

# Oxford Public International Law

## **The Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, Commission of the European Communities, Opinion of the Court of Justice, Opinion 1/94, [1994] ECR I-5267, ILEC 007 (CJEU 1994), 15th November 1994, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]**

**Date:** 15 November 1994

**Citation(s):** Opinion 1/94 (Official Case No)

[1994] ECR I-5267 (Official Citation)

ILEC 007 (CJEU 1994) (OUP reference)

**Content type:** European Court of Justice decisions

**Product:** Oxford Reports on International Law [ORIL]

**Module:** International Law in EU Courts [ILEC]

**Jurisdiction:** Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ]

**Parties:** Commission of the European Communities (European Commission)

**Judges/Arbitrators:** René Joliet; Francis G Jacobs; Carl Otto Lenz; Giuseppe Tesauro; Georges Cosmas; Philippe Léger; Michael Bendik Elmer

**Procedural Stage:** Opinion of the Court of Justice

### **Related Development(s):**

*Joined Cases 3, 4 and 6/76 (Cornelis Kramer and ors)*, Judgment of the Court of Justice, Joined Cases 3/76, 4/76 and 6/76, [1976] ECR 1279, 14 July 1976 (implied powers doctrine, exclusivity)

*Opinion 2/92 'Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment'*, Opinion of the Court of Justice, [1995] ECR I-521, 24 March 1995 (scope of common commercial policy, exclusivity)

*Opinion 2/00 'Cartagena Protocol'*, Opinion of the Court of Justice, [2001] ECR I-09713, 6 December 2001 (scope of common commercial policy, exclusivity)

*'Open Skies'*, Judgments of the Court of Justice, Case nos C-467/98, C-468/98, C-469/98, C-470/98, C-471/98, C-472/98, C-472/98, C-473/98, C-474/98, C-475/98 and C-476/98, [2002] ECR I-09519, [2002] ECR I-09855, 5 November 2002 (exclusivity)

*Opinion 1/03 'Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'*, Opinion of the Court of Justice, [2006] ECR I-01145, 7 February 2006 (exclusivity)

*Opinion 1/08 'Conclusion of agreements in the context of the General Agreement on Trade in Services (GATS)', Opinion of the Court of Justice, [2009] ECR I-11129, 30 November 2009 ( scope of common commercial policy, exclusivity)*

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**Subject(s):**

Legal representation, right to — Intellectual property — International customs law — Most-favoured-nation treatment (MFN) — Public procurement — Rules of origin — Subsidies — Technical barriers to trade — Treaties, conclusion — EC Law, relationship with international law

**Core Issue(s):**

Whether the European Community ('EC') (now European Union ('EU')) had exclusive competence to conclude the World Trade Organization Agreement and its annexes.

Whether the EC had exclusive competence to conclude the Multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

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## **Facts**

**F1** As a result of the Uruguay round of multilateral trade negotiations launched by the Punta del Este Ministerial Declaration (20 September 1986) GATT Doc MIN DEC 6, reprinted (1987) GATT, *BISD* 33d Supp 20–21, the following agreements were annexed to the Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 154; (1994) 33 ILM 1144, entered into force 1 January 1995 ('WTO Agreement'):

- Annex 1A: Multilateral Agreements on Trade in Goods (14 April 1994) (1994) 33 ILM 1154, entered into force 1 January 1995, including the General Agreement on Tariffs and Trade (15 April 1994) 1867 UNTS 187; (1994) 33 ILM 1153, entered into force 1 January 1995 ('GATT') ; Agreement on Agriculture (15 April 1994) 1867 UNTS 410, entered into force 1 January 1995; Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) 1867 UNTS 493, entered into force 1 January 1995 ('SPS Agreement'); Agreement on Technical Barriers to Trade (15 April 1994) 1868 UNTS 120, entered into force 1 January 1995 ('TBT Agreement').
- Annex 1B: General Agreement on Trade in Services (15 April 1994) 1869 UNTS 183; (1994) 33 ILM 1167, entered into force 1 January 1995 (GATS').
- Annex 1C Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 1869 UNTS 299; (1994)33 ILM 1197, entered into force 1 January 1995 ('TRIPS'), including trade in counterfeit goods.

**F2** On 15 December 1993, the Trade Negotiations Committee—a body specially set up by the Punta del Este Conference to conclude the Uruguay Round negotiations—approved the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, (15 April 1994), 1867 UNTS 14, (1994) 33 ILM 1143 ('Final Act').

**F3** At its meeting on 7 and 8 March 1994, the Council decided to proceed to the signature of the Final Act and the WTO Agreement. It authorized the President of the Council and Commissioner Sir Leon Brittan to sign the Final Act and the WTO Agreement at Marrakesh on 15 April 1994 on behalf of the Council of the European Community ('EC') (now European Union ('EU')). The representatives of the member states—who took the view that those acts 'also cover[ed] matters of national competence'—agreed on the same date that they would proceed to sign the Final Act and the WTO Agreement. The European Commission ('Commission'), for its part, had recorded in the minutes its view that 'the Final Act (...) and the agreements annexed thereto fall exclusively within the competence of the European Community'.

**F4** On 6 April 1994 the Commission put forward a request for an opinion pursuant to Article 228(6) of the Treaty Establishing the European Community (25 March 1957) Official Journal C 325 (24 December 2002), entered into force 1 January 1958 ('EC Treaty'), to ascertain, first, whether or not the EC had exclusive competence to conclude the Multilateral Agreements on Trade in Goods, in so far as those Agreements concerned European Coal and Steel Community ('ECSC') and Euratom products. Those questions further related to the exclusive competence the EC may have enjoyed by virtue of either Article 113 EC Treaty, or the parallelism of internal and external competence, or Article 100(a) EC Treaty or Article 235 EC Treaty, to conclude the GATS and TRIPS.

## **Held**

**H1** The request for an opinion pursuant to Article 228(6) EC Treaty was admissible at any time before the EC's consent to be bound by the agreement was finally expressed. Unless and until that consent was given, the agreement remained an envisaged agreement. (paragraph 12)

**H2** In their capacity as the states responsible for the international relations of their dependent territories which were outside the scope of EC—and not as member states of the EC—the states responsible for those territories could participate in the agreements. However, this did not affect the problem relating the demarcation of spheres of competence within the EC. (paragraphs 17, 18)

**H3** The fact that the member states would have borne some of the expenses of the World Trade Organization ('WTO') did not of itself justify participation of the member states in the conclusion of the WTO Agreement. (paragraph 21)

**H4** The exclusive competence of the EC to conclude the Multilateral Agreements on Trade in Goods could not be impugned on the ground that they also applied to Euratom or ESCS products. (paragraphs 24, 27)

**H5** The fact that the commitments entered into under the Agreement on Agriculture required internal measures to be adopted on the basis of Article 43 EC Treaty did not prevent the international commitments themselves from being entered into pursuant to Article 113 EC Treaty alone. (paragraph 29)

**H6** The SPS Agreement could be concluded on the basis of Article 113 EC Treaty alone. (paragraph 31)

**H7** The TBT Agreement fell within the ambit of the common commercial policy. (paragraph 33)

**H8** It followed that the EC had the exclusive competence, pursuant to Article 113 EC Treaty, to conclude the Multilateral Agreements on Trade in Goods (paragraph 34)

**H9** Trade in services could not immediately, and as a matter of principle, be excluded from the scope of Article 113 EC Treaty. Regard had to be given to the definition of trade in services in the GATS. (paragraphs 41, 42)

**H10** Cross-frontier supplies not involving any movement of persons, as in Article I(2) of the GATS, were considered not different from trade in goods and therefore fell within the ambit of the common commercial policy. (paragraphs 43, 44)

**H11** The other three modes of supply of services referred to by Article I(2) of the GATS as 'consumption abroad', 'commercial presence', and the 'presence of natural persons' entailed the movement of persons. As Article 3 of the Treaty on European Union (7 February 1992) Official Journal C 325 (24 December 2002), entered into force 1 November 1993 ('TEU'), distinguished between 'a common commercial policy' and 'measures concerning the entry and movement of persons', these three modes of supply of services could not be regarded as falling within the common commercial policy. (paragraphs 46, 47)

**H12** The particular services comprised in transport are the subject of a specific title of the TEU, distinct from the title on the common commercial policy. Consequently, international agreements in transport matters were not covered by Article 113 EC Treaty, despite the enactment by the Council and the Commission, on the basis of Article 113 EC

Treaty, of a series of embargoes involving the suspension of transport services. (paragraphs 48, 51, 52, 53)

**H13** Apart from those of its provisions which concerned the prohibition of the release into free circulation of counterfeit goods, the TRIPS did not fall within the scope of the common commercial policy. (paragraph 71)

