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External Relations Powers of the European Community

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Abstract

As a result both of the way in which the external relations powers of the European Community (“EC” or “Community”) have been organized by the Treaty establishing the European Community (“EC Treaty”) and of the interpretation by the Court of Justice of the European Communities (“ECJ”), an analysis of the evolution of the external relations powers requires distinguishing between powers relating to foreign trade in the strict sense of the terms, i.e., “common commercial policy” under Article 113 of the EC Treaty, and other external relations powers both express and implied. The subject of this contribution is the external relations powers of the Community. This contribution does not deal with the external relations of the European Union (“EU” or “Union”) in the area covered by the common foreign and security policy.

EXTERNAL RELATIONS POWERS OF THE EUROPEAN COMMUNITY

*Jacques H.J. Bourgeois**

INTRODUCTION

As a result both of the way in which the external relations powers of the European Community ("EC" or "Community") have been organized by the Treaty establishing the European Community¹ ("EC Treaty") and of the interpretation by the Court of Justice of the European Communities ("ECJ"), an analysis of the evolution of the external relations powers requires distinguishing between powers relating to foreign trade in the strict sense of the terms, i.e., "common commercial policy" under Article 113 of the EC Treaty,² and other external relations powers both express and implied. The subject of this contribution is the external relations powers of the Community. This contribution does not deal with the external relations of the European Union ("EU" or "Union") in the area covered by the common foreign and security policy.³

There is no Union and even if there was, it would have no external relations powers. It is true that the absence of a treaty provision granting legal personality is not conclusive under international law.⁴ One can hardly by-pass the fact, however, that a proposal tabled to that effect at the latest Intergovernmental Conference was not carried. In view of the manifest intention of the High Contracting Parties for the Union not to have interna-

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1. Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA].

2. EC Treaty, *supra* note 1, art. 113, O.J. C 224/1, at 44 (1992), [1992] 1 C.M.L.R. at 656.

3. See TEU, *supra* note 1, tit. V, O.J. C 224/1, at 94-96 (1992), [1992] 1 C.M.L.R. at 729-34 (Provisions on a common foreign and security policy).

4. Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11) (advisory opinion).

tional legal personality, there is no room for implied or inherent international personality in the Union.

The Treaty of Amsterdam⁵ (or "Amsterdam Treaty") has nonetheless provided a certain innovation by inserting Article J.14 into the Treaty on European Union ("TEU" or "Maastricht Treaty").⁶ First, the Amsterdam Treaty provides that the Council of the European Union ("Council") may conclude international agreements in implementation of Title V and Title VI.⁷ Second, it provides that such agreements are not binding on a Member State "whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure," in which case "the other members of the Council may agree that the agreement shall apply provisionally to them."⁸ Although new, in effect, this provision is no more than the extension in the area of external relations of the formula introduced by the Maastricht Treaty⁹ whereby the Union is "served by a single institutional framework,"¹⁰ without, however, altering the intergovernmental nature of the common foreign and security policy and the cooperation in the field of justice and home affairs.¹¹ It is doubtful whether this innovation will be welcomed. From an EC internal institutional perspective, it does not add anything: the fact that the agreements as contemplated would be concluded by the Council does not make them agree-

5. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) (not yet ratified) [hereinafter Treaty of Amsterdam].

6. See *id.* art. 1(10), O.J. C 340/1, at 15 (1997) (inserting art. J.14 into TEU); Consolidated version of the Treaty on European Union, art. 24, O.J. C 340/2, at 161 (1997), 37 I.L.M. 67, 73 (not yet ratified) [hereinafter Consolidated TEU] (art. J.14 of TEU), *incorporating changes made by* Treaty of Amsterdam, *supra* note 5. By virtue of the Treaty of Amsterdam, articles of the TEU will be renumbered in the Consolidated version of the Treaty on European Union. Treaty of Amsterdam, *supra*, art. 12, O.J. C 340/1, at 78-79 (1997).

