate successfully in the WTO, while preserving the national interests of the Member States at the same time.

The position of the external competence of the Community regarding TRIPs today will be analysed, and interpreted in the light of earlier case law and the ECT. The advantages and disadvantages of exclusive and shared

⁵ Opinion of 15/11/1994, Opinion 1/94 (Rec.1994,p.I-5267).

external competence will also be evaluated, as well as discussing possible solutions to remaining problems regarding the external competence.

To answer the purpose two questions present themselves:

How is the nature of the shared external competence regarding TRIPs in Opinion 1/94 to be interpreted, and how has it worked out practically in the WTO?

Is the approach attempted by the successive amendments to Article 133, to integrate intellectual property questions in the common commercial policy, beneficial?

An important aspect of this paper is the aim to treat the external competence of the Community only in relation to TRIPs. As far as the author is aware this is a novel approach. Most books and articles in this field have a broad perspective and try to cover the entire field of external relations or at least the entire WTO Agreement as the ECJ did in Opinion 1/94. What this paper attempts to achieve by this approach is to give special attention to the special nature of intellectual property rights in EU law.

1.3 Delimitations

This paper deals with matters that fall under the TRIPs Agreement. It will therefore not speak of the 'exhaustion of rights' theory in the EU as this is not covered by TRIPs.⁶

1.4 Methodology

This paper is mainly based on a traditional legal analysis. That is a description and an analysis of legal sources. The paper further tries to put this legal analysis in its political, historical and economical context. This is since the paper is concerned not only with the legal aspects of the EU's external relations but also questions of an economic nature about how to achieve an effective representation in the WTO multilateral trade talks, as well as political questions about competence and the choice between a supranational or intergovernmental cooperation. To understand the nature of the EU's external competence it is also necessary to see how it has developed through the treaties and the case law of the ECJ. External representation, trade and sovereignty cannot be understood simply by looking at them only as legal matters, they have an important political and economic character. Some basic features of economic theories concerning trade and intellectual property rights are therefore discussed, in order to analyse and evaluate the different approaches to the external competence regarding trade related intellectual property rights.

The materials used in this paper are mainly the traditional sources of law. The ECT and especially the amendments to Article 133 (ex Article 113) in the Amsterdam and Nice treaties and the proposals and debate of the inter-

⁶ Article 6 TRIPs provides that '*nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights*'.

governmental conventions on these amendments will be analysed at some length, as will Article III-315 in the Constitutional Treaty.

The case law of the ECJ is used when relevant, and especially the opinions of the ECJ on external competence. Under Article 300 Paragraph 6 (ex Article 228 Paragraph 6), the ECJ can make a ruling on the compatibility of an international agreement with the ECT. Since these opinions are the only way to attack an international agreement before it has been concluded, they have been the main forum for the developments of Community law on external relations.

The WTO Agreement, and its annex the TRIPs Agreement, is analysed to see if the rules on membership, implementation and cross-retaliation particularly, and the nature of the WTO as a single undertaking and the objectives of TRIPs in general, might have implications as to the external competence of the Community.

Academic literature is used to a great extent, as a source and aid in analysing different legal problems.

1.5 Structure

After the introductory chapter, chapters 2 to 3 provide an overview as well as an analysis of intellectual property rights in trade theory, the development of the external competence of the Community until Opinion 1/94. Chapter 4 analyses Opinion 1/94 in light of the previous chapters. Chapter 5 looks at the place of intellectual property rights in the European integration under the ECT. Chapters 6-7 evaluate how the two approaches to the external competence in regard to TRIPs have worked out since Opinion 1/94. First, chapter 6 analyses the successive amendments to Article 133 in the Amsterdam and Nice treaties, as well as the proposed changes in the unratified Constitutional Treaty. Then, chapter 7 examines how the shared competence of the Community and the Member States has been exercised so far in the WTO and procedures used.

The final chapter contains the conclusions and an attempt to achieve the purpose.

2 Intellectual Property Rights in International Trade

This chapter provides a brief outline of trade theory and the economic logics behind GATT. It then gives an overview of TRIPs, before analysing how traditional trade theory applies to intellectual property rights in the TRIPs. Finally, the Community approach to unity of action in the multilateral trade talks is viewed in the light of the special nature of intellectual property rights.

2.1 Comparative Advantage and GATT

GATT seeks to promote free trade and is based on the idea that international trade is beneficial for all countries involved. The economic theory behind this perception is the theory of comparative advantage.⁷ Although the theory of comparative advantage is subject of discussion among economists, it is generally accepted in international trade.⁸ In any case it is the foundation of the general argument for free trade that could thus be stated: '*Free trade promotes a mutually profitable division of labor, greatly enhances the potential real national product for all nations, and makes possible higher standards of living all over the globe*'.⁹ What is interesting in regard to the comparative advantage is the fact that most of the rules regulating international economic law in GATT and later in the WTO System, have been devised from the logics of this theory on international trade.¹⁰

2.2 Comparative Advantage and TRIPs

One of the main shortcomings of the theory of comparative advantage is that it doesn't pay attention to several factors of great importance to trade, such as innovation.¹¹ With TRIPs, innovation and the protection of intellectual property rights became a component of the multilateral trade system created under the WTO Agreement.

2.2.1.1 TRIPs

2.2.1.1.1 Intellectual Property Rights in the Uruguay Round

A key issue of the Uruguay Round was to bring new issues under the multilateral negotiations. GATT provided a regulation of trade in goods but did not cover issues of growing importance to world trade such as

⁷ As developed by Adam Smith and Ricardo, for an introduction to this theory from an economic law perspective see Lowenfeld, p. 3-8.

⁸ Ibid., p. 7.

⁹ P. Samuelson, quoted from Lowenfeld, p. 7.

¹⁰ Lowenfeld, p. 8.

¹¹ Ibid., p. 7.

investments, services and intellectual property rights. With the emerging globalisation, intellectual property rights created two great disturbances to world trade. The first problem was that countries that did not have a high level of protection for intellectual property rights got an advantage, due to significantly lower production costs. The second problem was that countries with many holders of intellectual property rights and an economy based on innovation (which is measured by the fact that their exports contain a high percentage of domestically generated technologies) suffered great losses due to unpaid fees.¹²

The Punta del Este Declaration, that set the objectives for the Uruguay Round, did not cover intellectual property rights.¹³ At the beginning of the negotiations the developing countries were quite reluctant to including intellectual property rights in the negotiations since this would not be to their advantage.¹⁴ The fact that an agreement on intellectual property rights could finally be accepted within the WTO framework can only be seen as a great triumph for the EU and the United States.¹⁵ The EU had, after some coaxing by high-technology industries and other parties that would profit from higher international standards of intellectual property protection, supported the American initiative to include intellectual property rights in the Uruguay Round.¹⁶

2.2.1.1.2 The Contents and Objectives of TRIPs

TRIPs extends the two key principles of the GATT, national treatment (Article 3 TRIPs) and most-favoured-nation treatment (Article 4 TRIPs), to the areas covered by the Agreement. Those areas cover almost all aspects of intellectual property rights, from copyright and trademarks to layout design of integrated circuits. The members are required to provide protection of the intellectual property rights covered by TRIPs. What that means is that the members are required to harmonise national laws in order to offer the protection required by TRIPs.

The official objective of TRIPs is to promote trade, and its name implies that it is concerned with ‘trade-related aspects of intellectual property’. Yet TRIPs means a general harmonisation in the field of intellectual property rights to reach a higher level of protection. The TRIPs introduces minimum standards and requirements regarding nearly all significant aspects of intellectual property rights.¹⁷ However, a higher level of protection of intellectual property can in many senses be a restraint on trade.¹⁸

The objectives of TRIPs are, however, to be seen in the light of its position as an appendix to the WTO agreement and thus its position in the relations of world trade. The WTO Agreement is structured as a ‘frame agreement’ to which the agreements containing the material rights are annexed. TRIPs, GATT and the important DSU (Understanding on Rules and Procedures

¹² Falkenberg, p. 65.

¹³ Ibid., p. 66.

¹⁴ As has been discussed developing countries have, at least in a short perspective little to gain from a stricter level of protection for intellectual property rights.

¹⁵ Falkenberg calls the TRIPS ‘central to a positive evaluation of the final outcome’ of the Uruguay Round from a EU perspective, Falkenberg, p. 69.

¹⁶ Trebilcock/Howse, p. 409.

¹⁷ Tridimas/Eeckhout, p. 159.

¹⁸ Lowenfeld, p. 101.

Governing the Settlement of Disputes), that gives a new judicial character to the WTO and greatly increases its enforcement possibilities, are all annexed to the WTO Agreement.

The WTO Agreement is a single enterprise, or ‘package deal’, and so the Community and the Member States are full members to all annexed agreements, including the TRIPs.¹⁹

The finality of the TRIPS is to promote world trade according to its preamble. The protection of intellectual property (for instance by a harmonisation of national laws) is merely an instrument of promoting the goal of the WTO system, which is to encourage free trade by breaking down barriers and obstacles to trade.²⁰

TRIPs clearly favours nations with economies based on innovations and does not promote free trade generally. This is reflected in the fact that TRIPs focuses on harmonising intellectual property rights and does not cover the issue of exhaustion of rights.²¹ The exhaustion of rights theory would have benefited countries with an economy based on adoption instead of innovation and an international exhaustion would no doubt have led to increased trade. It doesn’t help that TRIPs provides a very weak international regulation of restrictive practices in the field of intellectual property rights in return to its general strengthening of intellectual property protection.²² This shows that the objectives of TRIPs aren’t necessarily compatible with the general objective to promote trade of the WTO System.

2.2.1.2 Comparative Advantage in Innovation v. Comparative Advantage in Adoption

The logics of free trade do not work in the same way when it comes to intellectual property rights. Following the logics of trade theory a country’s interest in a higher or lower protection of intellectual property is in direct relation to whether its comparative advantage lies in innovation or in imitation and adaptation.²³ This is not just a divide between ‘north and south’.

When we look at the different Member States in the EU, especially after the 2005 enlargement, we realise that some of the Member States benefit from a higher level of protection (countries with a comparative advantage in innovation, which is measured by the fact that their exports contain a high percentage of domestically generated technologies) whereas others will actually make losses because of stricter protection (countries having a comparative advantage in imitation and adoption of others innovations).²⁴ Traditionally the different Member States have also had different approaches to which aspects of intellectual property that they want to emphasise their protection on.

¹⁹ Article II, WTO Agreement.

²⁰ See preamble to TRIPs.

²¹ Eeckhout, p. 34.

²² Arup, p. 213.

²³ Trebilcock/Howse, p. 400.

²⁴ Ibid., p. 400.

2.3 Unity of Action and Intellectual Property Rights

Generally, the unity of action approach of the Community in GATT and later in the WTO has been regarded as the key to successful negotiations. As a single economic unit the EU trading block is the biggest in the world after the 2005 enlargement.²⁵ In order to enjoy the benefits of this strength, the EU needs a unity of action. Normally, the EU is represented by the Commission in order to achieve a unity of representation. At times the EU trading block is under ‘attack’ from third countries, seeking to diminish the power of the EU by a strategy of ‘divide and rule’.²⁶ Usually the trading partner tries to negotiate a separate agreement with some countries of the EU, thus introducing a ‘Trojan horse’ into the EU camp, in order to diminish the impact of the EU trading block as a whole.²⁷

The WTO Agreement takes no notice of the special nature of the division of competences in the EU. This means that whatever difficulties the EU and its Member States may have as to a divide in competences to act within the WTO, it is their concern. The WTO Agreement does not recognise the division of competences.²⁸

The protection of intellectual property rights is still diverse and fractured in the EU and the ECT does not attach the same importance to intellectual property rights in the creation of the internal market. Consequently, the interests of the Member States are more diverging when it comes to intellectual property rights. As we have seen, the specific nature of intellectual property rights in international trade shows us that the Member States in the EU are likely to have very differing opinions, depending on whether their economies are based on innovation or adoption. When it comes to intellectual property rights it could then be questioned if a unity of action is even a good thing to strive for?²⁹ This could have been argued if TRIPs was a separate agreement, but it is part of the ‘package deal’ that the WTO Agreement represents. What this does show, however, is that when intellectual property rights are concerned, it is important to preserve the national interests of the Member States, while at the same time trying to achieve a unity of action.

²⁵ Meunier/Nicolaïdis, p. 265.

²⁶ Recurring attempts have been made by the United States to this end, See Meunier/Nicolaïdis, p. 259.