**H14** The EC's exclusive external competence could not automatically flow from its power to lay down rules at the internal level. Only in so far as common rules had been established at the internal level did the external competence of the EC become exclusive. (paragraphs 77, 81)

**H15** The preservation of the coherence of the internal market did not justify the conclusion of the GATS by the EC alone. Attainment of freedom of establishment and freedom to provide services for nationals of the member states were not inextricably linked to the treatment to be afforded in the EC to nationals of non-member countries or in non-member countries to nationals of member states of the EC. (paragraphs 83, 86)

**H16** An internal power to harmonize which had not been exercised in a specific field could not confer exclusive external competence in that field and Article 235 EC could not in itself vest exclusive competence in the EC at the international level. The EC had not included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries. (paragraphs 88, 89, 95)

**H17** It followed that the competence to conclude the GATS had to be shared between the EC and the member states. (paragraph 98)

**H18** As regards intellectual property, the harmonization achieved within the EC in certain areas covered by the TRIPS was either partial or non-existent. Consequently, the EC and its member states were jointly competent to conclude TRIPS. (paragraphs 103, 105)

**H19** The duty to cooperate was all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which were inextricably interlinked, and in respect of which a dispute settlement system was established involving cross-retaliation measures. (paragraph 109)

Date of Report: 15 April 2013

**Reporter(s):** Yole Tanghe

### ***Analysis***

**A1** The importance of this opinion was twofold: on the one hand it further determined the scope of the concept of 'common commercial policy'; on the other hand it clarified the doctrine of implied powers and exclusivity.

**A2** The question of the exclusive competence to conclude the various WTO Agreements was closely related to the concept of 'common commercial policy', because it is established case law that the EC is exclusively competent to conclude agreements in matters falling within the scope of 'common commercial policy', which was explicitly confirmed by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, (17 December 2007) Official Journal C 306, Entered into force 1 December, 2009 ('Treaty of Lisbon') in Article 3(1) TEU. See, *Draft understanding on a Local Cost drawn up under the auspices of the OECD*, Opinion of the Court of Justice, Opinion 1/75, [1975] ECR 01355, 11 November 1975 and *International Agreement on*

*Natural Rubber*, Opinion of the Court of Justice, Opinion 1/78, [1979] ECR 2871, 4 October 1979 ('Opinion 1/78').

**A3** Article 133 EC Treaty defined the 'common commercial policy' concept by enumerating subject matters falling within its scope. In Opinion 1/78, the Court advocated a broad interpretation of the concept and established that the enumeration in Article 133 EC was non-exhaustive. In this Opinion 1/94, the scope of 'common commercial policy' was further delimited.

**A4** First, the Court—by referring to the trade objectives of the various WTO Agreements on trade in goods—considered within the realm of common commercial policy external trade in all kinds of goods, including Euratom and ECSC products, as well as the establishment of an agricultural trading system and the adoption and enforcement of sanitary and phytosanitary measures and technical regulations and standards. Consequently, the Court came to a broad conception of 'trade' and ruled that the EC had sole competence to conclude all the Multilateral Agreements on Trade in Goods, in Annex 1A of the WTO Agreement. Therefore there was no need to consider implied powers in this area. (paragraphs 24–34)

**A5** The Court then turned to Annex 1B of the WTO Agreement, the GATS, and ruled that trade in services could not as a matter of principle be excluded from the scope of Article 133 EC Treaty. Cross-frontier supplies not involving any movement of persons were considered not unlike trade in goods and could fall within the scope of 'common commercial policy'. However, the other three modes of supply of services in Article I(2) of the GATS could not be covered by Article 133 EC Treaty, because this was apparent from the structure and organization of the EC Treaty: Article 3 EC Treaty distinguished between a 'common commercial policy' in paragraph (b) and 'measures concerning the entry and movement of persons' in paragraph (d). Similarly, international agreements in transport matters could not be covered by Article 133 EC Treaty because the particular services in transport were the subject of a specific title of the treaty, distinct from the title on 'common commercial policy'. (paragraphs 37–53)

**A6** As regards the TRIPS in Annex 1C to the WTO Agreement, this Opinion 1/94 came to the same conclusion. First, the Court pointed out that the section on intellectual property enforcement containing rules on measures to be applied at border crossing points, had its counterpart in the provisions of the Council Regulation No 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods, OJ 1986 L 357, p1, 1 December 1986. The Court then stated that since measures of that type could be adopted autonomously on the basis of Article 133 EC Treaty, international agreements in that field could also fall within the scope of 'common commercial policy'. However, as regards the other provisions of TRIPS, the Court observed that the connection between intellectual property and trade in goods, whereby intellectual property rights enable those holding them to prevent third parties from carrying out certain acts having effects on such trade, was not enough to bring those rights within the scope of Article 133 EC Treaty. (paragraphs 53–71)

**A7** In conclusion, as a result of this opinion, the bulk of 'trade in services' and intellectual property was excluded from the definition of 'common commercial policy' and the EC was found not to be exclusively competent to conclude the WTO Agreements. With the Treaty of Lisbon, the Court's ruling on shared competence in case of trade in services and the commercial aspects of intellectual property seemed to be superseded by the new Article 207 TFEU that now includes a reference to agreements in these subjects too. However, it is not clear yet whether under the current provision the WTO Agreements could have been

concluded exclusively by the EC. Further case law will need to clarify the exact scope of the amendments.

**A8** The Court then turned to the question of implied powers and exclusivity. In *Commission v Council ('AETR')*, Judgment of the Court of Justice, Case no C-22/70, [1971] ECR 263, 31 March 1971 ('AETR'), the Court had established that member states had no right to enter into international commitments which might affect or alter the scope of 'internal' EC rules. In *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, Opinion of the Court of Justice, Opinion 1/76, [1977] ECR 00741, 26 April 1977 ('Opinion 1/76') the Court introduced the 'complementarity principle' stating that whenever EC law had conferred internal competences on the institutions to attain a specific objective, the EC could enter into the international commitments necessary for attainment of that objective, even in the absence of an express provision to that effect.

**A9** Opinion 1/94 has significant implications as the Court rejected parallelism of internal and external competence by stating very clearly that it was not because the EC was competent to legislate internally on the right of establishment, freedom to provide services and transport policy, it was automatically also exclusively competent to conclude international agreements on these subject matters. It thus confirmed the *AETR* judgment in stating that the external competence of the EC could only become exclusive in so far as common rules had been established at the internal level. As opposed to the situation in the *AETR* judgment, the chapters on the right of establishment and freedom to provide services did not provide for an external dimension. (paragraphs 77, 81)

**A10** Further, the Court rejected the application of *Opinion 1/76* to GATS by stating that the attainment of freedom of establishment and freedom to provide services for nationals of the member states is not inextricably linked to the treatment to be afforded in the EC to nationals of non-member countries or in non-member countries to nationals of member states of the EC. The conclusion of the WTO Agreements was thus not considered 'necessary' for the attainment of the EC objective of freedom of establishment and freedom to provide services for nationals and therefore the complementarity principle could not apply. (paragraphs 84-86)

**A11** Lastly, Opinion 1/94 restated the *AETR* principle that an internal power to harmonize which had not been exercised in a specific field could not confer exclusive external competence in that field. Also, the Court held that whenever internal legislative acts included a reference to the external negotiating power of the EC, this gave rise to an exclusive external competence in the sphere covered by those acts. In the absence of any express provision conferring the power to negotiate with non-member countries, and as there was no or only partial harmonization in many service sectors and certain areas covered by TRIPS, the Court concluded that the competence to conclude the WTO Agreements was shared between the EC and the member states. (paragraphs 88, 95, 96, 98, 103, 104, 105)

Date of Analysis: 15 April 2013

Analysis by: Yole Tanghe

#### **Further analysis:**

Pierre Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?', (1999) *Common Market Law Review* p387-405  
Andrea Appella, 'Constitutional Aspects of Opinion 1/94 of the ECJ Concerning the WTO Agreement', (1996) *International and Comparative Law Quarterly* p440-462

Thiébaut Flory and Frédéric-Paul Martin, 'Remarques à propos des avis 1/94 et 2/92 de la Cour de justice des Communautés européennes au regard de l'évolution de la notion de politique commerciale commune', (1996) Cahiers de droit européen p379-400

X, 'The aftermath of Opinion 1/94 or how to ensure unity of representation for joint competences', (1995) Common Market Law Review p385-390

Rainer M Bierwagen, 'European Communities: Court of Justice, Opinion 1/94 concerning the Competence of the European Community to Conclude International Agreements concerning Services and the Protection of Intellectual Property — Article 228(6) of the EC Treaty', (1995) International Legal Materials p689-693