7. See Treaty of Amsterdam, *supra* note 5, art. 1(10), O.J. C 340/1, at 15 (1997) (inserting art. J.14 into TEU); Consolidated TEU, *supra* note 6, art. 24, O.J. C 340/2, at 161 (1997), 37 I.L.M. at 73 (art. J.14 of TEU).

8. See Treaty of Amsterdam, *supra* note 5, art. 1(10), O.J. C 340/1, at 15 (1997) (inserting art. J.14 into TEU); Consolidated TEU, *supra* note 6, art. 24, O.J. C 340/2, at 161 (1997), 37 I.L.M. at 73 (art. J.14 of TEU).

9. TEU, *supra* note 1, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719. The TEU is popularly known as "Maastricht Treaty."

10. *Id.* art. C, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727.

11. See TEU, *supra* note 1, tit. VI, O.J. C 224/1, at 97-98 (1992), [1992] 1 C.M.L.R. at 735-58 (Provisions on cooperation in justice and home affairs).

ments concluded by the Community subject to the normal rules of the EC Treaty. This type of agreement cannot be interpreted by the ECJ and cannot be relied upon by private parties pursuant to the case law of the ECJ. In relations with third countries, recourse to this provision is bound to create confusion between the Community and the Union.¹²

This essay focuses on the foreign trade powers and on the implied external relations powers, leaving aside the few other express external relations powers.

I. FOREIGN TRADE POWERS

A. Legal Text

Most commentators agree that Article 113 of the Treaty establishing the European Economic Community¹³ ("EEC Treaty"), which was and still is the key common commercial policy provision, has been poorly drafted. Article 113 of the EEC did not, and Article 113 of the EC Treaty, as amended,¹⁴ still does not define what is meant by commercial policy and it does not generally define or exhaustively enumerate the instruments to which the Community may have recourse to implement this policy. As other EC Treaty provisions granting powers to the

12. See Christian W.A. Timmermans, *Het Verdrag van Amsterdam. Enkele inleidende kanttekeningen*, 45 SEW 344, 346 (1997).

13. EEC Treaty, *supra* note 1, art. 113, at 60.

14. Article 113 of the Treaty establishing the European Community ("EC Treaty") reads as follows:

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy.

3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.

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

The relevant provisions of Article 228 shall apply.

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

EC Treaty, *supra* note 1, art. 113, O.J. C 224/1, at 44 (1992), [1992] 1 C.M.L.R. at 656.

Community, Article 113 does not say anything about the relationship between these powers and Member States' powers; are they parallel, concurrent, or exclusive? On the occasion of successive amendments to the EC Treaty, the European Commission and the European Parliament put forward amendments to Article 113, which failed to be adopted.

The Maastricht Treaty introduced two changes, which relate to the exercise by the Community of its foreign trade policy powers, but do not deal with the scope of these powers. First, Article 113 of the EC Treaty now expressly refers to the amended Article 228,¹⁵ which deals with the conclusion of international agreements.¹⁶ Article 228(3) provides for consultation of the European Parliament, except for agreements referred to in Article 113(3), i.e., agreements in the field of foreign trade.¹⁷ Member States obviously wanted, through the Council, to keep exclusive control over such agreements.¹⁸ A foreign trade agreement "establishing a specific institutional framework by organizing cooperation procedures" or "having important budgetary implications for the Community," however, requires the assent of the European Parliament.¹⁹ For instance, the conclusion of the World Trade Organization Agreement²⁰ required the assent of the European Parliament. As far as unilateral foreign trade policy measures are concerned, the European Commission undertook in 1973 to recommend that the Council consult the European Parliament except in cases of urgency because of confidentiality or for non-important matters.²¹ Second, as a result of the new Article 228a, economic sanctions taking the form of trade policy measures can only be taken after a common position or a joint action has been adopted to that effect within the framework of the common foreign and security policy, which means in effect that unanimity is required.²²

15. *Id.* art. 228, O.J. C 224/1, at 77 (1992), [1992] 1 C.M.L.R. at 714-15.