²⁷ This is what happened in 1992, when the United States negotiated a secret deal on telecommunications with Germany. Having already achieved a deal with the most important economy in Europe, the United States then wanted to negotiate with the decimated EC. In that case the secret agreement between the United States and Germany was declared void since it was contrary to binding Community law, so no harm was done. This ‘Trojan horse’ strategy has been described by Meunier.

²⁸ Ni Chatháin, p. 462.

²⁹ Meunier has discussed the limits of the unity of action approach, especially when it comes to agriculture.

3 The External Competence of the EU

This chapter analyses the two possible legal bases for external competence regarding TRIPs. The first is the express competence conferred on the Community under the common commercial policy by Article 133. The second is the judicial doctrine of implied powers, which has given the Community an implied external competence in several areas.

3.1 External Competence in the Common Commercial Policy

3.1.1 The Origins of the Common Commercial Policy

The EC was founded as a customs union in 1957. The common commercial policy, one of the original policies of the Community, is to some extent the natural prolongation of this customs union. A customs union provides for a common external tariff, but it soon became clear that the Community would need a common commercial policy if the customs union was to be further integrated in a common market.³⁰ In article 131 (ex article 110) of the ECT a sort of declaration of the common commercial policy is given:

'By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.'

The common commercial policy and GATT have always been closely related. The wording of Article 131 is an obvious reference to GATT and the EC was set up in compliance with the GATT rules as a customs union, an accepted exception to the most-favoured-nation principle.³¹

'Trade', was to the founders of the common commercial policy more or less synonymous with trade in goods, since the economies of the six members of the EC were all focussed on goods at this time.

The external dimension of the common commercial policy was thus more or less designed with the GATT in mind, since goods was the subject for the multilateral trade talks in the GATT Rounds.

3.1.2 External Competence under Article 133 – From a Pragmatic Arrangement to Exclusivity

Although all of the Member States were contracting parties to GATT, the EC never was. Still, the Commission represented the Member States in the

³⁰ Eeckhout, p. 9.

³¹ Article XXIV, GATT.

negotiations, since the ECT seemed to give it that power. But during the 1960's the question was never addressed directly. During this early period, the Commission represented the Member States in a pragmatic arrangement that was working out fine for everyone involved.³²

Initially, no one seemed really to be aware of there being a transfer of trade policy powers from the Member States to the Community. It was not until the case *Hauptzollamt Bremerhaven v. Massey Ferguson*³³ that this question was first raised. Soon after followed the first of many opinions decided by the ECJ following the procedure envisaged in Article 300 Paragraph 6 (ex-article 228 Paragraph 6). This was Opinion 1/75³⁴, an opinion that dealt with an agreement drawn up in the framework of the OECD. First, the Court expanded the scope of the common commercial policy by deciding that this agreement, that regarded export credits, fell within the common commercial policy. Secondly, the Court went on to consider, in answer to a question from the Commission, the nature of the treaty making power on common commercial policy according to the treaties. The Court made a significant finding that would change the external commercial policy of the EC forever. According to the ECJ the competence of the Community was exclusive in regards to the Member States.³⁵ In future, the Commission would handle the external part of the common commercial policy autonomously, and the Member States were prohibited from pursuing an external commercial policy of their own, not because of some pragmatic arrangement this time, but because such was the state of Community law, according to the Court.

The arguments for this exclusiveness are essential for the understanding of the subsequent rulings of the ECJ on intellectual property rights and external competence.

The first argument was that the common interest of the Community required an exclusive external competence, in order to pursue a unity of action in the multilateral trade talks. This is a political argument in the sense that it furthers one approach to external representation over another on its merits, without regard to the legal base.

This first political argument is not very strong. Certainly, unity of action gives more strength to the Community to defend a common interest, but the Community is made up of the Member States and if the Member States do not want to confer exclusivity on the Community then it is hardly a good argument that it would be more effective if they did.

The second argument is a classical legal argument in Community law. Permitting the Member States to have different external policies in these matters would lead to distortions of competition in the internal market. Indeed, the connection to the internal market and its integration is a strong argument for an exclusivity of the external competence in the common commercial policy. Otherwise different import quotas, as an example, would be liable to give competition advantages to some Member States, who perhaps restrict importation of a product from a third country so that its home-grown products can benefit from a larger market share. We will see below how this argument applies to intellectual property rights.

A third argument brought forth by the Court was the principle of loyalty found in Article 10. This is not a very sound argument. The principle of

³² Eeckhout, p. 11.

³³ Judgment of 12/07/1973, *Hauptzollamt Bremerhaven / Massey Ferguson* (Rec.1973,p.897).

³⁴ Opinion of 11/11/1975, Opinion 1/75 (Rec.1975,p.1355).

³⁵ Ibid.

loyalty does not confer exclusive competence on the Community. It only implies a sort of loyalty in cooperating. This was later echoed in the ‘obligation to cooperate’ in Opinion 1/94.

3.1.3 Defining the Common Commercial Policy – Commission v. Council

After Opinion 1/75 the Community’s exclusive competence in matters regarding the common commercial policy was clearly established. But the scope of the common commercial policy has never been clearly defined. The use of the word ‘*particularly*’ in Article 133 Paragraph 1 shows that the enumeration made there is not meant to be exhaustive. There has been a long debate on the subject between the Commission and the Council, but the scope of Article 133 remains undefined. The importance of this definition cannot be underestimated; if intellectual property rights are regarded as covered by this definition then they would also be covered by the exclusive external competence of the Community.

3.1.3.1 Supranationalism v. Intergovernmentalism

The debate between the Commission and the Council is a part of the ongoing battle leading to the Opinion 1/94 and all the successive amendments of Article 133. The debate is between two concepts of cooperation within the EU. The Commission represents a supranational approach and is always striving towards a larger scope of the common commercial policy, whereas the Council represents intergovernmentalism and shared competence between the Community and the Member States, which means trying to keep the definition of the common commercial policy narrow.

The ECJ has never resolved the question in a definitive manner. Instead the Court treats the common commercial policy as ‘an open-ended and evolutionary concept’.³⁶ This is in order for the common commercial policy to be able to integrate more fields as international economic relations develop.³⁷

Thus, the battle carries on, and intellectual property rights have become one of the most important battlegrounds.

3.1.3.2 The Instrumental Approach v. The Finalist Approach

Both the Commission and the Council have proposed one theory each, to provide some sort of criteria to define the common commercial policy.

The Commission championed an instrumental theory. This meant that a measure of commercial policy should be regarded on the merits of its position as an instrument regulating international trade.³⁸ That is an interesting position and has backfired against the Commission when it comes to intellectual property rights.

³⁶ Jacobs, p. 3.

³⁷ Tridimas, p. 50.

³⁸ Blumann/Dubois p. 599.

The Council defended a theory based on a finalist approach. They wanted to include every measure that was likely to influence the volume or flow of trade as part of the common commercial policy and thus under exclusive competence.³⁹

The ECJ has not backed either of these approaches, and has not solved the dispute in any other way either. As discussed above, the Court has been quite reluctant to put down rules that could be generalised when it comes to the definition of the common commercial policy. But the instrumental and the finalist approaches have continued to be part of the debate on the external competence regarding TRIPs.

3.2 The Doctrine of Implied Powers⁴⁰

3.2.1 The Notion of Implied Powers

The notion of implied powers must be viewed as two distinct issues. These two issues are the *existence* of an implied competence and the *nature* of that competence, if it exists.⁴¹ This distinction must be kept in mind when analysing the case law on implied powers, although the ECJ has not used this distinction with the greatest consistency. But it is essential to understand the case law on implied powers, especially for analytical purposes. Indeed, one of the reasons that make the case law on implied competences so enigmatic is the fact that the ECJ often does not draw this distinction very clearly.

A third issue can be added: if Community competence is not exclusive but shared with Member State competence, is it then facultative or obligatory? If it is facultative that means that both the Community and the Member States have competence and that they can use them more or less independently of each other. If it's obligatory, the Community can only exercise its external competence if the Member States exercise theirs. In other terms, is the participation of both the Community and the Member States legally possible or legally necessary?⁴²

³⁹ Eeckhout, p. 19.

⁴⁰ In relation to Opinion 1/94 there are two trends in the interpretations of the earlier case law. The first 'classical' interpretation seems to give a broad interpretation of the scope of implied powers and was highly critical of Opinion 1/94. The second is an interpretation that is made in the hindsight of Opinion 1/94 and makes narrower interpretations of parts of the earlier case law, although it is quite aware of the fact that it is to some extent an afterthought. This chapter is based mainly on the second 'school' of interpretation, as this is the approach that seems to have gained ground in the aftermath of the first negative reactions to Opinion 1/94, see for example Dashwood/Heliskoski, Eeckhout, Koutrakos. For a discussion on the problems regarding the interpretation on the case law on implied powers before Opinion 1/94, see Schütze, p. 240-241.

⁴¹ Koutrakos, p. 80. Dashwood talks of the 'existence' and the 'exclusivity' questions, see Dashwood 1998, p. 113. In this paper Koutrakos' terminology has been preferred, since the discussion will not focus simply on whether or not the competence is exclusive or shared, but also what sort of shared competence.

⁴² For an attempt at a typology on these matters, which has not, however, been used in this paper, see Rosas, p. 206.

3.2.2 The Existence of Implied Competences

The ECT originally contained very few provisions concerning the external relations of the Community. There was Article 133 discussed above, which referred to the conclusion of international agreements on commercial policy. The rest of the provisions concerning external relations were found in the last part of the treaty under the heading ‘General and Final Provisions’.⁴³ However, it was clear that none of these provisions gave the Community any substantive powers to negotiate and conclude agreements with third countries. Did this mean that the Community could not enter into binding agreements with third countries in matters where the ECT was silent as to the existence of an external competence? Or could the Community have an implied external competence?

3.2.2.1 Case Law on the Existence of an Implied Competence

3.2.2.1.1 AETR

The existence of implied powers was first set down by the *AETR* case, a milestone in EC case law, both from an external relations perspective and a constitutional perspective. The ECJ held that the treaty making power of the Community did not need to be expressly provided for in the Treaty, but could arise by implication.

The case concerned the European Agreement on the work of crews of vehicles engaged in international road transport. The Council had decided that the Member States were to negotiate this agreement, albeit with a common position that the Council had put down. The Commission attacked this procedure on the grounds that the competence to negotiate the agreement had become an exclusive competence of the EC, since it fell within the scope of Council Regulation 543/69.⁴⁴ The Regulation was concerned with harmonisation in this area but also contained the following provision: ‘*The Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation*’.⁴⁵

The ECJ’s solution in the *AETR* case was quite innovative. The Advocate General had sided with the Council and held that recognising external powers in the field of transports did not follow from the treaties and that it would border on a discretionary construction of law to confer external powers under such circumstances, when Article 300 said that international agreements could be negotiated ‘*where this Treaty provides for it*’.⁴⁶

The Court did not hold on to the conclusions of the Advocate General. The position of the ECJ was that external competence could arise by implication. The response of the Court is best cited in full, it has become known as the *AETR* principle:

‘*17 In particular, each time the Community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down*

⁴³ For an exhaustive discussion of these Articles and external competence see Eeckhout, p. 58.

⁴⁴ Council Regulation 543/69, OJ L77/49.

⁴⁵ Ibid., Article 3.

⁴⁶ Conclusion of Dutheillet de Lamothe Advocate General in *AETR*.

common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.

18 As and when such common rules come into being, the community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.

19 With regard to the implementation of the provisions of the treaty the system of internal community measures may not therefore be separated from that of external relations.'

The inseparability of internal and external competences was pointed out already in Paragraph 19. Paragraph 18 in the *AETR* case points to an exclusive Community competence.

The use of the words '*In particular*' in paragraph 17 implies that the ECJ did not wish to limit itself with this formulation and that external competence may arise, without express conferment, in more than this way.⁴⁷

3.2.2.1.2 Kramer

A few years after the *AETR* case, in 1976, implied external competence was once again before the ECJ in the *Kramer* case.⁴⁸ This time it was external competence in regard to the common structural policy for the fishing industry and the common organisation of the market in fishery products that was under scrutiny. This was outlined in two Council Regulations,⁴⁹ and Article 102 of the Act of Accession.⁵⁰ The question in *Kramer* was whether the Netherlands had been competent to enter into an international agreement on the preservation of fish in the North Sea, or whether the Community was competent in that matter. The Court reasoned that the Community had the competence to enter into such an agreement. Implied competence could henceforth flow from an internal competence even when the secondary legislation did not mention the conclusion of international agreements.