Jacques H.J Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: an Echternach Procession', (1995) Common Market Law Review p763-787

Meinhard Hilf, 'The ECJ's Opinion 1/94 on the WTO — No Surprise, but Wise?', (1995) European Journal of International Law / Journal européen de droit international Vol 6 no 2 p245-259

Judith Hippler Bello, 'Opinion 1/94, Community Competence to Conclude Certain International Agreements', (1995) American Journal of International Law p772

Antti Maunu, 'The Implied External Competence of the European Community after the ECJ Opinion 1/94 — Towards Coherence or Diversity?', (1995) Legal Issues of European Integration 1995/2 p115-128

Denys Simon, 'La compétence de la Communauté pour conclure l'accord OMC : l'avis 1/94 de la Cour de justice', (1994) Europe Décembre Chron no 9 p1-3

Edwin Vermulst and Bart Driessen, 'Het sluiten van de Uruguay rondevetdragen: advies van het Hof van Justitie van 1/94', (1994) Euridica no 10 p3-5

***Instruments cited in the full text of this decision:***

*International*

Treaty establishing the European Coal and Steel Community (18 April 1951) 261 UNTS 140, entered into force 23 July 1952, expired 23 July 2002, Article 71

Treaty establishing the European Atomic Energy Community (25 March 1957) 298 UNTS 167, entered into force January 1958

Treaty Establishing the European Community (25 March 1957) Official Journal C 325 (24 December 2002), entered into force 1 January 1958, Articles 3, 39, 54, 57, 75(1), 84, 100, 100(a), 113, 228 (6), 232, 235,238, Title IV

Munich Convention on the Grant of European Patents, JORF, Decree No 77-1151 (27 September 1977), p5002, 5 October 1973, entered into force 7 October 1977

Ministerial Declaration on the Uruguay Round of the Multilateral Trade Negotiations (20 September 1986) (1986) 25 LLM 1623

Punta del Este Ministerial Declaration (20 September 1986) GATT Doc MIN DEC 6, reprinted (1987) GATT, *BISD* 33d Supp 20-21

Agreement between the European Economic Community and the People's Republic of China on trade in textile products (19 December 1988) OJ 1988 L 380, p2, entered into force 1 January 1989



Agreement with the Republic of Austria on the control and reciprocal protection of quality wines and 'retsina' wine (23 December 1988 ),OJ 1989 L 56, p2

Luxembourg Agreement relating to Community Patents, OJ 1989 L 401, p1, 15 December 1989, not entered into force

Agreement between the European Economic Community and the Union of Soviet Socialist Republics on trade in textile products (18 December 1989), OJ 1989 L 397, p2, entered into force 1 January 1990

Interim Agreement on Trade and Trade related Matters between the European Economic Community and the European Coal and Steel Community, of the one part, and Republic of Hungary (16 December 1991), OJ 1992 L 116, p2, entered into force 1 February 1994

Interim Agreement between the European Economic Community and the European Coal and Steel Community, of the one part, and the Czech and Slovak Federal Republic (16 December 1991), OJ 1992 L 115, p2, entered into force 1 February 1994

Interim Agreement on trade and trade-related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Bulgaria, (8 March 1993), OJ 1993 L 323, p2, entered into force 1 February 1995

Multilateral Agreements on Trade in Goods (14 April 1994) (1994) 33 ILM 1154, entered into force 1 January 1995

Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, (15 April 1994), 1867 UNTS. 14, (1994) 33 ILM 1143

Agreement Establishing the World Trade Organization (15 April 1994) 1867 UNTS 154; (1994) 33 ILM 1144, entered into force 1 January 1995, Article II(1), Article VII

General Agreement on Tariffs and Trade (15 April 1994) 1867 UNTS 187; (1994) 33 ILM 1153, entered into force 1 January 1995

Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) 1867 UNTS 493, entered into force 1 January 1995

Agreement on Agriculture (15 April 1994) 1867 UNTS 410, entered into force 1 January 1995

Agreement on Technical Barriers to Trade (15 April 1994) 1868 UNTS 120, entered into force 1 January 1995

Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) 1869 UNTS 299; (1994)33 ILM 1197, entered into force 1 January 1995, Section 4 Part III

General Agreement on Trade in Services (15 April 1994) 1869 UNTS 183; (1994) 33 ILM 1167, entered into force 1 January 1995, Article I(2)

Agreement with Australia on trade in wine (26 and 31 January 1994) OJ 1994 L 86, p3

## *European*

Council Regulation (EEC) No 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJ 1984 L 252/1, 17 September 1984, Article 10(3)

Council Regulation (EEC) No 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods, OJ 1986 L 357/1, 1 December 1986

Council Regulation (EEC) No 4058/86 concerning coordinated action to safeguard free access to cargoes in ocean trades, OJ 1986 L 378/21, 22 December 1986, Article 3

Council Regulation (EEC) No 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and third countries OJ 1986 L 378/1, 22 December 1986, Articles 3, 5

Council Regulation (EEC) No 4257/88 applying generalized tariff preferences for 1989 in respect of certain industrial products originating in developing countries, OJ 1988 L 375/1, 19 December 1988, Article 1(3)

Council Directive (89/104/EEC) to approximate the laws of the Member States relating to trade marks, OJ 1989 L 40/1, 21 December 1988

Council Directive (89/646/EEC) on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ 1989 L 386/1, 15 December 1989

Council Directive 89/666/EEC concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State , OJ 1989 L 395/36, 21 December 1989

Council Directive 90/618/EEC amending, particularly as regards motor vehicle liability insurance, Directive 73/239/EEC and Directive 88/357/EEC which concern the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance, OJ 1990 L 330/44, 8 November 1990, Article 4

Council Directive (90/619/EEC) on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ 1990 L 330/50, 8 November 1990, Article 8

Council Regulation (EEC) No 2340/90 preventing trade by the Community as regards Iraq and Kuwait, OJ 1990 L 213/1, 8 August 1990

Council Regulation (EEC) No 3155/90 extending and amending Regulation (EEC) No 2340/90 preventing trade by the Community as regards Iraq and Kuwait, OJ 1990 L 304, p1, 29 October 1990

Council Regulation (EEC) No 1194/91 amending Regulations (EEC) No 2340/90 and (EEC) No 3155/90 preventing trade by the Community as regards Iraq and Kuwait, OJ 1991 L 115, p37, 7 May 1991

Council Regulation (EEC) No 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), OJ 1993 L 102/14, 26 April 1993

Council Regulation (EEC) No 1608/93 introducing an embargo concerning certain trade between the European Economic Community and Haiti, OJ 1993 L 155/2, 23 June 1993

Council Regulation (EC) No 40/94 on the Community trade mark, OJ 1994 L 11/1, 20 December 1993

Council Decision 94/184/EC concerning the conclusion of an Agreement between the European Community and Australia on trade in wine OJ 1994 L 86/1, 24 January 1994

Council Directive 93/22/EEC on investment services in the securities field, OJ 1993 L 141/27, 10 May 1993, Article 7

### *Constitutions*

Constitution, 1976 (Portugal)

### ***Cases cited in the full text of this decision:***

#### *Court of Justice*

*Commission v Council ('AETR')*, Judgment of the Court of Justice, Case no C-22/70, [1971] ECR 263, 31 March 1971

*Draft understanding on a Local Cost drawn up under the auspices of the OECD'*, Opinion of the Court of Justice, Opinion 1/75, [1975] ECR 01355, 11 November 1975

*Draft Agreement establishing a European laying-up fund for inland waterway vessels*, Opinion of the Court of Justice, Opinion 1/76, [1977] ECR 00741, 26 April 1977

*Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports'*, Ruling of the Court of Justice, Ruling 1/78, [1978] ECR 2151, 14 November 1978

*International Agreement on Natural Rubber*, Opinion of the Court of Justice, Opinion 1/78, [1979] ECR 2871, 4 October 1979

*Commission v Council*, Judgment of the Court of Justice, Case no 45/86, [1987] ECR 1493, 26 March 1987

*United Kingdom v Council*, Judgment of the Court of Justice, Case no 68/86, [1988] ECR 855, 23 February 1988

*Commission v Council*, Judgment of the Court of Justice, Case no C-131/87, [1989] ECR I-3764, 16 November 1989

*Convention No 170 of the International Labour Organization concerning safety in the use of chemicals at work'*, Opinion of the Court of Justice, Opinion 2/91, [1993] ECR-I 1061, 19 March 1993

*European Commission*

Commission Decision 87/251/EEC on the initiation of an international consultation and disputes settlement procedure concerning a United States measure excluding imports of certain aramid fibres into the United States of America ,OJ 1987 L 117/18, 12 March 1987

Notice of initiation of an 'illicit commercial practice' procedure concerning the unauthorized reproduction of sound recordings in Indonesia, OJ 1987 C 136/3, 21 May 1987

Notice of initiation of an examination procedure concerning an illicit commercial practice, within the meaning of Council Regulation (EEC) No 2641/84, consisting of piracy of Community sound recordings in Thailand, OJ 1991 C 189/26, 20 July 1991

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## **Decision - full text**

### **Opinion of the court**

#### ***I . Introduction***

**1** The questions put to the Court by the Commission in its request for an Opinion, submitted pursuant to Article 228(6) of the Treaty establishing the European Community, seek to ascertain, first, whether or not the Community has exclusive competence to conclude the Multilateral Agreements on Trade in Goods, in so far as those Agreements concern ECSC products and Euratom products. Those questions further relate to the exclusive competence the Community may enjoy by virtue of either Article 113 of the EC Treaty, or the parallelism of internal and external competence, or Articles 100a or 235 of the EC Treaty, to conclude the General Agreement on Trade in Services (hereinafter 'GATS') and the Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods (hereinafter 'TRIPs').