16. *Id.* art. 113, O.J. C 224/1, at 44 (1992), [1992] 1 C.M.L.R. at 656.

17. *Id.* art. 228(3), O.J. C 224/1, at 77 (1992), [1992] 1 C.M.L.R. at 714.

18. See Alan Dashwood, *Community Legislative Procedures in the Era of the Treaty on European Union*, 19 EUR. L. REV. 343, 344 (1994).

19. EC Treaty, *supra* note 1, art. 228(3), O.J. C 224/1, at 77 (1992), [1992] 1 C.M.L.R. at 714.

20. Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1994).

21. 6 E.C. BULL., no. 10, at 89-91, ¶ 2427 (1973).

22. EC Treaty, *supra* note 1, art. 228a, O.J. C 224/1, at 78 (1992), [1992] 1

In the course of the Intergovernmental Conference that produced the Amsterdam Treaty, several proposals were put on the table. At some point the amendments discussed took the form of an amendment to Article 113 and a protocol to which delegations wanted to add declarations. As negotiations progressed, the set of texts became a Christmas tree with small gifts for about every delegation. As a result, the amendment was withdrawn. There remains only an additional paragraph five, which provides: "The Council, acting unanimously on a proposal from the Commission and after consultation with the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on services and intellectual property as far as they are not covered by these paragraphs."²³

This wording can only be read as recognizing that international agreements on services and intellectual property come within the scope of the common commercial policy. There are several arguments to support this view. First, this provision is a new paragraph to Article 113 of the EC Treaty, which itself appears under the title common commercial policy.²⁴ Its only effect is to require a unanimous decision of the Council for the other parts of Article 113 to apply. Second, had the High Contracting Parties considered similar agreements to be outside the scope of the common commercial policy, they could hardly have left it to the Council, even acting by unanimity, to extend the scope of EC power. Third, had they taken that view, Article 113(5),²⁵ added by the Amsterdam Treaty, was not necessary to

C.M.L.R. at 715. This formalizes a procedure that has been followed in the past. *See, e.g.*, Council Regulation No. 877/82, O.J. L 102/1 (1982) (establishing trade sanctions against Argentina in Falklands war).

23. Treaty of Amsterdam, *supra* note 5, art. 2(20), O.J. C 340/1, at 35 (1997) (adding art. 113(5) to EC Treaty); Consolidated version of the Treaty establishing the European Community, art. 133(5), O.J. C 340/3, at 238 (1997), 37 I.L.M. 79, 99 (not yet ratified) [hereinafter Consolidated EC Treaty] (art. 113(5) of EC Treaty), *incorporating changes made by Treaty of Amsterdam, supra*. By virtue of the Treaty of Amsterdam, articles of the EC Treaty will be renumbered in the Consolidated version of the Treaty establishing the European Community. *See Treaty of Amsterdam, supra*, art. 12, O.J. C 340/1, at 78-79 (1997).

24. *See EC Treaty, supra* note 1, tit. VII, O.J. C 224/1, at 44 (1992), [1992] 1 C.M.L.R. at 655-57.

25. *See Treaty of Amsterdam, supra* note 5, art. 2(20), O.J. C 340/1, at 35 (1992) (adding art. 113(5) to EC Treaty); Consolidated EC Treaty, *supra* note 23, art. 133(5), O.J. C 340/3 at 238, 37 I.L.M. at 99 (art. 113(5) of EC Treaty).

allow the Community to enter into such agreements, recourse to Article 235²⁶ of the EC Treaty would have done the trick.