3.2.2.1.3 Opinion 1/76

In Opinion 1/76, the ECJ showed yet another one of the other roads to external competence to which the '*In particular*' of paragraph 17 of the *AETR* case had opened the door. The Court made it clear that it is not a prerequisite to external competence that the EC has actually used its internal competence by adopting Community legislation, as in *AETR* and *Kramer*. So the Community could have an external competence in the absence of both an express conferment and the adoption of common rules that could be affected if the Member States negotiated independently. So the treaty making power '*flows by implication from the provisions of the Treaty creating the internal power*'.⁵¹ In Opinion 1/76, the Community's

⁴⁷ Dashwood/Heliskoski, p. 7.

⁴⁸ Joined cases 3, 4 and 6/76 Judgment of 14/07/1976, Cornelis Kramer and others (Rec.1976,p.1279).

⁴⁹ Council Regulations 2141/70 and 2142/70, OJ Spec Ed III 703 and 707.

⁵⁰ The Accession Act of Denmark, Ireland and the United Kingdom.

⁵¹ Dashwood/Heliskoski, p. 12.

participation in the international agreement concerned was necessary for the attainment of the Treaty's objectives, according to the ECJ.⁵²

3.2.2.1.4 Opinion 2/91

In Opinion 2/91, the ECJ once again pronounced an opinion on the external competence, this time regarding a draft convention negotiated in the International Labour Organization.⁵³

The ECJ conferred an implied external competence covering the whole area of the internal competence, based on the fact that the Community had an internal power.⁵⁴ Here there is a mirroring parallelism between the existence of an internal competence and an external competence.⁵⁵

3.2.2.2 The Existence of Parallel Competences

Opinion 2/91 gives a clear concept of a pure form of a principle of parallelism in the existence of competences. But the case law is a lot more inconsistent in its approach. The term principle or doctrine of parallelism is only used in academic literature and the ECJ never used it in the case law discussed above.⁵⁶ As this paper is more interested in the nature of the external competence than its existence, it will suffice here to mention the classic version of the principle of parallelism in regard to the existence issue.⁵⁷ The classic version can be summed up by the Latin device '*in foro interno in foro externo*' meaning that if the Community has a power to do something on the internal level, it has the power to do so on the external level.

3.2.3 The Nature of Implied Competences

3.2.3.1 Exclusive Implied External Competence

There are two main bases for an exclusive implied external competence, stemming from *AETR* and Opinion 1/76, respectively; they were also referred to in Opinion 1/94.

3.2.3.1.1 The AETR Doctrine

Since the international agreement concerned in *AETR* fell under the Council Regulation 543/69 it was an exclusive *external* competence since the Council Regulation 543/69 had de facto made it an exclusive *internal* competence.⁵⁸ So, when internal legislation is liable to be affected by an international agreement, the Community has an implied exclusive external competence. In the absence of the internal legislation, the external

⁵² Eeckhout, p. 67. This was taken up by the Commission as an argument in Opinion 1/94.

⁵³ Opinion of 19/03/1993, Opinion 2/91 (Rec.1993,p.I-1061).

⁵⁴ Ibid., para. 17.

⁵⁵ Schütze, p. 234.

⁵⁶ Ibid., p. 235.

⁵⁷ As the existence of the Community's external competence regarding TRIPs has been clear since Opinion 1/94, this paper is more interested in the nature of the external competence. For a discussion of different interpretations of the principle of parallelism and the existence see Schütze, p. 235-240.

⁵⁸ Compare with the internal notion of pre-emption.

competence was shared as far as the field of transport is concerned.⁵⁹ Accordingly, it can be exercised by the Community as well as by the Member States. But the court, in *AETR*, did not elaborate on the question of the nature of the implied power. *AETR* was a reply to the ‘existence’ question primarily, and not the question of the ‘nature’ of the external competence.⁶⁰

In the *AETR* case, the Court never actually spoke of exclusivity, but it did indirectly point at it by excluding all Member State action in the external field covered by the Council Resolution.⁶¹ In its view on the nature of the implied external competence, the *AETR* was based on somewhat fuzzy pre-emption logic.

The doctrine of pre-emption evolved at around the same time and was to become an important part of the implied powers doctrine. In *AETR*, the logics of pre-emption led to the conclusion that the Council Regulation had pre-empted the area covered by the Council Regulation, not only on the internal level but also on the external level. Lenaerts made an important observation as far as the relationship between implied external competence and the doctrine of pre-emption is concerned.⁶² Lenaerts meant that it is a question of ascertaining the primacy of Community law over national law. This is while the engagement of a Member State into an international agreement with a third country would be an act of national law that would hinder the Community from using its external competence in the field.

3.2.3.1.2 The Opinion 1/76 Doctrine

In Opinion 1/76, the ECJ makes no clear reference to the external competence as being exclusive; however it has been interpreted as meaning that.⁶³ Opinion 1/76 is very limited in its scope, since it concerned an agreement on the use of a number of European inland waterways and the adoption common internal rules by the Community could not fully obtain the objective of rationalising the economic situation on these waterways without concluding an international agreement with Switzerland, since Swiss vessels took part in navigation on these waterways. It was thus necessary to conclude an international agreement with a third country in order to attain the Community objectives. This necessity criterion makes the scope of Opinion 1/76 quite narrow. Hence, analogies to the reasoning in Opinion 1/76 are difficult to draw.

3.2.3.2 Shared Implied External Competence

In the *Kramer* case, the ECJ ruled that the Community had external competence to conclude an international agreement in the area concerned. However, the ECJ also said that this did not prevent the Netherlands to enter into such an agreement. A shared competence then? Yes, but this was while the transition period concerning these fields were not yet ended. In a later case, after the transpiration of the transition period, the ECJ ruled that the Member States could no longer enter into agreements on conservation

⁵⁹ Eeckhout, p. 68.

⁶⁰ Dashwood 1998, p. 118.

⁶¹ *AETR*, para. 31.

⁶² Lenaerts, p. 58.

⁶³ It has been interpreted as conferring exclusive external competence by the ECJ itself in Opinion 1/94, see Eeckhout, p. 81.

measures on their own.⁶⁴ Until the Community had exercised its competence fully in the field the Netherlands could enter into an agreement as well. Shared external competence until fully exercised internal competence in other words.

In *AETR* and Opinion 1/76, the ECJ had not explicitly stated that the external competence was exclusive and it had made no reference what so ever to a shared competence. Opinion 2/91 for the first time developed a more consistent theory on when the external competence was a shared one. It has been interpreted as a sanctioning of shared competence as the main rule when external competence is derived from an internal competence.⁶⁵ This seems logical since most of the internal powers are shared. The Court first summed up the principles set down in the earlier case law on implied powers. It then went on to the question of exclusivity. The Court first referred to some earlier decisions that had stated that the exclusive external competence arising from provisions of the Treaty excluded any Member State competence.⁶⁶ The ECJ now analysed the nature of exclusive implied powers. The ECJ first said that, as had been the case in *AETR*, the competence was exclusive when the Community had adopted rules that were liable to be infringed if the Member States could continue to enter into agreements with third countries in the areas concerned. In Opinion 2/91, the ECJ also took no account of the practical problems that a shared external competence might lead to. The ECJ seems to have interpreted the international representation of the Community not from the ‘external perspective’ of how it is actually going to work, but from the ‘internal perspective’ of how the external competence can fit into the legal framework of the ECT, an approach that was used in Opinion 1/94 as well. The ECJ handles the practical considerations of its ruling by referring to the ‘duty to cooperate’ between the Community and the Member States, as it would do in Opinion 1/94 as well.

3.2.3.3 The Elusive Nature of Parallel Competences

Nothing in the case law on implied powers have said anything specific on the nature of the shared competence. It can be imagined essentially in two different ways. Either as meaning that the Community and the Member States can both enter into agreements separately as well as together. Or it could be seen as both the Community and the Member States needing to participate in an agreement where the external competence is shared. That is to say that no separate agreements can be negotiated. In the first case the participation of both the Community and the Member States are legally possible, in the second it is required legally.

⁶⁴ 804/79 Judgment of 05/05/1981, Commission / United Kingdom (Rec.1981,p.1045).

⁶⁵ Koutrakos, pp. 104-105.

⁶⁶ Opinion 1/75 on Article 113, and Commission v. United Kingdom on Article 102 of the Act of Accession (which has the rank of a Treaty).

4 Opinion 1/94

This Opinion has been something of a big bang in external competence and intellectual property rights. It has been considered a landmark in the general external relations of the EU by the academic literature. From this Opinion stems all the successive amendments to Article 133. It is an opinion of great importance and consequences.

4.1 The Question of Competence in Opinion 1/94

The Commission demanded the ECJ to give an opinion as to whether it had an exclusive competence to conclude the WTO Agreement.

The questions put to the Court were summarised by the Court in the following way:

*'... the fundamental issue is whether or not the Community has exclusive competence to conclude the WTO Agreement and its annexes. It is that fundamental issue which the Court proposes to deal with in the remainder of this opinion, by examining in turn certain particular questions arising from the Multilateral Agreements on Trade in Goods, from GATS and from TRIPs.'*⁶⁷

The Opinion focuses entirely, as the citation shows, on whether the competence is exclusive or not. However, the first question put by the Commission was '*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 113 EC alone, or in combination with Article 100a EC and/or Article 235 EC?*'. That is to say if there is a general competence regardless of whether it is exclusive or not. This question was never distinctly answered by the ECJ. However, it has been interpreted as if the Community has a general, but not exclusive, competence to conclude the whole of the WTO Agreement.⁶⁸

4.2 Article 133 and TRIPs

The Commission's main argument was that TRIPs fell under Article 133 since '*the rules concerning intellectual property rights are closely linked to trade in the products and services to which they apply*'.⁶⁹ In the opinion the Court first distinguishes between the measures that are taken directly at the frontier, such as the TRIPs provisions against introducing counterfeit goods.⁷⁰ These measures are part of the exclusive competence of the EC on the basis of Article 133, according to the Court. These are considered

⁶⁷ Opinion 1/94, para. 14.

⁶⁸ Timmermans 2000, p. 240 specially note 6.

⁶⁹ Opinion 1/94, para. 54.

⁷⁰ This only concerned the provisions of Section 4 of Part III of TRIPs dealing with border measures.

instruments of the common commercial policy.⁷¹ This is while they had their counterpart in an EC Regulation based on Article 133.⁷²

The other parts of the TRIPs do not fall within the scope of article 133. This is while '*intellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade.*'⁷³

The Court meant that general harmonisation of intellectual property protection, which TRIPs amounts to in the end, is not covered by article 133. The citation shows, that although the Court admits that intellectual property rights have a bearing on international trade, that is not sufficient to include intellectual property rights in the definition of Article 133 and the common commercial policy while they affect internal and external trade in much the same way, '*if not more*'. So the ECJ adopts an instrumental approach to TRIPs. Thus the ECJ interprets the primary objective of TRIPs as being to harmonise the protection of intellectual property rights and not to promote trade.

In stark contrast to its earlier support of this instrumental approach, the Commission had based its arguments in Opinion 1/94 on a finalist approach to TRIPs, claiming that TRIPs should be seen as part of the overall trade policy objectives of the WTO Agreement.

The reference that internal trade is affected '*just as much as, if not more than, international trade*' is a hint that the ECJ regard TRIPs as falling rather within the rules of the internal market and not the common commercial policy. This is important since it implies the view that intellectual property rights, at least under TRIPs, is not a matter for the common commercial policy by their nature.

The Court continues on this line in underlining some institutional problems that the inclusion of TRIPs in the exclusive competence of the common commercial policy could lead to:

*'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.'*⁷⁴

This implies that the ordinary procedures for harmonisation under the ECT would be by-passed by a 'forced' harmonisation following the adhesion to some international treaty providing for intellectual property harmonisation.

The ECJ regard the external competence to conclude TRIPs largely as an internal institutional problem.

According to the Court, the primary objective of TRIPs is to harmonise protection of intellectual property rights. This interpretation of the primary objective of TRIPs is motivated since the agreement is mostly concerned with harmonisation and shuns away from more trade-related intellectual property issues such as the exhaustion of rights issue, despite the name 'trade-related aspects'.⁷⁵

⁷¹ Auvret-Finck, point 28.