**2** Those agreements are annexed to the Agreement establishing the World Trade Organization (hereinafter 'the WTO Agreement'). The WTO Agreement establishes a common institutional framework for the conduct of trade relations among its members in matters related to the agreements and legal instruments annexed to it (Article 11(1) of the WTO Agreement). Those agreements embody the results of the Uruguay Round multilateral trade negotiations launched by the Punta del Este Ministerial Declaration of 20 September 1986.

**3** Having approved that declaration, the Council and the Member States decided, 'in order to ensure the maximum consistency in the conduct of the negotiations', that 'the Commission would act as the sole negotiator on behalf of the Community and the Member States'. However, it was stated in the minutes of the meeting that that 'decision [did] not prejudice the question of the competence of the Community or the Member States on particular issues'.

**4** On 15 December 1993, the Trade Negotiations Committee, a body specially set up by the Punta del Este Conference to conclude the Uruguay Round negotiations, meeting at the level of senior officials, approved the Final Act embodying the results of the Uruguay Round multilateral trade negotiations.

**5** At its meeting on 7 and 8 March 1994, the Council decided to proceed to the signature of the Final Act and the WTO Agreement. It authorized the President of the Council and Commissioner Sir Leon Brittan to sign the Final Act and the WTO Agreement at Marrakesh on 15 April 1994 on behalf of the Council of the European Union. The representatives of the Member States, who took the view that those acts 'also cover [ed] matters of national competence', agreed on the same date that they would proceed to sign the Final Act and the WTO Agreement. The Commission, for its part, had recorded in the minutes its view that 'the Final Act (...) and the agreements annexed thereto fall exclusively within the competence of the European Community'.

**6** The Commission submitted its request for an Opinion on 6 April 1994. It asked the following questions:

'As regards the results of the Uruguay Round GATT trade talks contained in the Final Act of 15 December 1993:

(1) Does the European Community have the competence to conclude all parts of the Agreement establishing the WTO concerning trade in Services (GATS) and the trade-related aspects of intellectual property rights including trade in counterfeit goods (TRIPs) on the basis of the EC Treaty, more particularly on the basis of Article 113 EC alone, or in combination with Article 100a EC and/or Article 235 EC?

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

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

**7** The agreements resulting from the Uruguay Round were indeed signed at Marrakesh on 15 April 1994. On behalf of the Community and its Member States, they were signed in accordance with the decisions referred to above (see paragraph 5).

**8** The request for an Opinion submitted by the Commission was served on the Council and the Member States on 24 May 1994.

## ***II . The admissibility of the request***

**9** The Court has consistently held that its opinion may be sought, pursuant to Article 228(6) of the Treaty, in particular on questions concerning the division between the Community and the Member States of competence to conclude a given agreement with non-member countries, as in this instance (see, in particular, Opinion 1/75 [1975] ECR 1355, especially p. 1360, Opinion 1/78 [1979] ECR 2871, paragraph 30, and Opinion 2/91 [1993] ECR I-1061, paragraph 3).

**10** The Kingdom of Spain claims that the request is inadmissible. It argues that the procedure for seeking an opinion pursuant to Article 228 can be initiated only where the Community has not yet entered into any international commitment. The Kingdom of Spain observes that the signature of the Final Act at Marrakesh served to authenticate the texts resulting from the negotiations and entailed an obligation on the part of the signatories to submit them for the approval of their respective authorities. The Council and the Netherlands Government merely express certain doubts as to whether an agreement which has already been signed can still be an agreement which is simply 'envisaged' within the meaning of Article 228.

**11** Those objections and doubts must be dismissed.

**12** The Court may be called upon to state its opinion pursuant to Article 228(6) of the Treaty at any time before the Community's consent to be bound by the agreement is finally

expressed. Unless and until that consent is given, the agreement remains an envisaged agreement. Consequently, there is nothing to render this request inadmissible.

### ***III . The wording of the Commission's questions***

**13** The Council criticizes the way in which the Commission has worded its questions. Since the proceedings relate to an agreement which has been signed by the Community and the Member States pursuant to their respective powers, the question is not whether the Community may sign and conclude that agreement alone (a hypothetical question, according to the Council) but instead whether 'the joint conclusion by the Community and the Member States of the agreements resulting from the Uruguay Round is compatible with the division of powers laid down by the Treaties establishing the European Communities', which would not be the case if the agreement fell in its entirety within the exclusive competence of the Community.

**14** The Council's criticisms, which are supported by the Portuguese Government, must be rejected. Whether the questions are put in the terms proposed by the Council or in the words used by the Commission, 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. First of all, however, it is necessary to consider the arguments advanced by the Council and some of the Governments which have submitted observations regarding the representation of the dependent territories of the Member States and those of the Portuguese Government in relation to the participation of the Member States in financing the operation of the WTO.

### ***IV . The representation of certain dependent territories of the Member States***

**15** In opposing the Commission's claim that the Community has exclusive competence to conclude the WTO Agreement and its annexes, the Council and some of the Governments which have submitted observations point out that certain Member States remain competent to conclude and perform agreements relating to territories to which the Treaties establishing the European Communities do not apply.

**16** The French Government states, moreover, that many aspects of the WTO Agreement and its annexes fall outside the scope of the arrangements concerning the association of the overseas countries and territories and that, to that extent, it alone has competence to conclude the WTO Agreement and its annexes.

**17** As the Court held in Opinion 1/78, cited above (paragraph 62), the territories in question, in so far as they remain outside the ambit of the EEC Treaty, are, as regards the Community, in the same situation as non-member countries. Consequently, it is in their capacity as the States responsible for the international relations of their dependent territories which are outside the scope of Community law, and not as Member States of the Community, that the States responsible for those territories are called upon to participate in the agreement.

**18** However, as the Court noted in that opinion (same paragraph), the special position of those Member States cannot affect the solution of the problem relating to the demarcation of spheres of competence within the Community.

### ***V . Budgetary and financial matters***

**19** The Portuguese Government refers to Article VII of the WTO Agreement, which provides that each member is to contribute to the expenses of the WTO, and submits that, given that the Member States of the Community are to acquire the status of original members of the WTO (see Article XI(1)), that is enough to justify the participation of the Member States in the conclusion of the agreement, even though financing is not as crucially important as it was in the International Agreement on Natural Rubber which gave rise to Opinion 1/78, cited above. The Portuguese Government also advances a reason based on its own constitutional law, under which the national parliament is required to approve international treaties providing for the participation of the Portuguese Republic in international organizations.

**20** In reply to that latter argument, suffice it to say that internal rules of law, even of a constitutional nature, cannot alter the division of international powers between the Member States and the Community as laid down by the Treaty.

**21** Nor can the first argument be accepted. Given that the WTO is an international organization which will have only an operating budget and not a financial policy instrument, the fact that the Member States will bear some of its expenses cannot, on any view, of itself justify participation of the Member States in the conclusion of the WTO Agreement.

## ***VI . The Multilateral Agreements on Trade in Goods***

**22** The Commission and the parties which have submitted observations agree that the Multilateral Agreements on Trade in Goods are for the most part covered by the exclusive competence conferred on the Community in matters concerning the common commercial policy by Article 113 of the EC Treaty. The differences between them relate only to specific points.

**23** Neither the Council nor any of the Member States which have submitted observations disputes the Commission's claim that the Community has exclusive competence to conclude the Multilateral Agreements on Trade in Goods in so far as they apply to Euratom products. However, since that issue has been raised by the Commission in its second question, it must be examined.