Two points should be noted. First, paragraph five only refers to negotiations and agreements. Autonomous action in the field of trade in services and international protection of intellectual property rights remains subject to other EC Treaty provisions. This requirement probably means that the new so-called Trade Barriers Regulation²⁷ enacted under Article 113 still cannot be applied in the field of trade in services and international protection of intellectual property rights beyond the limits within which Article 113 currently applies, as interpreted by the ECJ in its Opinion 1/94 on the results of the Uruguay Round.²⁸ Second, it might be argued that the extension may be made on an *ad hoc* basis only to certain types of services and intellectual property rights, as opposed to their permanent subjection to Article 113.²⁹ It may well be that certain Member States had this argument in mind, but this interpretation does not find support in the wording. If this interpretation had been the intention of the Intergovernmental Conference, a wording similar to Article 235 would have been used along the lines of: "If, however, certain negotiations and agreements appear necessary"³⁰

In constitutional terms as regards the relationship between the Community and its Member States, Article 113(5) means that the power to enter into international agreements in the field of services and protection of intellectual property has been transferred to the Community and forms part of the Community's foreign trade policy powers. No further amendment to the EC Treaty is required if the Community wants to act in these fields. This transfer, however, is subject to a condition prece-

26. See EC Treaty, *supra* note 1, art. 235, O.J. C 224/1, at 78 (1992), [1992] 1 C.M.L.R. at 716.

27. Council Regulation No. 3286/94, O.J. L 349/71 (1994). For a comment, see Marco C.E. Bronckers, *Enforcing WTO Law Through the EC Trade Barriers Regulation*, 3 INT'L TRADE & REG. 76 (June 1997). Interestingly, the European Commission accepted complaints and initiated investigations in relation to alleged obstacles to trade taking the form of intellectual property measures. See, e.g., O.J. C 177/5 (1997) (IMRO complaint about licensing of musical works in the United States).

28. Re the Uruguay Round Treaties, Opinion 1/94, [1994] E.C.R. I-5267, [1995] 1 C.M.L.R. 205.

29. THE EUROPEAN POLICY CENTER, MAKING SENSE OF THE AMSTERDAM TREATY 97-98 (1997).

30. EC Treaty, *supra* note 1, art. 235, O.J. C 224/1, at 78 (1992), [1992] 1 C.M.L.R. at 716.

dent, i.e., a unanimous vote of the Member States in the Council. Member States opposing the effective extension of the foreign trade policy powers to these fields have the right and the political possibility to do so. They can, however, no longer use the legal argument that these matters do not come within EC powers and that EC measures in these fields would be opened to legal challenge under national constitutional law.

B. *Conflicting Views of EC Institutions*

There have been several occasions in which conflicting views about the interpretation of Article 113 arose between the Council, or at least a number of Member States in the Council, and the Commission. There were diverging views concerning the sort of measures that could be taken under that provision. Whether Article 113 also covers trade in services and intellectual property became a real issue at the end of the Uruguay Round.

Discussions about whether this or that particular foreign trade policy measure proposed by the Commission came within EC powers under Article 113 usually arose because some Member States considered that they could better defend their interests by acting on their own. Member States also reflected deeper disagreements over the scope of these powers in general. From a legal point of view, some Member States were concerned that, once it was accepted that the Community had the power to take the measure in question, it would be difficult to deny this power in the future for similar measures. This position explains why, for instance, the Council refused in the past to identify, in the preamble of regulations on the EC General System of Preferences, the operative provision of the EC Treaty. One should bear in mind that when acting under Article 113, the Council may decide by qualified majority. This ability also explains why there have been cases in which the Council rested its decisions on Article 235,³¹ either alone or in conjunction with Article 113. Relying on Article 235 had the added advantage of making clear

31. Article 235 of the EC Treaty reads as follows:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

EC Treaty, *supra* note 1, art. 235, O.J. C 224/1, at 78 (1992), [1992] 1 C.M.L.R. at 716.

that the measures adopted were not, or not entirely, covered by the Community's foreign trade policy powers.

The issue of the scope of the Community's foreign trade policy powers cannot be separated from the interpretation of the ECJ according to which these powers are exclusive.³² The broader the scope of EC powers, the narrower the scope for Member States to act on their own in this field.