⁷² Council Regulation 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods, 1986, O.J. L357/1.

⁷³ Opinion 1/94, para. 57.

⁷⁴ Ibid., para. 60.

⁷⁵ Eeckhout, p. 34.

As TRIPs covers many areas in which there was no Community harmonisation, this would enable the Community to harmonise intellectual property rights on the basis of Article 133, without any participation of the Parliament and with a majority vote instead of unanimity. Compared to the internal procedures and voting rules, the Court mentions Articles 94, 95 and 308 ECT, that are much more restraining, this cannot be acceptable.⁷⁶

The Commission had also argued that the Community had been permitted to incorporate ancillary provisions regarding intellectual property rights in agreements negotiated under Article 133 was a de facto proof that TRIPs fell under the exclusive competence of Article 133.⁷⁷ The ECJ noted that these ancillary provisions were very limited in scope and did in no way imply that TRIPs could be concluded under Article 133.⁷⁸

4.3 Implied Powers and TRIPs

4.3.1 Shared Implied External Competence

The Commission, as a subsidiary argument to Article 133, argued that exclusive implied powers, derived from the different treaty provisions and Community legislation, covered all the areas of TRIPs. First, the Commission argued that internal legislative acts could be affected by TRIPs, as in the *AETR* case. Secondly, in line with Opinion 1/76, that it was necessary for the Community to conclude TRIPs in order to achieve the objectives of the Treaty. Thirdly, because the intellectual property rights affected by TRIPs could be harmonised under Articles 95 (ex Article 100a) and 308 (ex Article 235) and that this gave the Community an exclusive external competence.⁷⁹

The ECJ first referred to the ‘necessity test’ in Opinion 1/76 and declared that it was not necessary to conclude international agreements with third countries in order to achieve the objectives of harmonisation of intellectual property rights in the Community. The ECJ also states that Articles 95 and 308 could not ‘*in themselves confer exclusive competence on the Community*’.⁸⁰

The ECJ then considered whether ‘legislative acts adopted in the Community context could be affected within the meaning of the *AETR* judgement if the Member States were to participate in the conclusion of TRIPs’.⁸¹ The Court did a short survey of the harmonisation of intellectual property law. It concluded that in many areas covered by TRIPs harmonisation was only partial; it cited trademarks as an example. In other areas, such as patents, industrial design and undisclosed technical information, there was no harmonisation whatsoever. The Court specifically pointed out, as discussed above regarding the Community Patent Convention, that as far as patents were concerned intergovernmental conventions had been used, not Community acts.⁸²

⁷⁶ Opinion 1/94, para. 58-59.

⁷⁷ Ibid., para. 66.

⁷⁸ Ibid., para. 68.

⁷⁹ Ibid., para. 99.

⁸⁰ Ibid., para. 100-101.

⁸¹ Ibid., para. 102.

⁸² Ibid., para. 103.

The ECJ explained that, in contrast to what some Member States had argued, there was no exclusive competence for the Member States either concerning TRIPs.⁸³ Since all the areas could potentially be harmonised through Article 95.⁸⁴ Then the ECJ comes with its twist: '*It follows that the Community and its Member States are jointly competent to conclude TRIPs*'.⁸⁵ This laconic statement is the source of many obscurities in the external relations regarding intellectual property rights.

4.3.2 The 'Obligation to Cooperate'

The ECJ then proceeded to say that it was not oblivious to the problems that a shared competence might cause, but that this did not give a carte blanche to override institutional provisions on decision-making in the Treaty. However, the ECJ provided a remedy to the problems that might be caused by a shared competence in stating that the Commission and the Member States had an 'obligation to cooperate'.⁸⁶ The Court ended its Opinion at that point and did not develop any further how such an obligation would be applied or concretised.

It is an obligation that seems to be more specific than the general principle of loyalty in Article 10 (ex Article 5).⁸⁷ What the duty of cooperation is aimed to achieve is stated quite clearly in Opinion 1/94: '*...obligation to cooperate flows from the requirement of unity in the international representation of the Community*'.⁸⁸ So the ECJ has set down what the duty of cooperation shall achieve, unity of representation, but left it to the other institutions of the Community and the Member States to decide on how to achieve that unity of representation.

4.4 The Nature of the Shared Competence

An interesting yet often overlooked aspect of Opinion 1/94 is that it actually established a shared competence between the Commission and the Member States. It was by no means obvious that the Member States did not have an exclusive external competence regarding all intellectual property issues. The fact that the competence was necessarily shared and not exclusive to Member States is rather important shows us that the Court was quite interested in the good handling of negotiations in the WTO and the importance of keeping the unity of action in the WTO.

If indeed Member States have no exclusive rights on matters under Article 95 on the external level, they should not have that on the internal level either. But under Article 95 Member States are free to take measures as long as an area is not pre-empted. So under the internal competence the Member States do not have an exclusive competence, yet they can take measures as long as an area is not pre-empted. If the parallelism is to be upheld in a strict sense that seems to imply that the Member States are free to conclude

⁸³ Opinion 1/94, para. 104.

⁸⁴ Ibid., para. 104.

⁸⁵ Ibid., para. 105.

⁸⁶ Ibid., para. 108-109.

⁸⁷ Timmermans 2000, p. 241.

⁸⁸ Opinion 1/94, para. 108 (which cites Opinion 1/78, para. 34 to 36 and Opinion 2/91, para. 36).

agreements on their own for as long as no common position can be reached by the Community and the Member States together. That is not a very happy scenario for the unity of action in the WTO. Nothing but the elusive ‘obligation to cooperate’ would stand in the way of total anarchy in TRIPs negotiations and Member State negotiating separate agreements with third countries.

But is that the only possible interpretation of the external competence in Opinion 1/94?

The first question of the Commission that remained unanswered was whether the Commission had a general competence to conclude TRIPs. The Court never answered this question expressly, but it seems as though the Community has a general competence to conclude TRIPs. The reasons for this interpretation is the reference to Article 95 and the fact that Member States did not have exclusive competence since the Community could harmonise all areas of TRIPs under that Article. Hence, the participation of the Member States is not obligatory but facultative.⁸⁹ If this interpretation is correct it means that the participation of the Member States is legally possible but not legally necessary. If the Member States choose to, they can let the Community conclude the negotiation of Agreements under TRIPs on its own.

The ECJ did not specify the nature of the shared competence in regard to the Member States either. It has been discussed whether the shared competence to conclude TRIPs in Opinion 1/94 could be interpreted as meaning that the participation of both the Community and the Member States is legally necessary.⁹⁰ This would mean that the Member States could only exercise their external competence in concert with the Community. In this scenario the Community and the Member States are each other’s ‘prisoners’, one cannot act without the other. This is a very tempting interpretation since that would solve the most acute problem of a shared competence, namely the risk of Member States concluding separate deals when no common position is reached and thereby endangering the unity of action. This interpretation of shared competence would undeniably render the ‘obligation to cooperate’ a lot more substantial, since it would mean that either the Community and the Member States reach a common position or no action can be taken at all, as the participation of both are required.⁹¹

This interpretation of the shared competence would also meet the requirements of the *AETR* judgement; that the Community should have competence in fields where legal acts of the Community could be affected. The ECJ has already said that the Community does not have an exclusive external competence implied from Article 95 insofar as an area has not been pre-empted. The Member States are then free to take measure on the internal level according to Article 95. The principle of parallelism should then mean that the Member States could do so on the external level as well. But there is a significant difference between the internal and external level here, and the principle of parallelism needs to be adjusted to it.

If a Member State takes action on the internal level, that action can still be undone by Community harmonisation. Hence, the Community competence under Article 95 is not endangered by the actions of the Member States in these areas. But on the external level things are not the same. If a Member State has concluded an agreement on its own with a third country, that agreement is legally binding under international law. This cannot be undone by internal Community legislation aiming at harmonising the area in

⁸⁹ Rosas, p. 206.

⁹⁰ Editorial CMLR 1995.

⁹¹ Ibid., p. 389.

question. The result is quite the opposite; the international agreement between the Member State and the third country would hinder the Community harmonisation. In fact it would mean that Member State action would erode the Community competence irrevocably. A prerequisite to enter into an international agreement is that treaty-making power exists under national law. National law would then have primacy over Community law.

Therefore this paper interprets the shared competence to conclude TRIPs as implying the necessary participation of both the Community and the Member States.

5 Intellectual Property Rights in the EU

This chapter examines the position of intellectual property rights under the ECT and in the internal market. Further, it analyses some possible implications of the special nature of intellectual property rights in the internal market with regard to external trade.

5.1 Intellectual Property Rights Under the ECT

In the absence of harmonisation the ECT is very silent as to intellectual property rights. Great efforts have been made to harmonise different aspects of intellectual property, with a mixed outcome.

5.1.1 Articles 295 and 30

Intellectual property rights can be a great obstacle to the creation of an internal market. As intellectual property rights usually mean an exclusive right delivered under a national system, it can have an important market dividing effect. National intellectual property rights could easily lead to the division of the internal market into self-contained areas to which the trade and competition rules do not apply. Yet Article 295 states that: '*This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership*'. The reference to property ownership includes intellectual property rights.⁹² So intellectual property rights were not included in the ECT in the beginning.

In fact the ECT was specially designed not to interfere with the intellectual property rights of the different Member States. Article 30 (ex Article 36) mentions intellectual property rights as one of few express exceptions to Article 28 (ex Article 30), a key stone article in the creation of the internal market, which prohibits quantitative restrictions between Member States concerning the free movement of goods. Accordingly, the basic structures of the ECT are quite reluctant to including intellectual property rights in the integration of the Community.

The ECJ soon came up with a solution that facilitated the creation of the internal market despite the hindering effect of the treaty provisions on intellectual property rights. The ECJ divided intellectual property rights into 'existence' and 'exercise' and protected only the latter in the exhaustion of rights theory.⁹³

⁹² Craig/de Burca, p. 1088.

⁹³ Ibid., p. 1088-1089.

5.1.2 Harmonisation of Intellectual Property Rights Under Other Articles

The harmonisation of intellectual property rights has been going on for a long time. A clear divide in the attempts at harmonising is distinguishable in the entry into force of the Single European Act on 1 July 1987.

5.1.2.1 Harmonisation Before the Single European Act - Article 94

Article 94 (ex Article 100) was the base for harmonisation before the Single European Act. Under Article 94 unanimity is required for harmonisation. Although harmonisation of intellectual property rights would be better than relying on the creative case law of the ECJ, the constant squabbling of the Member States made most of the early attempts in this direction fail.⁹⁴ The Community Patent Convention offers an illustrative example of the approach of the Member States to harmonisation in this field.⁹⁵

In 1975 a Community Patent Convention was adopted in order to create a European patent. But it did not have the support of the Member States who never ratified the Convention.⁹⁶ Instead a European Patent Convention was preferred.⁹⁷ This was not a Community act but a convention between all the Member States and some third countries. So the Member States preferred to keep the cooperation on a patent out of the Community all together and use a traditional intergovernmental instrument in resorting to a convention.

5.1.2.2 Harmonisation After the European Single Act – Article 95

5.1.2.2.1 Qualified Majority Voting

In 1985 the Commission published a white paper that would lead to a novel approach to harmonisation in the EU.⁹⁸ In the white paper the Commission stated that Article 94 alone did not suffice and that a new strategy would be required as well in order to achieve a '*genuine common market*'.⁹⁹ One of the central pieces of this new strategy was Article 95 (ex Article 100a) that permitted qualified majority decisions on harmonisation, although as a residual article when the ECT did not provide otherwise. Intellectual property rights could hereafter be harmonised by qualified majority voting under Article 95, a procedure that facilitates the passage of legislation to

⁹⁴ Craig/deBurca, p. 119.

⁹⁵ Convention 76/76/EEC for the European Patent for the Common Market, OJ 1976 L 17/1.

⁹⁶ Vinje, '*Harmonising Intellectual Property Laws in the European Union*', European Intellectual Property Review, 1995, p. 373. However one of the main unsolved issues between the Member States was simply linguistic, since applications for a Community Patent had to be made in English, French or German, but in order to be effective in a country with another official language than these, a translation had to be filed with the competent national authorities.

⁹⁷ Convention of the Grant of European Patents of 5 October.

⁹⁸ 'Completing the Internal Market', COM (85) 310, 14 June 1985.

⁹⁹ Ibid., para. 61.

achieve harmonisation in the internal market compared to the procedure in Article 94.