**24** Article 232(2) of the EC Treaty states that the provisions of that Treaty 'shall not derogate from those of the Treaty establishing the European Atomic Energy Community'. Since the Euratom Treaty contains no provisions relating to external trade, there is nothing to prevent agreements concluded pursuant to Article 113 of the EC Treaty from extending to international trade in Euratom products.

**25** ECSC products, on the other hand, constitute a point of disagreement between the Commission, which considers that the exclusive competence conferred on the Community by Article 113 of the EC Treaty also covers ECSC products, and the Council and most of the Member States which have submitted observations, which cite Article 71 of the ECSC Treaty to argue that the Member States have competence.

**26** Admittedly, Article 71 of the ECSC Treaty provides that 'the powers of the Governments of Member States in matters of commercial policy shall not be affected by this Treaty, save as otherwise provided therein'. Furthermore, Article 232(1) of the EC Treaty provides that that Treaty does not affect the provisions of the Treaty establishing the ECSC, in particular as regards the rights and obligations of Member States and the powers of the institutions.



**27** However, since the ECSC Treaty was drawn up at a time when the European Economic Community was not yet in existence, Article 71 of that Treaty can only have been intended to refer to coal and steel products. In any event, it can only have reserved competence to the Member States as regards agreements relating specifically to ECSC products. On the other hand, the Community has sole competence pursuant to Article 113 of the EC Treaty to conclude an external agreement of a general nature, that is to say, encompassing all types of goods, even where those goods include ECSC products. As the Court held in Opinion 1/75, cited above (at p. 1365, third paragraph), Article 71 of the ECSC Treaty cannot 'render inoperative Articles 113 and 114 of the EEC Treaty and affect the vesting of power in the Community for the negotiation and conclusion of international agreements in the realm of common commercial policy'. In the present case, it appears from an examination of the Multilateral Agreements on Trade in Goods that none of them relates specifically to ECSC products. It follows that the exclusive competence of the Community to conclude those agreements cannot be impugned on the ground that they also apply to ECSC products.

**28** The Council contends that Article 43 of the EC Treaty must be adopted as the basis for its decision to conclude the WTO Agreement and its annexes in respect of the Agreement on Agriculture and the Agreement on the Application of Sanitary and Phytosanitary Measures, since they concern not just the commercial measures applicable to international trade in agricultural products but also, and above all, the internal rules on the organization of agricultural markets. The United Kingdom in particular contends that the commitments to reduce domestic support and export refunds stipulated in the Agreement on agricultural products will affect the common organizations of the markets and that, since they concern Community products and not imported products, they fall outside the framework of Article 113 of the EC Treaty.

**29** As regards the Agreement on Agriculture, it is true that Article 43 has been held to be the appropriate legal basis for a directive laying down uniform rules on the conditions under which products may be marketed, not only in intra-Community trade but also when they originate from non-member countries (see Case C-131/87 *Commission v Council* [1989] ECR1-3764, paragraph 27). However, that directive was intended to achieve one or more of the common agricultural policy objectives laid down in Article 39 of the Treaty. That is not the case as regards the Agreement on Agriculture annexed to the WTO Agreement. The objective of the Agreement on Agriculture is to establish, on a worldwide basis, 'a fair and market-oriented agricultural trading system' (see the preamble to that Agreement). The fact that the commitments entered into under that Agreement require internal measures to be adopted on the basis of Article 43 of the Treaty does not prevent the international commitments themselves from being entered into pursuant to Article 113 alone.

**30** The Council further contends that, for the same reasons as were put forward in relation to the Agreement on Agriculture, it will also be necessary to rely on Article 43 of the EC Treaty as the basis for its decision to conclude the Agreement on the Application of Sanitary and Phytosanitary Measures.

**31** That contention must be rejected. The Agreement on the Application of Sanitary and Phytosanitary Measures is confined, as stated in its preamble, to 'the establishment of a multilateral framework of rules and disciplines to guide the development, adoption and enforcement of sanitary and phytosanitary measures in order to minimize their negative effects on trade'. Such an agreement can be concluded on the basis of Article 113 alone.

**32** According to the Netherlands Government, the joint participation of the Community and the Member States in the WTO Agreement is justified, since the Member States have their own competence in relation to technical barriers to trade by reason of the optional nature of certain Community directives in that area, and because complete harmonization has not been achieved and is not envisaged in that field.

**33** That argument cannot be accepted. The Agreement on Technical Barriers to Trade, the provisions of which are designed merely to ensure that technical regulations and standards and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade (see the preamble and Articles 2.2 and 5.1.2 of the Agreement), falls within the ambit of the common commercial policy.

**34** It follows that the Community has exclusive competence, pursuant to Article 113 of the EC Treaty, to conclude the Multilateral Agreements on Trade in Goods.

### ***VII . Article 113 of the EC Treaty, GATS and TRIPs***

**35** The Commission's main contention is that the conclusion of both GATS and TRIPs falls within the exclusive competence conferred on the Community in commercial policy matters by Article 113 of the EC Treaty. That point of view has been vigorously disputed, as to its essentials, by the Council, by the Member States which have submitted observations and by the European Parliament, which has been permitted, at its request, to submit observations. It is therefore appropriate to begin by examining the Commission's main contention, with reference to GATS and to TRIPs respectively.

#### **A . GATS**

**36** Relying essentially on the non-restrictive interpretation applied by the Court's case-law to the concept of the common commercial policy (see Opinion 1/78, paragraphs 44 and 45), the links or overlap between goods and services, the purpose of GATS and the instruments used, the Commission concludes that services fall within the common commercial policy, without any need to distinguish between the different modes of supply of services and, in particular, between the direct, cross-frontier supply of services and the supply of services through a commercial presence in the country of the person to whom they are supplied. The Commission also maintains that international agreements of a commercial nature in relation to transport (as opposed to those relating to safety rules) fall within the common commercial policy and not within the particular title of the Treaty on the common transport policy.

**37** It is appropriate to consider, first, services other than transport and, subsequently, the particular services comprised in transport.

**38** As regards the first category, it should be recalled at the outset that in Opinion 1/75 the Court, which had been asked to rule on the scope of Community competence as to the arrangements relating to a local cost standard, held that 'the field of the common commercial policy, and more particularly that of export policy, necessarily covers systems of aid for exports and more particularly measures concerning credits for the financing of local costs linked to export operations' ([1975] ECR 1362). The local costs in question concerned expenses incurred for the supply of both goods and services. Nevertheless, the Court recognized the exclusive competence of the Community, without drawing a distinction between goods and services.

**39** In its Opinion 1/78, cited above (paragraph 44), the Court rejected an interpretation of Article 113 ‘the effect of which would be to restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade’. On the contrary, it considered that ‘the question of external trade must be governed from a wide point of view’, as is confirmed by ‘the fact that the enumeration in Article 113 of the subjects covered by commercial policy ... is conceived as a non-exhaustive enumeration’ (Opinion 1/78, cited above, paragraph 45).

**40** The Commission points out in its request for an opinion that in certain developed countries the services sector has become the dominant sector of the economy and that the global economy has been undergoing fundamental structural changes. The trend is for basic industry to be transferred to developing countries, whilst the developed economies have tended to become, in the main, exporters of services and of goods with a high value-added content. The Court notes that this trend is borne out by the WTO Agreement and its annexes, which were the subject of a single process of negotiation covering both goods and services.

**41** Having regard to this trend in international trade, it follows from the open nature of the common commercial policy, within the meaning of the Treaty, that trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article 113, as some of the Governments which have submitted observations contend.

**42** In order to make that conclusion more specific, however, one must take into account the definition of trade in services given in GATS in order to see whether the overall scheme of the Treaty is not such as to limit the extent to which trade in services can be included within Article 113.

**43** Under Article I(2) of GATS, trade in services is defined, for the purposes of that agreement, as comprising four modes of supply of services: (1) cross-frontier supplies not involving any movement of persons; (2) consumption abroad, which entails the movement of the consumer into the territory of the WTO member country in which the supplier is established; (3) commercial presence, i. e. the presence of a subsidiary or branch in the territory of the WTO member country in which the service is to be rendered; (4) the presence of natural persons from a WTO member country, enabling a supplier from one member country to supply services within the territory of any other member country.

**44** As regards cross-frontier supplies, the service is rendered by a supplier established in one country to a consumer residing in another. The supplier does not move to the consumer’s country; nor, conversely, does the consumer move to the supplier’s country. That situation is, therefore, not unlike trade in goods, which is unquestionably covered by the common commercial policy within the meaning of the Treaty. There is thus no particular reason why such a supply should not fall within the concept of the common commercial policy.

**45** The same cannot be said of the other three modes of supply of services covered by GATS, namely, consumption abroad, commercial presence and the presence of natural persons.