At some point, in an attempt to put an end to endless debates, the Council lawyers developed what came to be called the "finalist theory," according to which any measure that aims to influence the volume or flow of trade is to be considered as a measure coming within the scope of Article 113. The Commission objected to this theory on the ground that it is not easy to determine what is meant by the aims and that the aim pursued by those responsible for the measure cannot be a proper criterion to define the scope of their powers. The Commission developed its own theory according to which a measure of commercial policy must be assessed, primarily by reference to its specific character as an instrument regulating international trade. This theory came to be called the "instrumentalist theory." The respective theories of the Commission and Council are set out in Opinion 1/78.³³ In this opinion and in subsequent opinions and judgments, the ECJ refrained from endorsing either theory.

C. *Case Law Before Opinion 1/94*

Not surprisingly, private parties involved in litigation in national courts used arguments about the interpretation of Article 113 that led these courts to refer questions of interpretation to the ECJ. Disputes between the Commission and the Council about the interpretation of Article 113 also ended up in the ECJ in the form of either requests for advisory opinions under Article 228 or applications for the annulment of Council legal actions

32. Re the O.E.C.D. Understanding on a Local Cost Standard, Opinion 1/75, [1975] E.C.R. 1355, [1976] 1 C.M.L.R. 85; see *Donckerwolcke v. Procureur de la République*, Case 41/76, [1976] E.C.R. 1921, [1977] 2 C.M.L.R. 535 (following Opinion 1/75); *Bulk Oil (Zug) v. Sun Int'l Ltd. & Sun Oil Trading Co.*, Case 174/84, [1986] E.C.R. 559, [1986] 2 C.M.L.R. 732 (following Opinion 1/75).

33. Re the Draft International Agreement on Natural Rubber, Opinion 1/78, [1979] E.C.R. 2871, 2880-94, [1979] 3 C.M.L.R. 639, 646-61. For a critique of both theories, see Claus-Dieter Ehlermann, *The Scope of Article 113 of the EEC Treaty*, in *ÉTUDES DE DROIT DES COMMUNAUTÉS EUROPÉENNES: MÉLANGES OFFERTS A PIERRE-HENRI TEITGEN* 145 (1984).

brought by the Commission under Article 173.³⁴

As already indicated, the ECJ has avoided espousing the Commission or the Council theory and has not developed a theory of its own. In the period prior to Opinion 1/94, during which, it should be stressed, the ECJ was only asked to interpret Article 113 with respect to trade in goods, the ECJ took a broad view of the scope of EC powers. The ECJ has significantly contributed to defining the scope of Article 113.

The ECJ held that certain measures, which are not specifically mentioned in Article 113, came within the scope of this provision. These measures included "the elimination of national disparities, whether in the field of taxation or of commerce affecting trade with third countries,"³⁵ customs valuation,³⁶ an international agreement on export credits,³⁷ an international commodity agreement,³⁸ the EC System of Generalized Preferences,³⁹ the application of internal indirect taxes on goods imported from third countries,⁴⁰ and measures taken at the external border of the Community to protect human health.⁴¹

The ECJ also broadly interpreted secondary legislation enacted under Article 113. For instance, the EC regulations on import and export regimes that define the liberalization of imports into the Community and exports from the Community as "not subject to quantitative restrictions"⁴² were held to prohibit measures other than quotas, which in intra-Community trade are called "measures having equivalent effect to quantitative restrictions."⁴³ While such a broad interpretation makes sense and is

34. EC Treaty, *supra* note 1, art. 173, O.J. C 224/1, at 62 (1992), [1992] 1 C.M.L.R. at 687-88.

35. *Sociaal Fonds voor de Diamantarbeiders v. N.V. Indiamex and Association de fait De Belder*, Joined Cases 37-38/73, [1973] E.C.R. 1609.

36. *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, Case 8/73, [1973] E.C.R. 897.

37. Opinion 1/75, [1975] E.C.R. 1355, [1976] 1 C.M.L.R. 85.

38. Opinion 1/78, [1979] E.C.R. 2871, [1979] 3 C.M.L.R. 639.

39. *Commission v. Council*, Case 45/86, [1987] E.C.R. 1493, [1988], 2 C.M.L.R. 131.

40. *Co-Frutta Sàrl v. E.C. Commission*, Case 191/88, [1988] E.C.R. 4551, [1990] 2 C.M.L.R. 372.