It should be noted that Article 95 only permits the passage of *directives*, which are subject to Member State implementation in order to become binding.

5.1.2.2.2 The Doctrine of Pre-emption

The Community has a competence to harmonise intellectual property rights. But the Member States remain fully competent to take action in the fields covered by Article 95 for as long as the Community has not exhausted the field by total harmonisation. This is the doctrine of pre-emption as applied to Article 95. Thus we can say that the Community and the Member States have a shared competence under Article 95. The Community's competence under Article 95 can become exclusive if a field is pre-empted by total harmonisation. That is to say that Community rules covers the whole area, so no space is left for the Member States to operate. But the Member States competence can never become exclusive under the doctrine of pre-emption. Any action that the Member States may take under Article 95 can still be harmonised, so the Community's competence always remains.

5.1.2.2.3 Harmonisation and TRIPs

On January 1st 1993, the day of the nominal completion of the Single Market, intellectual property harmonisation had still not gotten very far. Many visionary initiatives had been presented, but the Member States were still debating them and have continued to do so in many areas of intellectual property rights.¹⁰⁰

Following the presentation of a Green Paper on the fight against counterfeiting and piracy in the Single Market by the Commission, the debate on the harmonisation of intellectual property rights in the wake of TRIPs was reignited.¹⁰¹ The European Parliament and the Council presented a '*Proposal for a directive on measures and procedures to ensure the enforcement of intellectual property rights*'.¹⁰² The objective of this directive was to '*achieve the internal market in the field of intellectual property*'.¹⁰³ In the directive, adopted in 2004, the reference to TRIPs is clear.¹⁰⁴ Paragraph 7 of the Preamble to the directive states that '*It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights*'. This directive shows that a new attempt has been launched to harmonise intellectual property rights with TRIPs especially in mind.

¹⁰⁰ Vinje, p. 361.

¹⁰¹ 'Green Paper on the fight against counterfeiting and piracy in the Single Market', COM(98) 569 final.

¹⁰² '*Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights*', COM (2003)46.

¹⁰³ Ibid., p. 4.

¹⁰⁴ Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights.

5.2 The Internal Market and External Trade

5.2.1 Article 30 and External Competence

There has always been a close link between the common market (now internal market) and the common commercial policy. Indeed, this was the strongest argument for an exclusive Community competence in Opinion 1/75. As we have seen, the ECJ stated that external trade measures by Member States could lead to distortions of competition or deflections in trade in the common market. In order to avoid this, exclusivity of the Community in the external competence of the common commercial policy was motivated.

However, trade related measures are often taken for reasons that are not necessarily trade related. As an example such measures can be taken for the protection of public health or consumer protection. In the internal market there are a few express exceptions in Article 30 that can permit the Member States to have quantitative restrictions, which is normally strictly prohibited under Article 28 as a limit to the free movement of goods. In its case law, the ECJ has expanded these exceptions to an open list of ‘mandatory requirements’, starting *ex nihilo* in the famous Cassis de Dijon¹⁰⁵ case in 1979.

Timmermans made the suggestion that Article 133 should be interpreted in the light of these permitted exceptions to the internal market.¹⁰⁶ Member states would thus be able to take measures, either under Article 30, or, if proportionate, a ‘mandatory requirement’ in spite of the exclusive competence of the Community. The risk of distortions in competition or deflections in trade would not exist, as the Member States could any way erect barriers to this extent in internal trade. Hence, the main argument for an exclusive competence would no longer be valid.

Timmermans wrote his article in 1986, eight years before Opinion 1/94, but Eeckhout has discussed Timmermans’ argument more recently concerning environment, consumer protection and other possible ‘mandatory requirements’ that could affect the external competence.¹⁰⁷ But none of these authors have, to the author’s knowledge, drawn the obvious conclusion of this argument regarding intellectual property rights. That is that the exclusive external competence of the Community in the common commercial policy does not prevent Member States from entering into international agreements concerning intellectual property rights. It is an obvious conclusion since intellectual property rights is one of the few express exceptions in Article 30.¹⁰⁸

So, if we are to interpret Article 133 according to Timmermans’ reasoning, it is difficult to see how any reference could be made to intellectual property rights in Article 133, be they ‘commercial’, ‘trade related’ or not, without going against the logic of Article 30.

¹⁰⁵ Judgment of 20/02/1979, Rewe / Bundesmonopolverwaltung für Branntwein (Rec. 1979, p.649).

¹⁰⁶ Timmermans 1986, 96-97.

¹⁰⁷ Eeckhout, p. 22-23.

¹⁰⁸ Article 30 refers to ‘*the protection of industrial or commercial property*’, but this has since been expanded to cover all intellectual property rights in the case law of the ECJ see, Blumann/Dubois, p 97.

Even if we are not prepared to go that far, Article 30 shows that there is no place for intellectual property rights in a logically coherent system made up of the internal market and the common commercial policy. Intellectual property rights do not have a natural place in any of these.

This also leads us to a second conclusion. The only way that the Community can achieve an exclusive competence regarding a matter of intellectual property rights is by harmonising. This is because harmonising is the only way to go around Article 30 in the internal market. Due to the parallelism of the internal and external competences, the same should be true of the external competence.

Thirdly, Article 30 highlights the great difference between the GATS (General Agreement on Trade in Services) and TRIPs from a Community perspective. That is the difference between services and intellectual property rights in the ECT.

5.2.2 The Completion of the Single Market and the Uruguay Round

Whereas services are one of the four fundamental liberties of the ECT, intellectual property rights have not only been excluded in Article 295, but even made one of few express exceptions in Article 30. While everything has been done to integrate services, everything has been done to keep intellectual property rights from being integrated and stay within the competence of the Member States.

However, when the programme to complete the single market (1987-1992), agreed to under the Single Act of 1986, coincided with the Uruguay Round (1986-1993) these things seem to have become mixed up. The completion of the single market, as well as the Uruguay Round, focused on integrating services.¹⁰⁹ The Commission, perhaps a little overzealous, meant that both services and intellectual property rights should be included in the external competence in Opinion 1/94. In Opinion 1/94 the Commission had a strong case for an exclusive competence on services, not least since that would have meant keeping with the main argument regarding the coherence between the internal market and the common commercial policy from Opinion 1/75.¹¹⁰ But when it comes to intellectual property rights the claims of the Commission are almost bizarre in their pretensions.¹¹¹

Ever since, the trend in academic literature has been to discuss external competence regarding services and intellectual property rights at the same time, and most often from a services' point of view. Indeed, no article has, to the author's knowledge, treated the external competence regarding intellectual property rights without treating services. One of the main objectives of this paper is to show that an attempt to describe and evaluate the external competence of the Community regarding intellectual property rights in the WTO must emphasise the great difference between services and intellectual property rights under the ECT and in the internal market.

To think that the same solutions to the problems regarding external competence can be applied to two areas so radically different on the internal

¹⁰⁹ Meunier/Nicolidis, p. 260.

¹¹⁰ See for an example of this view, Dutheil de la Rochère.

¹¹¹ See for an example of an author who considers the Commission's claims to exclusive competence regarding intellectual property rights as unfounded Eeckhout, p. 32-33. The only argument put forth to include intellectual property rights is that it is essential for the unity of action in WTO, see for an example Dutheil de la Rochère.

level as services and intellectual property rights would be naïve. As an example the main argument for an exclusive competence from Opinion 1/75 discussed above could well apply to services, but is as we have seen very hard to apply as far as intellectual property rights are concerned.

6 The Successive Amendments to Article 133

The ECJ itself hinted at all the possible problems that the shared competence solution in Opinion 1/94 might lead to:

‘...the Member States will, in the context of the WTO, undoubtedly seek to express their views individually on matters falling within their competence whenever no consensus has been found. Furthermore, interminable discussions will ensue to determine whether a given matter falls within the competence of the Community, so that the Community mechanisms laid down by the relevant provisions of the Treaty will apply, or whether it is within the competence of the Member States, in which case the consensus rule will operate. The Community’s unity of action vis-à-vis the rest of the world will thus be undermined and its negotiating power greatly weakened.’¹¹²

In order to address these problems, all successive treaties have made amendments to Article 133. They will be analysed in the present chapter amendment by amendment and summed up in the end of this chapter.

6.1 The Amsterdam Amendment to Article 133

At the inter-governmental conference that drafted the Amsterdam Treaty, the Commission argued in favour of an amendment of Article 133 that would include intellectual property rights and cover all annexes to the WTO Agreement.¹¹³ But the Member States, who had argued the opposite in Opinion 1/94, did not agree to this. Finally, it was agreed upon to add a new Paragraph 5 to Article 133:

‘The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.’

First of all it should be noted that reference is made here to ‘intellectual property’ in general, and not to ‘trade-related intellectual property rights’ as in TRIPs. It would seem as the broader ‘intellectual property rights’ ought to cover the narrower ‘trade-related intellectual property rights’. Dashwood has however analysed the wording of the Masterdam amendment as not covering TRIPs. This is because Article 133 relates to the common commercial policy in combination with the fact that the ECJ in Opinion 1/94 held that the primary goal of TRIPs is to harmonise intellectual property law.¹¹⁴ Although this is seemingly far fetched it points at a disturbing and reappearing problem in all attempts to include TRIPs in Article 133, created by the ECJ’s interpretation of the objective of TRIPs.

¹¹² Opinion 1/94, para. 106.

¹¹³ Eeckhout, p. 49.

¹¹⁴ Dashwood 2000, p. 281.

Paragraph 5 refers only to the external competence, ‘*to international negotiations and agreements*’. This means that Paragraph 5 tries to give the Community external but not internal competence, in an attempt to separate internal from external competence. But that leaves us with the problem of how to implement an international agreement negotiated by the Community. How can the Member States be forced to implement an agreement in areas where they hold the internal competence?

The strange mechanism of Paragraph 5 meant that in order to reach a situation where a qualified majority can make a decision, a unanimous decision must be taken first. Hardly surprising, the procedure envisaged in Paragraph 5 was never used.¹¹⁵ Since a consensus for a real change could never be reached no real reform took place. The final amendment didn’t alter anything substantial to Opinion 1/94.

From an institutional point of view this new Paragraph 5 seems to give ‘*Kompetenz-Kompetenz*’ to the Community. Paragraph 5 says that the Council can give competence to the Community. This is awkward since the Council is not the Member States, but usually representatives of the Member States’ governments that do not have the power to transfer competence under national law.¹¹⁶

6.2 The Nice Amendment to Article 133

The bad experience from the Paragraph 5 of the Amsterdam Treaty made the European Council at Nice opt for an inclusion, with several derogations, of intellectual property in the field of application of Article 133.

In 2000 trade had become a hot topic due to the increased globalisation and the corresponding anti-globalisation activists that had popped up in the world.¹¹⁷ In December 1999, on the eve of the inter-governmental conference in Nice, trade talks in Seattle, set against chaotic street demonstrations, had ended in the failure to launch a new round of multilateral trade talks. This made Member States even more reluctant to give up their competence in matters of trade, since that would be a sensitive issue on the home arena. However, the enlargement of 2005 would require changes on a wide scale in the decision-making, including on external trade matters. 25 countries would represent even more disparate interests than the 15 at Amsterdam had done, so now was the time for action.¹¹⁸

6.2.1 The Debate at the Intergovernmental Conference

Before plunging into the meaning of this complex amendment some of the proposals that were discussed in Nice will be looked in to.

The intergovernmental conference that led to the Nice Treaty was a bit different. This time the Member States were actually showing a willingness to enlarge the applicability of Article 133 in order to cover the whole WTO Agreement including TRIPs, albeit with the reservation that they did not

¹¹⁵ Neframi, p. 608.

¹¹⁶ Eeckhout, p. 49.

¹¹⁷ Meunier/Nicolaïdis, p. 251.

¹¹⁸ Ibid., p. 252.

want to transfer any internal powers or sovereignty.¹¹⁹ The conference came up with several proposals to changes in Article 133. Two of these will be examined to illustrate the two main possibilities of incorporating intellectual property rights in Article 133.

6.2.1.1 Including Intellectual Property Rights in the Definition of Paragraph 1 of Article 133

The Commission proposed that services, investments and intellectual property should be included in the definition of the common commercial policy in Paragraph 1 of Article 133.¹²⁰

That would solve the problem of the external competence in the WTO once and for all. Only this was exactly what the Commission had argued before the Court in the Opinion 1/94. And exactly as in Opinion 1/94 the internal procedures blocked the external competence. The Council and the Member states had not liked this idea in 1994 and they did not like it any more in the year 2000, so the proposal was rejected.