**46** As regards natural persons, it is clear from Article 3 of the Treaty, which distinguishes between ‘a common commercial policy’ in paragraph (b) and ‘measures concerning the entry and movement of persons’ in paragraph (d), that the treatment of nationals of non-member countries on crossing the external frontiers of Member States cannot be regarded as falling within the common commercial policy. More generally, the existence in the Treaty

of specific chapters on the free movement of natural and legal persons shows that those matters do not fall within the common commercial policy.

**47** It follows that the modes of supply of services referred to by GATS as 'consumption abroad', 'commercial presence' and the 'presence of natural persons' are not covered by the common commercial policy.

**48** Turning next to the particular services comprised in transport, these are the subject of a specific title (Title IV) of the Treaty, distinct from Title VII on the common commercial policy. It was precisely in relation to transport policy that the Court held for the first time that the competence of the Community to conclude international agreements 'arises not only from an express conferment by the Treaty — as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements — but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions' (Case 22/70 *Commission v Council* [1971] ECR263, paragraph 16, the '*AETR* judgment'). The idea underlying that decision is that international agreements in transport matters are not covered by Article 113.

**49** The scope of the *AETR* judgment cannot be cut down by drawing a distinction between agreements on safety rules, such as those relating to the length of driving periods of professional drivers, with which the *AETR* judgment was concerned, and agreements of a commercial nature.

**50** The *AETR* judgment draws no such distinction. The Court confirmed that analysis in Opinion 1/76 ([1977] ECR 741) concerning an agreement intended to rationalize the economic situation in the inland waterways sector — in other words, an economic agreement not concerned with the laying down of safety rules. Moreover, numerous agreements have been concluded with non-member countries on the basis of the Transport Title; a long list of such agreements was given by the United Kingdom in its observations.

**51** In support of its view the Commission has further cited a series of embargoes based on Article 113 and involving the suspension of transport services: measures against Iraq: Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1), Council Regulation (EEC) No 3155/90 of 29 October 1990 extending and amending Regulation (EEC) No 2340/90 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 304, p. 1) and Council Regulation (EEC) No 1194/91 of 7 May 1991 amending Regulations (EEC) No 2340/90 and (EEC) No 3155/90 preventing trade by the Community as regards Iraq and Kuwait (OJ 1991 L 115, p. 37); measures against the Federal Republic of Yugoslavia (Serbia and Montenegro): Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (OJ 1993 L 102, p. 14); measures against Haiti: Council Regulation (EEC) No 1608/93 of 23 June 1993 introducing an embargo concerning certain trade between the European Economic Community and Haiti (OJ 1993 L 155, p. 2). Those precedents are not conclusive. As the European Parliament has rightly observed, since the embargoes related primarily to the export and import of products, they could not have been effective if it had not been decided at the same time to suspend transport services. Such suspension is to be seen as a necessary adjunct to the principal measure. Consequently, the precedents are not relevant to the question whether the Community has exclusive competence pursuant to Article 113 to conclude international agreements in the field of transport.

**52** In any event, the Court has consistently held that a mere practice of the Council cannot derogate from the rules laid down in the Treaty and cannot, therefore, create a precedent binding on Community institutions with regard to the correct legal basis (see Case 68/86 *United Kingdom v Council* [1988] ECR 855, paragraph 24).

**53** It follows that only cross-frontier supplies are covered by Article 113 of the Treaty and that international agreements in the field of transport are excluded from it.

## **B . TRIPs**

**54** The Commission's argument in support of its contention that the Community has exclusive competence under Article 113 is essentially that the rules concerning intellectual property rights are closely linked to trade in the products and services to which they apply.

**55** It should be noted, first, that Section 4 of Part III of TRIPs, which concerns the means of enforcement of intellectual property rights, contains specific rules as to measures to be applied at border crossing points. As the United Kingdom has pointed out, that section has its counterpart in the provisions of Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods (OJ 1986 L 357, p. 1). Inasmuch as that regulation concerns the prohibition of the release into free circulation of counterfeit goods, it was rightly based on Article 113 of the Treaty: it relates to measures to be taken by the customs authorities at the external frontiers of the Community. Since measures of that type can be adopted autonomously by the Community institutions on the basis of Article 113 of the EC Treaty, it is for the Community alone to conclude international agreements on such matters.

**56** However, as regards matters other than the provisions of TRIPs on the release into free circulation of counterfeit goods, the Commission's arguments cannot be accepted.

**57** Admittedly, there is a connection between intellectual property and trade in goods. Intellectual property rights enable those holding them to prevent third parties from carrying out certain acts. The power to prohibit the use of a trade mark, the manufacture of a product, the copying of a design or the reproduction of a book, a disc or a videocassette inevitably has effects on trade. Intellectual property rights are moreover specifically designed to produce such effects. That is not enough to bring them within the scope of Article 113. Intellectual property rights do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade.

**58** As the French Government has rightly observed, the primary objective of TRIPs is to strengthen and harmonize the protection of intellectual property on a worldwide scale. The Commission has itself conceded that, since TRIPs lays down rules in fields in which there are no Community harmonization measures, its conclusion would make it possible at the same time to achieve harmonization within the Community and thereby to contribute to the establishment and functioning of the common market.

**59** It should be noted here that, at the level of internal legislation, the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles 100 and 100a and may use Article 235 as the basis for creating new rights superimposed on national rights, as it did in Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1). Those measures are subject to voting rules (unanimity in the case of Articles 100 and 235) or rules of procedure (consultation of the Parliament in the case of Articles 100 and 235, the joint decision-

making procedure in the case of Article 100a) which are different from those applicable under Article 113.

**60** 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.

**61** Institutional practice in relation to autonomous measures or external agreements adopted on the basis of Article 113 cannot alter this conclusion.

**62** The Commission cites three cases in which, by virtue of the 'new commercial policy instrument' (Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (OJ 1984 L 252, p. 1), which was itself based on Article 113 of the Treaty), procedures were opened to defend the Community's intellectual property interests: Commission Decision 87/251/EEC of 12 March 1987 on the initiation of an international consultation and disputes settlement procedure concerning a United States measure excluding imports of certain aramid fibres into the United States of America (OJ 1987 L 117, p. 18); notice of initiation of an 'illicit commercial practice' procedure concerning the unauthorized reproduction of sound recordings in Indonesia (OJ 1987 C 136, p. 3); notice of initiation of an examination procedure concerning an illicit commercial practice, within the meaning of Council Regulation (EEC) No 2641/84, consisting of piracy of Community sound recordings in Thailand (OJ 1991 C 189, p. 26).

**63** The measures which may be taken pursuant to that regulation in response to a lack of protection in a non-member country of intellectual property rights held by Community undertakings (or to discrimination against them in that field) are unrelated to the harmonization of intellectual property protection which is the primary objective of TRIPs. According to Article 10(3) of Regulation No 2641/84, cited above, those measures are: the suspension or withdrawal of any concession resulting from commercial policy negotiations; the raising of existing customs duties or the introduction of any other charge on imports; and the introduction of quantitative restrictions or any other measures modifying import or export conditions in trade with the non-member country concerned. All those measures fall, by their very nature, within the ambit of commercial policy.

**64** The Commission also relies on measures adopted by the Community in relation to Korea within the framework of Council Regulation (EEC) No 4257/88 of 19 December 1988 applying generalized tariff preferences for 1989 in respect of certain industrial products originating in developing countries (OJ 1988 L 375, p. 1). Since Korea had discriminated between its trading partners as regards protection of intellectual property (see the nineteenth recital in the preamble to the regulation), the Community suspended the generalized tariff preferences in respect of its products (Article 1(3) of the regulation).

**65** That argument is no more convincing than the preceding one. Since the grant of generalized preferences is a commercial policy measure, as the Court has held (see the 'Generalized tariff preferences' judgment in Case 45/86 *Commission v Council* [1987] ECR 1493, paragraph 21), so too is their suspension. That does not in any way show that the Community has exclusive competence pursuant to Article 113 to conclude an agreement with non-member countries to harmonize the protection of intellectual property worldwide.

**66** In support of its argument, the Commission has also cited provisions relating to the protection of intellectual property in certain agreements with non-member countries concluded on the basis of Article 113 of the Treaty.