41. *Hellenic Republic v. Council*, Case C-62/88, [1990] E.C.R. I-1527, [1991] 2 C.M.L.R. 649.

42. Council Regulation No. 3285/94, O.J. L 349/53, at 55 (1994); Council Regulation No. 519/94, O.J. L 67/89 (1994) (applying to state trading countries); Council Regulation No. 2603/69, O.J. L 324/25 (1969) (establishing common rules for export).

43. *Commission v. Greece*, Case C-65/91, [1992] E.C.R. I-5245; *Fritz Werner In-*

justified in light of the system and the purpose of these regulations, the ECJ could conceivably have interpreted these more narrowly on the basis of their wording.

Among the reasons on which it rested these broad interpretations of EC powers under Article 113, the ECJ opined that "policy" based on "uniform principles" and the non-exhaustive enumeration in Article 113 of the EC Treaty of the subjects covered by commercial policy show "that the question of external trade must be governed from a wide point of view" and that it does not "close the door to the application in a Community context of any other process intended to regulate external trade."⁴⁴

The ECJ also developed some criteria: "the proper functioning of the customs union;"⁴⁵ the concept of commercial policy, which has "the same content whether it is applied in the context of the international action of a State or to that of the Community;"⁴⁶ and Article 110,⁴⁷ listing as it does, the objectives for the aim of contributions to the harmonious development of world trade presupposing that commercial policy will be adjusted to take account of any changes of outlook in international relations.⁴⁸

The ECJ has also set forth two principles on which the interpretation of Article 113 should be based. The first principle could be called the principle of coherence: "a coherent commercial policy would no longer be practicable if the Community were not in a position to exercise its powers also in connection with a category of agreements which are becoming, alongside traditional commercial agreements, one of the major factors in the regulation of international trade."⁴⁹ The second principle is the principle of freedom of intra-EC trade: "a restrictive inter-

dustrie-Ausrüstungen GmbH v. Federal Republic of Germany, Case C-70/94, [1995] E.C.R. I-3189; *Criminal Proceedings Against Peter Lefier and Others*, Case C-83/94, [1995] E.C.R. I-3231.

44. Opinion 1/78, [1979] E.C.R. 2871, 2913, ¶ 45, [1979] 3 C.M.L.R. 639, 677.

45. *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*, Case 8/73, [1973] E.C.R. 897, 908, ¶ 4.

46. Opinion 1/75, [1975] E.C.R. 1355, 1362, [1976] 1 C.M.L.R. 85, 92; *see Commission v. Council*, Case 45/86, [1987] E.C.R. 1493, 1503, ¶ 16, [1988] 2 C.M.L.R. 131, 136.

47. EC Treaty, *supra* note 1, art. 110, O.J. C 224/1, at 44 (1992), [1992] 1 C.M.L.R. at 655.

48. *Commission v. Council*, [1987] E.C.R. at 1521, ¶ 19, [1988] 2 C.M.L.R. at 154.

49. *See* Opinion 1/78, [1979] E.C.R. at 2912, ¶ 43, [1979] 3 C.M.L.R. at 676; *see also Massey-Ferguson*, [1973] E.C.R. at 908, ¶ 4.

pretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.”⁵⁰

D. *Opinion 1/94*

Towards the end of the Uruguay Round of Multilateral Trade Negotiations, in which the Community had negotiated as a unit following the established EC procedures⁵¹ for all matters including trade in services and trade-related intellectual property measures, the question had to be faced as to whether the Community had the power to conclude several agreements that it had negotiated. This event was to be a *cronica de una muerte anunciada*.⁵² From the outset, several Member States opposed the Commission's view that the whole of the agreements fell within the scope of the EC foreign trade policy powers under Article 113 of the EC Treaty, alternatively that the General Agreement on Trade in Services⁵³ (“GATS”) and the Agreement on Trade-related Aspects of Intellectual Property Rights⁵⁴ (“TRIPs Agreement”) fell under the implicit external relations powers. The issue of the Community's power remained unresolved at the end of the Uruguay Round. At a Council of the European Union meeting of March 1994, Member States took the view that the Final Act and the WTO Agreement “also cover[ed] matters of national competence”⁵⁵ while the Commission asserted that “the Final Act . . . and the agreements annexed thereto [fell] exclusively within the competence of the European