The proposition of the Commission is, however, more than just a repetition of their view from the Opinion in 1994. Their new proposition is made in order to reflect the WTO Agreement. The proposition covers not only intellectual property, but also services and investments. On the external level this is an obvious solution if the EU is to be able to negotiate as one body at all times and effectively avoids the problems of a shared competence that the interpretation manifested in Opinion 1/94 had created. But this solution fails to address the internal problems linked to the external competence.

Including intellectual property in the definition of the common commercial policy would inevitably lead to an overruling of the decision rules and an ill-masked attempt at conferring more competence on the Community.

6.2.1.2 An Extension of the Scope of Article 133

Another proposition was to insert certain aspects of intellectual property rights into the scope of Article 133, as an annex to the first Paragraphs.¹²¹

This proposition would avoid including intellectual property in the definition of Paragraph 1, yet manage to include TRIPs by means of a protocol. Thus competence was extended to cover TRIPs but without really expanding the common commercial policy in a definite manner. In choosing to make reference to a protocol it showed that it was a case-by-case choice whether or not to allow the exclusive competence of the Community. To some point this solution reminds us of the awkward solution of the Amsterdam Treaty. In the end what was put on the protocol must be decided unanimously, and what would then be the point of it all? However, part of this solution was retained in the Paragraph 5 of the present Nice Treaty and will be discussed in the following.

¹¹⁹ Eeckhout, p.49.

¹²⁰ ‘Note of the Presidency on expanding the qualified majority voting’, CONFER 4789/00, Brussels, 26 October 2000, p. 4.

¹²¹ Ibid., p. 5-7.

6.2.2 The Final Amendment

The amendment contained a new Paragraph 5, the complexity of which merits its extensive citation:

'Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, insofar as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations insofar as such agreements comply with Community law and other relevant international agreements.'

This new Paragraph 5 refers to '*commercial aspects of intellectual property rights*' and is thus narrower than Paragraph 5 in the Amsterdam Treaty. Placing '*commercial aspects of intellectual property rights*' in Paragraph 5 means that it is not part of the definition of the common commercial policy, which is found in Paragraph 1. But intellectual property rights still come within the scope of Article 133 as some sort of appendix to the common commercial policy. But regarding the '*commercial aspects of intellectual property*' competence lies with the Council and decision-making requires unanimity. According to sub-paragraph 2 of paragraph 5, unanimity is required where internal rules would require it.

So far, it seems as though Paragraph 5 confers exclusive external competence to the Community. But sub-paragraph 4 says that Paragraph 5 '*shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations*'. So the shared competence remains unaltered.¹²²

The Community can still negotiate other intellectual property questions that do not fall within Paragraph 5 by a special ad hoc decision, reminding of the solution used in the Amsterdam Treaty, according to the new Paragraph 7. As far as TRIPs is concerned one is left wondering whether Paragraph 5 or Paragraph 7 applies. In Opinion 1/94 the ECJ interpreted TRIPs as not commercial. This vital question remains unclear. If TRIPs is not covered by the new reference to '*commercial aspects*' then its inclusion in Article 133 really doesn't add anything to the exclusive external

¹²² This interpretation is supported by Herrmann, p. 19.

competence of the Community. It must then be interpreted as a reference to the ancillary provisions relating to intellectual property rights that were covered by paragraphs 1-4 already, according to Opinion 1/94. But then the words '*insofar as those agreements are not covered by the said paragraphs*', that are a reference to paragraphs 1-4, would make no sense. The history of the negotiations also implies that Paragraph 5 should cover TRIPs.¹²³ But none of these reasons would hinder the ECJ from regarding TRIPs as not falling under Paragraph 5.

Paragraph 5 operates a dichotomy between external and internal competence in that it gives only external but not internal competence to the EU.¹²⁴ An exclusive competence on the external level and a continued shared competence on the internal level. This is a tempting solution since it seems at first sight to solve the internal institutional problem. However, it is not quite that easy, as the external competence and the internal competence remain inextricably linked.

Once again, unanimity is required which robs Paragraph 5 of all its potential as a solution to the problem, in much the same way as it had Paragraph 5 of the Amsterdam Treaty. The cases referred to when unanimity would not be required are the same as the ones covered by implied powers in Opinion 1/94.

The amendment to Article 133 did not change the external competence, which remains shared in regard to TRIPs, as it had been after Opinion 1/94.¹²⁵

The Nice Treaty amendment to Article 133 can be interpreted in many different ways. The only thing that can be said with certainty is that it is a very complex and obscure provision; it has been referred to as a '*Chinese law*'.¹²⁶ The amendment is reminiscent of a move towards the Community's exclusive handling of all negotiations in the WTO. Still, under all the make-up, the amendment seems to have changed very little since Opinion 1/94.¹²⁷ Hermann wrote an article on the Nice amendment with the illustrative title '*Common commercial policy after Nice: Sisyphus Would Have Done a Better Job*'.¹²⁸ After all the work and negotiating that had been put down at the intergovernmental conference, the Community could look at the problem of the external competence and TRIPs tumbling down the hill to where it had been prior to the Amendment.

6.3 Article III-315 in the Unratified Constitutional Treaty

The Conventions Working Group on External Action focused on decision-making.¹²⁹ The amendment to Article 133 by the unratified Constitutional

¹²³ Herrmann, p. 18.

¹²⁴ Neframi, who means that this is the great contribution of the Nice Treaty and is generally optimistic about the Nice amendment. Hermann and Eeckhout, who are sceptical to this mechanism.

¹²⁵ Eeckhout, p. 53.

¹²⁶ Grard, p.381.

¹²⁷ This is the general opinion, see Herrmann and Eeckhout, p. 53. For a more positive commentary on the Nice Amendment to Article 133 see Neframi.

¹²⁸ Hermann.

¹²⁹ Eeckhout, p. 53. For detailed information see the Working Group's paper CONV 850/03 of 18th July 2003.

Treaty must be seen in the context of the new decision-making procedures that were envisaged for the common commercial policy.

Article III-315 is the direct replacement of Article 133. Compared with its predecessor it is a model of clarity. Concerning intellectual property rights, Article III-315 now has '*commercial aspects of intellectual property rights*' within the definition of the common commercial policy in paragraph 1, however with the restriction of unanimity when it is called for by internal competence, paragraph 4. There is also a safeguard in paragraph 5, that specifically states that an international agreement '*shall not affect the delimitation of internal competences*', and '*shall not lead to harmonization legislative or regulatory provisions of Member States insofar as the Constitution excludes such harmonization*'.

Article III-315 would achieve the dissolution of the categories of shared competence.¹³⁰ This feat must be seen in relation to the new decision-making. It is a great difference to hand an exclusive competence to the Commission and decision-making by a qualified majority, as was argued in Opinion 1/94, and handing an exclusive competence to the Council and decision-making by unanimity as would now be the case.

The above-discussed reform of decision-making in the common commercial policy might also be a reason that the Member States are ready to give up the shared competence. Decision-making in the common commercial policy, would, with the new Constitutional Treaty, be a lot more transparent and democratic, including the European Parliament to a greater extent.

Paragraph 5 seems to provide a guarantee that Member States would not be overruled or sidestepped.

One great difficulty would remain in the otherwise clear Article III-315. Only '*commercial aspects*' of intellectual property rights are covered by the definition. How shall we interpret what is commercial and what is not? This will be distinguished by a finalist approach (if it is commercial or not). So if the main objective is harmonisation of intellectual property rights protection the competence will not be exclusive. What then about TRIPs? According to the ECJ its primary objective is harmonization and not commerce. Does that mean that Article III-315 does not cover TRIPs? That can hardly have been the intention of the drafters of the Constitutional Treaty.

6.4 The Nature of the Exclusivity in the Amendments to Article 133

As the analysis in this chapter shows, all of these amendments have in some way tried to achieve a more exclusive external Community competence. This is to a great extent due to the never-ending zeal shown by the Commission to push in such a direction, despite reluctance on behalf of the Member States. Some of the findings from the analysis in this chapter are synthesised below to show some remaining problems.

6.4.1 The Scope of the Reference to Intellectual

¹³⁰ Blin, p. 93.

Property Rights

Already in the Amsterdam Amendment, which referred to ‘*intellectual property rights*’ in a general manner, interpretations were made to the extent that TRIPs was in fact not covered by this reference. This is of course highly disputable but still shows the great problems with including a reference to intellectual property rights in Article 133, that concerns trade, whereas the ECJ in Opinion 1/94 had clearly stated that it regarded the primary objective of TRIPs as being to achieve harmonisation of intellectual property protection and not trade related, despite the name of the Agreement. The Nice Amendment did not make this situation any better with its reference to ‘*commercial aspects*’ of intellectual property rights. Here it is definitely questionable whether TRIPs can fall under such a reference. According to the ECJ there was nothing commercial about TRIPs. The same goes for the unratified Constitutional Treaty. In order to solve this problem in a definite way, a direct reference to TRIPs would have to be introduced in Article 133.

6.4.2 Separating External and Internal Competence

Since the Nice Amendment, there has been, at least in the letters of Article 133, a separation of external and internal competences. This paper contends that this is not a realistic approach, as it goes against the reasoning of the Court in Opinion 1/94 when it stated that an exclusive external competence where there is no exclusive internal competence might lead to institutional problems if the rules on internal decision-making are by-passed. And problems would certainly arise if a Member State refused to implement a harmonisation of intellectual property rights in a field that was not covered by an exclusive internal competence.

6.4.3 Towards an Exclusive Competence with Unanimous Decision-making in the Council

The general trend in all these amendments is towards an exclusive external competence, but one where the decision-making is unanimous in the Council and not qualified majority decisions as is the normal procedure under Article 133. That way the effect of all of these amendments would not lead to any great changes pragmatically. Unanimous decision-making would apply in most cases and that makes it difficult to reach a common position, since the Member States could still veto ‘indirectly’ in the Council to safeguard their national interests. So it’s not at all the powerful exclusive external competence that the Commission wanted in Opinion 1/94. However, this system would lead to the significant benefit of keeping squabbles between the Member States and the Community within the EU, since it would effectively hinder Member States from negotiating a separate agreement with a third country if no common position is reached. Third

countries would thus not be able to benefit from disunity in the EU and the unity of action would not be infringed.

7 The Practice of Shared Competence in the WTO

In Opinion 1/94, the ECJ had stressed the practical importance of cooperation under the shared external competence regarding TRIPs:

*'The duty to cooperate is all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which are inextricably interlinked, and in view of the cross-retaliation measures established by the Dispute Settlement Understanding. Thus, in the absence of close cooperation, where a Member State, duly authorized within its sphere 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 113 of the Treaty. Conversely if the Community were given the right to retaliate in the sector of goods but find itself incapable of exercising that right, it would, in the absence of close cooperation, find itself unable, in law to retaliate in the areas covered by GATS or TRIPs, those being within the competence of the Member States.'*¹³¹

This chapter examines how the shared competence and the 'duty to cooperate' have functioned so far in the WTO in regard to the worries of the ECJ.

7.1 Mixed Agreements – the Modus Operandi of Shared Competence

When the Community and its Member States conclude an agreement together it is called a mixed agreement. Mixity has been defined as '*the legal formula enabling the Community and the Member States to negotiate, conclude and implement an international agreement whose subject-matter falls within the competence of both*'.¹³²

This formula enabled the Community to enter into international agreements alongside the Member States. It is a formula that has been accepted by the ECJ as well as by third countries.¹³³ It has permitted the Community to conclude agreements and enter into international organisations on a wide range of topics, from environment to development issues, the most famous being the WTO Agreement.

Whenever there is a shared competence, recourse is made to a mixed agreement. The 'duty of cooperation' is a reference to the necessary cooperation between the Community and the Member States in negotiating, concluding and implementing such an agreement, as well as how to act under such an agreement as the WTO.

¹³¹ Opinion 1/94, para. 109.

¹³² Definition quoted from Koutrakos, p. 150.

¹³³ Heliskoski, p. 2.