**67** It should be noted that those provisions are extremely limited in scope. The agreement between the European Economic Community and the People's Republic of China on trade in textile products, initialled on 9 December 1988 (OJ 1988 L 380, p. 2), and the agreement between the European Economic Community and the Union of Soviet Socialist Republics on trade in textile products, initialled on 11 December 1989 (OJ 1989 L 397, p. 2), merely provides for a consultation procedure in relation to the protection of trade marks or designs in respect of textile products. Moreover, the three interim agreements concluded between the Community and certain east European countries (Agreement with Hungary of 16 December 1991 (OJ 1992 L 116, p. 2); Agreement with the Czech and Slovak Federal Republic of 16 December 1991 (OJ 1992 L 115, p. 2); Agreement with the Republic of Bulgaria of 8 March 1993 (OJ 1993 L 323, p. 2)) all contain identically worded clauses (Articles 35, 36 and 37 respectively) calling upon those countries to improve the protection of intellectual property in order to provide, within a given time, 'a level of protection similar to that provided in the Community' by Community acts. As the French Government has rightly observed, clauses of that type are binding only on the non-member country which is party to the agreement.

**68** The fact that the Community and its institutions are entitled to incorporate within external agreements otherwise falling within the ambit of Article 113 ancillary provisions for the organization of purely consultative procedures or clauses calling on the other party to raise the level of protection of intellectual property does not mean that the Community has exclusive competence to conclude an international agreement of the type and scope of TRIPs.

**69** Lastly, it is indeed true, as the Commission states, that the Agreement with the Republic of Austria of 23 December 1988 on the control and reciprocal protection of quality wines and 'retsina' wine (OJ 1989 L 56, p. 2) and the Agreement with Australia of 26 and 31 January 1994 on trade in wine (OJ 1994 L 86, p. 3) contain provisions relating to the reciprocal protection of descriptions of wines. The names of Austrian wine-growing regions are reserved exclusively, within the territory of the Community, to the Austrian wines to which they apply and may be used only in accordance with the conditions laid down in the Austrian rules (Article 3(3) of the agreement). A similar provision is contained in the agreement with Australia (Article 7(3)).

**70** However, as is plain from the preamble to Council Decision 94/184/EC of 24 January 1994 concerning the conclusion of an Agreement between the European Community and Australia on trade in wine (OJ 1994 L 86, p. 1), that agreement was reached at Community level, because its provisions are directly linked to measures covered by the common agricultural policy, and specifically by the Community rules on wine and winegrowing. Moreover, that precedent does not provide support for any argument in relation to patents and designs, the protection of undisclosed technical information, trade marks or copyright, which are also covered by TRIPs.

**71** In the light of the foregoing, it must be held that, apart from those of its provisions which concern the prohibition of the release into free circulation of counterfeit goods, TRIPs does not fall within the scope of the common commercial policy.

### ***VIII . The Community's implied external powers, GATS and TRIPs***

**72** In the event of the Court rejecting its main contention that the Community has exclusive competence pursuant to Article 113, the Commission maintains in the alternative that the Community's exclusive competence to conclude GATS and TRIPs flows implicitly from the provisions of the Treaty establishing its internal competence, or from the existence of legislative acts of the institutions giving effect to that internal competence, or else from the need to enter into international commitments with a view to achieving an internal Community objective. The Commission also argues that, even if the Community does not have adequate powers on the basis of specific provisions of the Treaty or legislative acts of the institutions, it has exclusive competence by virtue of Articles 100a and 235 of the Treaty. The Council and the Member States which have submitted observations acknowledge that the Community has certain powers, but deny that they are exclusive.

#### **A . GATS**

**73** With particular regard to GATS, the Commission cites three possible sources for exclusive external competence on the part of the Community: the powers conferred on the Community institutions by the Treaty at internal level, the need to conclude the agreement in order to achieve a Community objective, and, lastly, Articles 100a and 235.

**74** The Commission argues, first, that there is no area or specific provision in GATS in respect of which the Community does not have corresponding powers to adopt measures at internal level. According to the Commission, those powers are set out in the chapters on the right of establishment, freedom to provide services and transport. Exclusive external competence flows from those internal powers.

**75** That argument must be rejected.

**76** It was on the basis of Article 75(1)(a) which, as regards that part of a journey which takes place on Community territory, also concerns transport from or to non-member countries, that the Court held in the *AETR* judgment (at paragraph 27) that 'the powers of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned'.

**77** However, even in the field of transport, the Community's exclusive external competence does not automatically flow from its power to lay down rules at internal level. As the Court pointed out in the *AETR* judgment (paragraphs 17 and 18), the Member States, whether acting individually or collectively, only lose their right to assume obligations with non-member countries as and when common rules which could be affected by those obligations come into being. Only in so far as common rules have been established at internal level does the external competence of the Community become exclusive. However, not all transport matters are already covered by common rules.

**78** The Commission asserted at the hearing that the Member States' continuing freedom to conduct an external policy based on bilateral agreements with non-member countries will inevitably lead to distortions in the flow of services and will progressively undermine the internal market. Thus, it argued, travellers will choose to fly from airports in Member States which have concluded an 'open skies' type of bilateral agreement with a non-member country and its airline, enabling them to offer the best quality/price ratio for transport. The Commission further claimed that as a result of the existence of an agreement between Germany and Poland exempting German road haulage operators from having to pay any transit tax, whereas the corresponding agreement between Poland and the Netherlands imposed a tax of DM 650 on Netherlands hauliers, distortion had arisen in competition



between Netherlands hauliers and German hauliers in relation to traffic bound for Russia, Byelorussia and the Baltic countries.

**79** In reply to that argument, suffice it to say that there is nothing in the Treaty which prevents the institutions from arranging, in the common rules laid down by them, concerted action in relation to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings. Moreover, that possibility is illustrated by several of the regulations on transport cited by the Commission in its reply to the Court's third written question.

**80** For example, the third paragraph of Article 3 of Council Regulation (EEC) No 4058/86 of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trades (OJ 1986 L 378, p. 21) provides that the Council, acting in accordance with the voting procedure laid down in Article 84(2) of the Treaty, may decide on coordinated action when action by a non-member country restricts free access by shipping companies of Member States to the transport of liner cargoes. Similarly, Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and third countries (OJ 1986 L 378, p. 1) requires the phasing-out or adjustment of existing cargo-sharing arrangements (Article 3) and makes cargo-sharing arrangements in any future agreements subject to a Community authorization procedure (Article 5).

**81** Unlike the chapter on transport, the chapters on the right of establishment and on freedom to provide services do not contain any provision expressly extending the competence of the Community to 'relationships arising from international law'. As has rightly been observed by the Council and most of the Member States which have submitted observations, the sole objective of those chapters is to secure the right of establishment and freedom to provide services for nationals of Member States. They contain no provisions on the problem of the first establishment of nationals of non-member countries and the rules governing their access to self-employed activities. One cannot therefore infer from those chapters that the Community has exclusive competence to conclude an agreement with non-member countries to liberalize first establishment and access to service markets, other than those which are the subject of cross-border supplies within the meaning of GATS, which are covered by Article 113 (see paragraph 42 above).

**82** Referring to Opinion 1/76 (paragraphs 3 and 4), the Commission submits, second, that the Community's exclusive external competence is not confined to cases in which use has already been made of internal powers to adopt measures for the attainment of common policies. Whenever Community law has conferred on the institutions internal powers for the purposes of attaining specific objectives, the international competence of the Community implicitly flows, according to the Commission, from those provisions. It is enough that the Community's participation in the international agreement is necessary for the attainment of one of objectives of the Community.

**83** The Commission puts forward here both internal and external reasons to justify participation by the Community, and by the Community alone, in the conclusion of GATS and TRIPs. At internal level, the Commission maintains that, without such participation, the coherence of the internal market would be impaired. At external level, the European Community cannot allow itself to remain inactive on the international stage: the need for the conclusion of the WTO Agreement and its annexes, reflecting a global approach to international trade (embracing goods, services and intellectual property), is not in dispute.

**84** That application of Opinion 1/76 to GATS cannot be accepted.

**85** Opinion 1/76 related to an issue different from that arising from GATS. It concerned rationalization of the economic situation in the inland waterways sector in the Rhine and Moselle basins, and throughout all the Netherlands inland waterways and the German inland waterways linked to the Rhine basin, by elimination of short-term overcapacity. It was not possible to achieve that objective by the establishment of autonomous common rules, because of the traditional participation of vessels from Switzerland in navigation on the waterways in question. It was necessary, therefore, to bring Switzerland into the scheme envisaged by means of an international agreement (see Opinion 1/76, paragraph 2). Similarly, in the context of conservation of the resources of the seas, the restriction, by means of internal legislative measures, of fishing on the high seas by vessels flying the flag of a Member State would hardly be effective if the same restrictions were not to apply to vessels flying the flag of a non-member country bordering on the same seas. It is understandable, therefore, that external powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted.

**86** That is not the situation in the sphere of services: attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community.