50. Opinion 1/78, [1979] E.C.R. 2871, 2913, ¶ 45, [1979] 3 C.M.L.R. 639, 677.

51. See Pieter Jan Kuijper, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 EUR. J. INT'L L. 222 (1995); Peter Van den Bossche, *The European Community and the Uruguay Round Agreements: Confusion and Controversy over the Competence and Conduct of the European Community in International Economic Relations: The Bittersweet Experience of the Uruguay Round*, in IMPLEMENTING THE URUGUAY ROUND 23-102 (John H. Jackson & Alan O. Sykes eds., 1997).

52. GABRIEL GARCIA MARQUEZ, *CRONICA DE UNA MUERTE ANUNCIADA* (1984).

53. General Agreement of Trade in Services, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), 33 I.L.M. 1125 (1994).

54. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994).

55. Opinion 1/94, [1994] E.C.R. I-5267, I-5267, ¶ 5, [1995] 1 C.M.L.R. 205, 309.

Community.”⁵⁶ On April 6, 1994, the Commission submitted to the ECJ a request for an advisory opinion with a view to obtaining a definitive ruling on the matter.

As far as the powers of the Community under Article 113 of the EC Treaty are concerned, in its Opinion 1/94,⁵⁷ the ECJ replied to the Commission’s questions as follows:

- the Community has exclusive competence to conclude the Multilateral Agreements on Trade in Goods,⁵⁸ including the Agreement on Agriculture,⁵⁹ and also with respect to goods subject to the Euratom Treaty⁶⁰ and the ECSC Treaty,⁶¹
- cross-frontier supplies of services are covered by Article 113, excluding international agreements in the field of transport services;⁶² and
- only the clauses in the TRIPs Agreement concerning the release into free circulation of counterfeit goods fall within the scope of the common commercial policy.⁶³

Opinion 1/94 has led to a flurry of comments in the literature.⁶⁴

56. *Id.*

57. *Id.*

58. *Id.* at I-5399, ¶ 34, [1995] 1 C.M.L.R. at 313.

59. *Id.* at I-5397-98, ¶ 29, [1995] 1 C.M.L.R. at 313.

60. *Id.* at I-5396, ¶ 24, [1995] 1 C.M.L.R. at 312.

61. *Id.* at I-5396-97, ¶ 27, [1995] 1 C.M.L.R. at 313.

62. *Id.* at I-5404, ¶ 53, [1995] 1 C.M.L.R. at 318.

63. *Id.* at I-5409, ¶ 71, [1995] 1 C.M.L.R. at 322.

64. See, e.g., Josiane Auvret-Finck, *Avis 1/94 de la Cour du 15 novembre 1994*, 31 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 322 (1995); Jacques H.J. Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession*, 32 COMMON MKT. L. REV. 763 (1995); Jacqueline Duthéil de la Rochère, *L'Ère des Compétences Partagées: A Propos de L'étendue des Compétences Extérieures de la Communauté Européenne*, 390 REVUE DU MARCHÉ COMMUN 461 (1995); Alan Dashwood, *The Limits of European Community Powers*, 21 EUR. L. REV. 113 (1996); Nicholas Emiliou, *The Death of Exclusive Competence?*, 21 EUR. L. REV. 294 (1996); Thiébaud Flory & 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*, 32 CAHIERS DE DROIT EUROPÉEN 379 (1996); Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise?*, 6 EUR. J. INT'L L. 245 (1995); Jan H. Jans, Note on Opinion 2/92 and 1/94, (44) SEW 110 (1996); Denys Simon, *La compétence de la Communauté pour conclure l'accord OMC: l'Avis 1/94 de la Cour de Justice* (1994) EUROPE, (December issue); G. Tognazzi, *Il Parere n° 1/94: nuovi sviluppi in tema di relazioni esterne della Comunità Europea* 35 DIR. COMUN. & SCAMBI. INTERN. 75 (1996); F. Zampini, *Les limites de la compétence externe de la Communauté européenne selon la CJCE et les limites de l'intervention judiciaire*, in LA COMMUNAUTÉ

There is no need to restate them here. Only a few points need to be made.