7.2 The 'Duty of Cooperation' under the DSU

Article 22 of the DSU, an annex of the WTO Agreement, introduces the principle of cross-retaliation in order to make the system of sanctions more effective. It is a reflection of the single undertaking that the WTO Agreement represents. Cross-retaliation has been a major argument against a shared competence.¹³⁴

In 1998, the United States initiated two different proceedings against Ireland and the Community.¹³⁵ The two proceedings were identical and covered the violation of a number of TRIPs provisions by the Irish legislation. However no problem arose since the pragmatic solution to join the proceedings was reached. The same happened in another set of identical double proceedings, this time against Greece and the Community, also concentrating on intellectual property rights.¹³⁶ So the question of who is competent has not had any direct implications on the ability of the Community to act within the WTO. As in the case of negotiations, the Commission takes on a role of single representative, thus enabling the Community and the Member States to stand united without changing the competence. But, as Heliskoski has noted, Member States might be suspicious of the motives of the Commission.¹³⁷ It is not unthinkable that the Commission would be as interested as a third country to get a Member State to agree to legislative changes, by letting a third country do its 'dirty work'. A 'harmonisation' might that way be created under the DSU instead of following the internal Community procedures.

7.3 The Negotiation of a Mixed Agreement under TRIPs

7.3.1 The Formula Used in the Uruguay Round

The Council, the Commission and the Member States have worked with different informal arrangements in order to fulfil the duty of cooperation. The legal basis for these informal arrangements is unclear.¹³⁸

The formula used when negotiating the WTO Agreement in the Uruguay Round, also known as the 'Punta del Este formula', was based on two principles. First, the complicated questions of defining competence between the Community and the Member States did not have any bearing on the

¹³⁴ This argument has been brought forth by most authors negative towards Opinion 1/94, e.g. Dutheil de la Rochère, p. 470, Footer, pp. 88-89.

¹³⁵ See Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights – Request for the Establishment of a Panel by the United States, WTO doc WT/DS82/2 of 12 Jan 1998 and European Communities – Measuring Affecting the Grant of Copyright and Neighbouring Rights – Request for the Establishment of a Panel by the United States, WTO doc WT/DS115/2 of 12 Jan 1998.

¹³⁶ European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs – Request for Consultations by the United States, WTO doc WT/DS124/1 of 7 May 1998 and WTO doc WT/DS125/1 of 7 May 1998.

¹³⁷ Heliskoski, p. 188-189.

¹³⁸ Timmermans 2000, p. 243.

negotiation of the Agreement. Secondly, the negotiations did not imply any commitment in regard to the allocation of competence. What this meant practically was that the Commission could continue to conduct the negotiations as a sole negotiator, but that this did in no way imply that the Commission or the Community actually had an exclusive competence to negotiate. This was expressed in these wordings '*in order to ensure the maximum consistency in the conduct of the negotiations, it was decided that the Commission would act as the sole negotiator on behalf of the Community and the Member States*'.¹³⁹

This is the approach used when negotiating mixed agreements in the WTO System. In making the Commission the 'external representative' of the Community and the Member States unity of action is achieved on an 'external level'. But problems remain on the 'internal level'.

7.3.2 Reaching a Common Position

7.3.2.1 The Common Position of the Member States

The fact that the Commission is the sole negotiator does not solve the fact that the opinions of the Community as well as that of different Member States may differ widely. The different national positions still have to be negotiated on an 'internal level' between the Member States in order to reach a joint position that the Commission can then go on to negotiate on the 'external level' with third countries in WTO.

How to reach a joint position is determined on a case-to-case basis.

7.3.2.2 The Community Position

Today the Community position is reached under the procedure of Article 300 (ex Article 228). As a rule in the Council by qualified majority, but there are some exceptions. One of them being notably when unanimity is required on the internal level.¹⁴⁰ In most cases concerning intellectual property rights unanimity would be required in the Council to adopt the Community position. Hence the national positions and differences would be present, indirectly, in the Council as well.

7.3.2.3 Coordinating the Community Position and the Common Position of the Member States

This coordination of the common position of the Member States and the Community position is one absurdity of a system where the Member States negotiate through their own organisation as well as on their own. However, at this point it should not be too difficult to coordinate the positions since unanimity is required to a great extent when it comes to intellectual property rights. This means that the positions should be about the same at this stage. The actual coordination usually takes place rather informally, in the Council, in working groups or in COREPER.¹⁴¹

So far, the informal procedures for finding a common position have worked out well.¹⁴² But a more formal procedure that could be enforced is

¹³⁹ Koutrakos, p. 160.

¹⁴⁰ Article 300 Paragraphs 1 and 2.

¹⁴¹ Timmermans 2000, p. 245.

¹⁴² Ibid., p. 245.

of course better in the event that problems would arise. The legal base for such a formalised procedure is not clear however.

7.3.2.4 The 'Solemn' Procedure of Conclusion

Normally, the 'solemn' procedure is used in mixed agreements by the Community.¹⁴³ Consequently, ratification is needed, and that the signing in itself is not a definite consent to be bound by the international agreement. Hence, the period of time between the signing and the actual ratification, or conclusion as it is called in mixed agreements, is often long.¹⁴⁴ One reason for the use of the 'solemn' procedure is that it is justified from a political and democratic perspective. The ratification process allows for national parliaments to have a say when this is required under national law.¹⁴⁵

7.4 The Idea of a Code of Conduct

With a more formalised duty of cooperation more transparency and discipline could be reached.¹⁴⁶ It would also prevent future squabbling between the Commission, the Council and the Member States if their roles were clearly put down. Most attempts at a Code of Conduct have also contained some proposition on decisions by qualified majority in order to break a deadlock when no common position can be reached.

A Code of Conduct had already been made to ease the negotiations on transport and investment services in the Uruguay Round. A number of proposals to a Code of Conduct have been drafted; however none of them has been accepted so far in the field of intellectual property rights.¹⁴⁷ At the Nice Intergovernmental Conference several drafts were presented.

The Portuguese Presidency submitted a draft protocol to the Feira European Council in June 2000 that gives an idea of what a Code of Conduct could contain.¹⁴⁸ It provided for a single procedure applicable in all cases to substitute the case-by-case approach used so far. The Commission would be the sole negotiator and the Council would determine the common position by qualified majority. Member States would be able to participate in all meetings and communication between the Commission and the Member States would be guaranteed.¹⁴⁹

Regarding the DSU, the Commission should represent the Member States and defend them in order to uphold the unity of representation, however in close cooperation with the Member States.

¹⁴³ Heliskoski, p. 86.

¹⁴⁴ Koutrakos, p. 141.

¹⁴⁵ Heliskoski, p. 86.

¹⁴⁶ Timmermans 2000, p. 244.

¹⁴⁷ Koutrakos, p. 177.

¹⁴⁸ 'Protocol on arrangements for participation by the European Union (European Community and Member States) in WTO proceedings', CONFER 4750/00 Presidency report to the Feira European Council (Brussels, 14 June 2000).

¹⁴⁹ Koutrakos, p. 177.

7.5 Accepting Amendments to TRIPs

The recent case of an amendment to TRIPs is illustrative of the practice of shared competence. Some new rules with the object of allowing for the grant of compulsory licences for manufacturing pharmaceutical products to export to countries with a public health problem were to be incorporated into TRIPs as a new Article 29 bis and an annex. How did the EU proceed to tackle the competence question with regard to this amendment? The Commission presented a proposal for a Council decision.¹⁵⁰ Thus the observations made earlier, that point towards decision-making taking place in the Council, are confirmed.

7.6 General Assessment of the Shared Competence

The ability to cooperate and safeguard the unity of action of the Community and its Member States in the external negotiations has clearly been underestimated.¹⁵¹

In avoiding the direct question of competence, informal and pragmatic arrangements have permitted the negotiations to function on a day-to-day basis. More importantly, it has also permitted the EU to keep the competence problems on an ‘internal level’ in the WTO and present a united front and not let third countries benefit from quarrels between the Member States.

It is not to be denied, however, that danger lurks beneath the seemingly smooth surface. The legal basis for these proceedings is very insecure, and whereas the informality has thus far helped the Community and the Member States to reach a common position, it might serve them badly in times of trouble. These procedures have worked out well because they have ignored the legal problems of the competence divide, not because they have solved it. But with no formal arrangements to back them the Member States have no safeguard against disunity.

One problem is vagueness regarding to what extent the Community could negotiate under TRIPs without the Member States, if the Member States should choose to let it do so. Opinion 1/94 only answered that the Community had no exclusive competence to conclude TRIPs, it never said if it had a general competence. This is important when trying to formalise these proceedings. If the Community does not have competence at all in some aspects then a solution include the Member States to a large extent, at least when it comes to ratifying procedures. Otherwise the Commission could be given a mandate to negotiate and conclude agreements within that mandate. A solution that would be a lot less time consuming than the ‘solemn’ process, where all the Member States must ratify.

If we look at the action taken by the Member States they seem to prefer the insecurities of a shared competence. They have stuck to their competence and refused all attempts at a formalisation of the role of the

¹⁵⁰ This proposition of 27 April 2006 was later adopted as Regulation No 816/2006 on the 17 May 2006.

¹⁵¹ Koutrakos, p. 179.

Commission as the sole negotiator, or decisions by qualified majority in a Code of Conduct.

Hitherto, the duty of cooperation concerning TRIPs must be seen as a success on the pragmatic level. It has achieved a unity of action for the time being. Under the DSU the Community and the Member States have to cooperate to be able to work at all.¹⁵² As far as intellectual property rights are concerned it is uncertain whether Member States can negotiate on their own if no common position is reached. This paper has argued that they can not. This interpretation of the shared competence eliminates one of the greatest threats to a unity of action.

The success so far has in large parts been due to the fact that Member States have not used the means at their disposal for assuring their interests, such as vetoes.¹⁵³

¹⁵² Ni Chatháin, p. 477.

¹⁵³ Ibid., p. 477.

8 Conclusions

It is difficult to conclude that all the Member States benefit from TRIPs to the same extent. Hence, the national interests of the Member States must be safeguarded as well, in order for TRIPs not to be used as an excuse to harmonise on issues where a decision to harmonise could not be reached by the internal procedures in the ECT. Having the same level of protection in the internal market would doubtlessly increase trade and counteract the market dividing effects and other trade negative effects of intellectual property rights. But this is achieved by harmonising on a regional level in the EU and not globally under TRIPs. Harmonising intellectual property rights has always been a sensitive issue within the EU.

In essence, the choice between exclusive or shared external competence is a choice between supranationalism and intergovernmentalism. This is one reason why it has been so cumbersome to include intellectual property rights in the exclusive external competence of the common commercial policy under Article 133.

In reluctance of transferring sovereignty to the Community, the Member States have not been able develop an amendment that would make the external competence regarding TRIPs exclusive. Even if they did, and this would mean giving up more sovereignty, it is not easy to see the great advantages of an exclusive competence under Article 133.

The attempts to include a reference to TRIPs all operate a separation between the external and internal competence. This separation is futile in the view of the author. If only the external competence is exclusive, that means that a decision must first be reached on the external level. Then another decision must still be reached on the internal level, where the competence remains shared, in order to implement the international agreement concluded following the first decision.

Doing it the other way around seems infinitely simpler. If a decision to harmonise is made on the internal level, the external competence will follow suit and become exclusive, matching the internal competence as an implied competence. The approach to separate the external from the internal competence that is operated in Paragraph 5 Article 133 in the Nice Treaty only leads to incoherence with the principle of parallelism.

Another problem is that Article 133 is concerned with trade, whereas the objective of TRIPs, as interpreted by the ECJ, is harmonisation of intellectual property rights protection. This points to one of the main arguments developed in this paper; that intellectual property rights do not have any place in the common commercial policy to the extent that they have not been harmonised. This paper has highlighted how the internal market and the external trade of the Community under Article 133 are two sides of the same coin. Since intellectual property rights have no place in the internal market under the ECT, it follows that they ought not to have a place in the external trade under Article 133 either.

Intellectual property rights can be integrated in the internal market, but only by harmonisation. Alas, to keep up the coherence between the internal market and external trade, the external competence regarding TRIPs should not be exclusive unless as an implied exclusive competence following an internal harmonisation.

Together with GATT, the internal market and the common commercial policy formed a coherent triangle. It is important to note that the WTO is not

GATT. Article 133 was created in the context of GATT, at a time when the world economy was based on trade in goods. GATT may have evolved into the WTO, thus comprising TRIPs as well. But Article 133 is closely linked to the rest of the ECT and the internal market, and these have not evolved to include intellectual property rights to any extent motivating the inclusion of TRIPs under Article 133. They may evolve in that direction, through harmonisation, in which event an exclusive external competence will flow implicitly from such a harmonisation. In fact this is what is taking place.