**87** Third, the Commission refers to Articles 100a and 235 of the Treaty as the basis of exclusive external competence.

**88** As regards Article 100a, it is undeniable that, where harmonizing powers have been exercised, the harmonization measures thus adopted may limit, or even remove, the freedom of the Member States to negotiate with non-member countries. However, an internal power to harmonize which has not been exercised in a specific field cannot confer exclusive external competence in that field on the Community.

**89** Article 235, which enables the Community to cope with any insufficiency in the powers conferred on it, expressly or by implication, for the achievement of its objectives, cannot in itself vest exclusive competence in the Community at international level. Save where internal powers can only be effectively exercised at the same time as external powers (see Opinion 1/76 and paragraph 85 above), internal competence can give rise to exclusive external competence only if it is exercised. This applies *a fortiori* to Article 235.

**90** Although the only objective expressly mentioned in the chapters on the right of establishment and on freedom to provide services is the attainment of those freedoms for nationals of the Member States of the Community, it does not follow that the Community institutions are prohibited from using the powers conferred on them in that field in order to specify the treatment which is to be accorded to nationals of non-member countries. Numerous acts adopted by the Council on the basis of Articles 54 and 57(2) of the Treaty — but not mentioned by it — contain provisions in that regard. The Commission has Ustetd them in response to a question from the Court.

**91** It is evident from an examination of those acts that very different objectives may be pursued by incorporation of external provisions.

**92** The directives on coordination of disclosure requirements and company accounts applied only to companies as such and not to their branches. That gave rise to some disparity, as regards the protection of members and third parties, between companies operating in other Member States by setting up branches and companies operating there by setting up subsidiaries. Consequently, Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36), which is based on Article 54 of the Treaty, was introduced to regulate the disclosure requirements applying to such branches. In order to avoid any discrimination based on a company's country of origin, that directive also had to cover branches established by companies governed by the laws of non-member countries.

**93** Moreover, the Second Council Directive (89/646/EEC) of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1), which is based on Article 57(2) of the Treaty, contains a Title III on 'relations with third countries'. That directive established a system of uniform authorization and requires the mutual recognition of controls.

**94** Once it is authorized in one Member State, a credit institution may pursue its activities in another Member State (for example, by setting up a branch there) without having to seek fresh authorization from that State. In those circumstances, it was enough for a credit institution having its seat in a non-member country to establish a subsidiary in a Member State or to acquire control of an establishment having its seat there to enable it to set up branches in all the Member States of the Community without having to seek further authorizations. For that reason, Title III of that directive provides for a series of measures, including negotiation procedures, with a view to obtaining comparable competitive opportunities for Community credit institutions in non-member countries. Similar provisions have been adopted in the field of insurance (Article 4 of Council Directive 90/618/EEC of 8 November 1990 amending, particularly as regards motor vehicle liability insurance, Directive 73/239/EEC and Directive 88/357/EEC which concern the coordination of laws, regulations and administrative provisions relating to direct insurance other than Ufe assurance (OJ 1990 L 330, p. 44); Article 8 of the Second Council Directive (90/619/EEC) of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (OJ 1990 L 330, p. 50)) and in the field of finance (Article 7 of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27)).

**95** Whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts.

**96** The same applies in any event, even in the absence of any express provision authorizing its institutions to negotiate with non-member countries, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity, because the common rules thus adopted could be affected within the meaning of the *AETR* judgment if the Member States retained freedom to negotiate with non-member countries.

**97** That is not the case in all service sectors, however, as the Commission has itself acknowledged.

**98** It follows that competence to conclude GATS is shared between the Community and the Member States.

## **B . TRIPs**

**99** In support of its claim that the Community has exclusive competence to conclude TRIPs, the Commission relies on the existence of legislative acts of the institutions which could be affected within the meaning of the *AETR* judgment if the Member States were jointly to participate in its conclusion, and, as with GATS, on the need for the Community to participate in the agreement in order to achieve one of the objectives set out in the Treaty (the 'Opinion 1/76 doctrine'), as well as on Articles 100a and 235.

**100** The relevance of the reference to Opinion 1/76 is just as disputable in the case of TRIPs as in the case of GATS: unification or harmonization of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective.

**101** Moreover, Articles 100a and 235 of the Treaty cannot in themselves confer exclusive competence on the Community, as stated above.

**102** It only remains, therefore, to consider whether the subordinate legislative acts adopted in the Community context could be affected within the meaning of the *AETR* judgment if the Member States were to participate in the conclusion of TRIPs, as the Commission maintains.

**103** Suffice it to say on that point that the harmonization achieved within the Community in certain areas covered by TRIPs is only partial and that, in other areas, no harmonization has been envisaged. There has been only partial harmonization as regards trade marks, for example: it is apparent from the third recital in the preamble to the First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) that it is confined to the approximation of national laws 'which most directly affect the functioning of the internal market'. In other areas covered by TRIPs, no Community harmonization measures have been adopted. That is the position as regards the protection of undisclosed technical information, as regards industrial designs, in respect of which proposals have merely been submitted, and as regards patents. With regard to patents, the only acts referred to by the Commission are conventions which are intergovernmental in origin, and not Community acts: the Munich Convention of 5 October 1973 on the Grant of European Patents (JORF, Decree No 77-1151, of 27 September 1977, p. 5002) and the Luxembourg Agreement of 15 December 1989 relating to Community Patents (OJ 1989 L 401, p. 1), which has not yet, however, entered into force.

**104** Some of the Governments which have submitted observations have argued that the provisions of TRIPs relating to the measures to be adopted to secure the effective protection of intellectual property rights, such as those ensuring a fair and just procedure, the rules regarding the submission of evidence, the right to be heard, the giving of reasons for decisions, the right of appeal, interim measures and the award of damages, fall within the competence of the Member States. If that argument is to be understood as meaning that all those matters are within some sort of domain reserved to the Member States, it cannot be accepted. The Community is certainly competent to harmonize national rules on those matters, in so far as, in the words of Article 100 of the Treaty, they 'directly affect the establishment or functioning of the common market'. But the fact remains that the Community institutions have not hitherto exercised their powers in the field of the 'enforcement of intellectual property rights', except in Regulation No 3842/86 (cited above,

see paragraph 55) laying down measures to prohibit the release for free circulation of counterfeit goods.

**105** It follows that the Community and its Member States are jointly competent to conclude TRIPs.

### ***IX . The duty of cooperation between the Member States and the Community institutions***

**106** At the hearing, the Commission drew the Court's attention to the problems which would arise, as regards the administration of the agreements, if the Community and the Member States were recognized as sharing competence to participate in the conclusion of the GATS and TRIPs agreements. While it is true that, in the negotiation of the agreements, the procedure under Article 113 of the Treaty prevailed subject to certain very minor adjustments, 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.

**107** In response to that concern, which is quite legitimate, it must be stressed, first, that any problems which may arise in implementation of the WTO Agreement and its annexes as regards the coordination necessary to ensure unity of action where the Community and the Member States participate jointly cannot modify the answer to the question of competence, that being a prior issue. As the Council has pointed out, resolution of the issue of the allocation of competence cannot depend on problems which may possibly arise in administration of the agreements.

**108** Next, where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community (Ruling 1/78 [1978] ECR 2151, paragraphs 34 to 36, and Opinion 2/91, cited above, paragraph 36).

**109** 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 of competence to take cross-retaliation measures, considered that they would be ineffective if taken in the fields covered by GATS or TRIPs, it would not, under Community law, be empowered to retaliate in the area of trade in goods, since that is an area which on any view falls within the exclusive competence of the Community under Article 113 of the Treaty. Conversely, if the Community were given the right to retaliate in the sector of goods but found 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.

**110** The Commission's third question having been put only on the assumption that the Court recognized that the Community had exclusive competence, it does not call for reply.

In conclusion,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, R. Joliet (Rapporteur), F. A. Schockweiler, P. J. G. Kapteyn and C. Gulmann (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward and A. M. La Pergola, Judges,

after hearing F. G. Jacobs, First Advocate General, C. O. Lenz, G. Tesauero, G. Cosmas, P. Léger and M. Elmer, Advocates General,

gives the following opinion:

**1 . The Community has sole competence, pursuant to Article 113 of the EC Treaty, to conclude the Multilateral Agreements on Trade in Goods.**

**2 . The Community and its Member States are jointly competent to conclude GATS.**

**3 . The Community and its Member States are jointly competent to conclude TRIPs.**

Rodríguez Iglesias Joliét Schockweiler

Kapteyn Gulmann Mancini

Kakouris Moitinho de Almeida Murray

Edward La Pergola

Luxembourg, 15 November 1994.

R. Grass

Registrar

G. C. Rodriguez Iglesias

President