The shared competence seems to have worked well so far in keeping the unity of action intact. This does not, however, mean that it is the most efficient approach. The solemn procedure in concluding international agreements, requiring the ratification of all Member States, is a slow process. On the other hand, it permits the national procedures to be followed, including parliamentary sessions when appropriate.

The greatest difficulty imposed by a shared competence is that it might lead to separate agreements being negotiated by the Member States if no common position is reached. Thus a shared competence could make the EU vulnerable, should its trading partners try to benefit from eventual internal divisions in the EU. Then the successful participation of the EU in the entirety of the multilateral trade negotiations within the WTO might be jeopardised. This would be alarming indeed, but is it the situation created by a shared competence regarding TRIPs?

This paper would argue that it is not. According to this author, the shared competence regarding TRIPs should be interpreted as a shared competence where the participation of both the Community and the Member States is legally necessary.

If that is indeed the case, the Community and the Member States are each others 'prisoners' and the Member States are not competent to negotiate on their own. The interpretation of the principle of parallelism carried out in this paper has led to this conclusion. If Member States were to be allowed to negotiate separately when no common position is reached, that would imply that their international agreements could hinder Community harmonisation under Article 95. This counteracts the very idea of the primacy of Community law as has been discussed in this paper. If the nature of the shared external competence regarding TRIPs is understood as excluding the possibility for Member States to negotiate separate deals, the greatest problem with a shared competence is avoided. It would also give more substance to the 'duty to cooperate'.

However, problems concerning qualified majority voting and the uncertain legal basis of procedural issues would still remain. All of these questions could be resolved in a binding Code of Conduct.

The fact remains that TRIPs is concerned with harmonisation. In the EU harmonisation should come from within for one simple reason. Unless the Member States are willing to harmonise intellectual property rights on the internal level they are not likely to be inclined to do so on the external level. Therefore, this paper concludes that a shared competence should be the preferred approach to the external competence of the Community in regard to TRIPs.

This shared competence, as it is an implied competence, is eventually becoming more and more exclusive. As the Directive 2004/48 shows the harmonisation in intellectual property rights continues, to a great extent inspired by TRIPs.

But before the EU starts discussing more harmonisation externally on a global level, it should look after its own house and harmonise intellectual property rights internally, in order to make the internal market more consistent with TRIPs.

Supplement - The Amendments to Article 133 (ex Article 113)

Article 133 Amsterdam Treaty

1. The common commercial policy 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 to be taken in the event of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.
The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.
The relevant provisions of Article 300 shall apply.
4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.
5. The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property insofar as they are not covered by these paragraphs.

Article 133 Nice Treaty

1. The common commercial policy 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 to be taken in the event of dumping or subsidies.
2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules.
The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue

to it. The Commission shall report regularly to the special committee on the progress of negotiations.

The relevant provisions of Article 300 shall apply.

4. In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.

5. Paragraphs 1 to 4 shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, in so far as those agreements are not covered by the said paragraphs and without prejudice to paragraph 6.

By way of derogation from paragraph 4, the Council shall act unanimously when negotiating and concluding an agreement in one of the fields referred to in the first subparagraph, where that agreement includes provisions for which unanimity is required for the adoption of internal rules or where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules.

The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.

This paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organisations in so far as such agreements comply with Community law and other relevant international agreements.

6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States.

Agreements thus negotiated shall be concluded jointly by the Community and the Member States.

The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.

7. Without prejudice to the first subparagraph of paragraph 6, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property in so far as they are not covered by paragraph 5.

Article III-315 Constitutional Treaty

1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

2. European laws shall establish the measures defining the framework for implementing the common commercial policy.

3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article III-325 shall apply, subject to the special provisions of this Article.

The Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.

4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority.

For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.

The Council shall also act unanimously for the negotiation and conclusion of agreements:

- (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;
- (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them.

5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Section 7 of Chapter III of Title III and to Article III-325.6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and

shall not lead to harmonisation of legislative or regulatory provisions of the Member States insofar as the Constitution excludes such harmonisation.

Bibliography

Books

Unless otherwise stated all references are to the 1st Edition.

Arup, C., ‘*The New World Trade Organization Agreements – Globalizing Law Through Services and Intellectual Property*’, Cambridge University Press, Cambridge, 2001.

Blumann, Claude & Dubois, Louis, ‘*Droit materiel de l’Union européenne*’, Paris, Montchrestien, 2006, 4th Edition [Cit. Blumann/Dubois].

Craig, Paul & de Burca, Gráinne, ‘*EU Law – Texts, cases and materials*’, Oxford, Oxford University Press, 2003, 3rd Edition [Cit. Craig/deBurca].

Eeckhout, Piet, ‘*External Relations of the European Union – Legal and Constitutional Foundations*’, Oxford, Oxford University Press, 2004.

Heliskoski, Joni, ‘*Mixed agreements as a technique for organizing the international relations of the European Community and its member states*’, The Hague, Kluwer Law International, 2001.

Koutrakos, Panos, ‘*EU International Relations Law*’, Oxford, Hart, 2006.

Lowenfeld, Andreas, ‘*International Economic Law*’, Oxford, Oxford Universtiyy Press, 2002.

Meunier, Sophie, ‘*L’union fait la force: L’Europe dans les négociations commerciales internationales*’, Paris, Sciences-Po Presses, 2005.

Trebilcock, Michael J. & Howse, Robert, ‘*The Regulation of International Trade*’, London, Routledge, 2005, 3rd Edition. [Cit. Trebilcock/Howse].

Articles

Editorial, ‘*The Aftermath of Opinion 1/94 or How to Ensure Unity of Representation for Joint Competence*’, CMLR 32, 1995, pp. 385-390 [Cit. Editorial CMLR 1995].

Auvret-Finck, Josiane, ‘*Avis 1/94 de la Cour, du 15 Novembre 1994*’, RTDE, 1995, pp. 322-336.

Grard, Loïc, ‘*La condition internationale de l’Union européenne après Nice*’, RAE 2000, pp. 334-388.

Dashwood, Alan, ‘*Implied External Competence of the EC*’, in Koskenniemi, Martti (ed.), ‘*International Law Aspects of the European Union*’, The Hague, Kluwer Law International, 1998 [Cit. Dashwood 1998].

Dashwood, Alan, ‘*E.C. External Relations Provisions Post-Amsterdam*’, in Dashwood, Alan & Hillion, Christophe (eds.), ‘*The General Law of E.C. External Relations*’, London, Sweet & Maxwell, 2000, pp. 279-286 [Cit. Dashwood 2000].

Dashwood, Alan & Heliskoski, Joni, ‘*The Classic Authorities Revisited*’, in Dashwood, Alan & Hillion, Christophe (eds.), ‘*The General Law of E.C. External Relations*’, London, Sweet & Maxwell, 2000, pp. 3-19.

Dutheil de la Rochère, Jacqueline, ‘*L’ère des compétences partagées*’, RMCUE, 1995, pp. 461-470.

Falkenberg, Karl F., ‘*The European Union’s Position in the Uruguay Round Negotiations*’, in Konstadinidis ‘*The Legal Regulation of the European Community’s External Relations after the Completion of the Internal Market*’, Aldershot, Dartmouth, 1996, pp. 63-70.

Footer, Mary E., ‘*Participation of the European Communities in the World Trade Organization*’, in Konstadinidis ‘*The Legal Regulation of the European Community’s External Relations after the Completion of the Internal Market*’, Aldershot, Dartmouth, 1996, pp. 71-106.

Herrmann, Christoph W., ‘*Common commercial policy after Nice: Sisyphus Would Have Done a Better Job*’, CMLR 39, 2002, pp. 7-29.

Jacobs, Francis G., ‘*The Completion of the Internal Market v the Incomplete Common Commercial Policy*’, in Konstadinidis ‘*The Legal Regulation of the European Community’s External Relations after the Completion of the Internal Market*’, Aldershot, Dartmouth, 1996, pp. 3-18.

Lenaerts, ‘*Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de « préemption »*’, in Demaret, Paul (ed.), ‘*Relations extérieures de la Communauté européenne et marché intérieur : aspects juridiques et fonctionnels*’, Bruges, Collège d’Europe, 1986, pp. 39-62.

Meunier, Sophie & Nicolaïdis, Kalypso, ‘*The European as a Trade Power*’ in Hill, Christopher & Smith, Michael (eds.), ‘*International Relations and the European Union*’, Oxford, Oxford University Press, 2005 [Cit. Meunier/Nicolaïdis].

Neframi, Eleftheria, ‘*La politique commerciale commune selon le Traité de Nice*’, CDE, 2001, pp. 605-646.

Ni Chatháin, Carmel, ‘*The European Community and the Member States in the Dispute Settlement Understanding of the WTO: United or Divided*’, ELJ, 1999, pp. 461-478.

Rosas, Allan, ‘*The European Union and Mixed Agreements*’, in Dashwood, Alan & Hillion, Christophe (eds.), ‘*The General Law of E.C. External Relations*’, London, Sweet & Maxwell, 2000, pp. 200-220.

Schütze, Robert, ‘*Parallel External Powers in the European Community: From ‘Cubist’ Perspectives Towards ‘Naturalist’ Constitutional Principles?*’, YEL 23, 2004, pp. 225-274.

Timmermans, Christiaan, ‘*La libre circulation des marchandises et la politique commerciale commune*’ in Demaret, Paul (ed.), ‘*Relations extérieures de la Communauté européenne et marché intérieur : aspects juridiques et fonctionnels*’, Bruges, Collège d’Europe, 1986, pp. 91-107.

Timmermans, Christiaan, ‘*Organising joint participation of E.C. and Member States*’, in Dashwood, Alan & Hillion, Christophe (eds.), ‘*The General Law of E.C. External Relations*’, London, Sweet & Maxwell, 2000, pp. 239-247 [Cit. Timmermans 2000].

Tridimas, Takis, ‘*The WTO and OECD Opinions*’, in Dashwood, Alan & Hillion, Christophe (eds.), ‘*The General Law of E.C. External Relations*’, London, Sweet & Maxwell, 2000, pp. 48-60.

Tridimas, Takis & Eeckhout, Piet, ‘*The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism*’, YEL 14, 1994, pp. 143-177.

Vinje, Thomas C., ‘*Harmonising Intellectual Property Laws in the European Union*’, EIPR, 1995, pp. 361-377.

Miscellaneous

‘*Completing the Internal Market*’, COM (85) 310, 14 June 1985.

‘*Protocol on arrangements for participation by the European Union (European Community and Member States) in WTO proceedings*’, CONFER 4750/00 Presidency report to the Feira European Council (Brussels, 14 June 2000).

‘*Note of the Presidency on expanding the qualified majority voting*’, CONFER 4789/00, Brussels, 26 October 2000

‘*Green Paper on the fight against counterfeiting and piracy in the Single Market*’, COM(98) 569 final

‘*Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights*’, COM (2003)46.

Table of Cases

European Court of Justice

Judgment of 31/03/1971, Commission / Council (Rec.1971, p. 263), 'AETR'.

Judgment of 12/07/1973, Hauptzollamt Bremerhaven / Massey Ferguson (Rec.1973, p. 897).

Opinion of 11/11/1975, Opinion 1/75 (Rec.1975, p. 1355).

Judgment of 14/07/1976 (Joined cases 3, 4 and 6/76), Cornelis Kramer and others (Rec.1976, p. 1279).

Opinion of 26/04/1977, Opinion 1/76 (Rec.1977, p. 741).

Judgment of 20/02/1979, Rewe / Bundesmonopolverwaltung für Branntwein (Rec.1979, p. 649), '*Cassis de Dijon*'.

Judgment of 05/05/1981, Commission / United Kingdom (Rec.1981, p.1045).

Opinion of 19/03/1993, Opinion 2/91 (Rec.1993, p. I-1061).

Opinion of 15/11/1994, Opinion 1/94 (Rec.1994, p. I-5267).

WTO Decisions

Ireland – Measures Affecting the Grant of Copyright and Neighbouring Rights – Request for the Establishment of a Panel by the United States, WTO doc WT/DS82/2 of 12 Jan 1998.

European Communities – Measuring Affecting the Grant of Copyright and Neighbouring Rights – Request for the Establishment of a Panel by the United States, WTO doc WT/DS115/2 of 12 Jan 1998.

European Communities – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs – Request for Consultations by the United States, WTO doc WT/DS124/1 of 7 May 1998 and WTO doc WT/DS125/1 of 7 May 1998.