It is worth mentioning that Opinion 1/94 put an end to a number of uncertainties that led to recurrent discussions: the Community has the power under Article 113 to enter into international agreements including international agreements on products falling under the Treaty establishing the European Coal and Steel Community, international agreements on trade in agricultural products, international agreements such as the WTO Agreement on Sanitary and Phytosanitary Measures⁶⁵ and the WTO Agreement on Technical Barriers to Trade,⁶⁶ and international agreements on cross-border supply of services. Opinion 1/94 should also put an end to the practice of having Member States appear alongside the Community as parties to certain international commodity agreements or, at least, deprive Member States of legal arguments in support of that practice, on the ground that they pay part of the administrative expenses.

Opinion 1/94 is a step back as regards the rationale that the ECJ developed in the past when defining the scope of the Community's foreign trade policy powers. In Opinion 1/94, the ECJ recalls that changes in the international economy are relevant for the interpretation of the scope of the powers under Article 113, as it stated in Opinion 1/78. Yet, the ECJ sets this criterion aside with respect to intellectual property and services by referring to the division of powers and the decision-making procedures *foro interno* under the EC Treaty. The ECJ also departs from other principles and criteria referred to above on which it relied in the past to define the scope of the Community's foreign trade powers under Article 113, such as the concept of commercial policy within the meaning of Article 113, which should have the same content as that of commercial policy of a State, or the principle that the Community's foreign trade powers should

EUROPÉENNE ET LES ACCORDS MIXTES. QUELLES PERSPECTIVES? 27 (Jacques H. Bourgeois et al. eds., 1997).

65. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, WTO Agreement, *supra* note 48, reprinted in LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1153 (1994).

66. Agreement on Technical Barriers to Trade, Apr. 15, 1994, WTO Agreement, *supra* note 48, Annex 1A, reprinted in LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1153 (1994) [hereinafter Technical Barriers Agreement].

extend to agreements that are becoming major factors in the regulation of international trade.

II. *IMPLICIT EXTERNAL RELATIONS POWERS*

A. *The Issue*

The common market established by the EEC Treaty, the policies conducted under this treaty, and the amendments to this treaty cover a broad range of activities entrusted to the Community. Yet, the constitutional provisions display a sort of myopia by focusing on the intra-EC aspects of the policies, as if such policies could be conducted in the intra-Community sphere by the Community while leaving the extra-Community aspects to be dealt with by Member States.

Apart from its Article 113, the EC Treaty conferred on the Community an express power to enter into international agreements in Article 238 of the EEC Treaty, with a view to conclude agreements that establish an association with other countries or international organizations.⁶⁷ Subsequently, the 1986 Single European Act⁶⁸ inserted into the EEC Treaty a provision conferring on the EEC external relations powers in the field of capital movements⁶⁹ and provisions conferring on the EEC the power to enter into agreements with non-EC countries on research and development programs and on environment.⁷⁰ The Maastricht Treaty inserted two provisions on international agreements into the framework of the economic and monetary union and development cooperation.⁷¹

The Amsterdam Treaty conferred on the Community additional external relations powers on matters of visa and asylum

67. EEC Treaty, *supra* note 1, art. 238, at 90.

68. SEA, *supra* note 1, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

69. *Id.* art. 20, O.J. L 169/1, at 8 (1987), [1987] 2 C.M.L.R. at 750 (amending Treaty establishing the European Economic Community ("EEC Treaty") by adding art. 102a).

70. *Id.* art. 24, O.J. L 169/1, at 11 (1987), [1987] 2 C.M.L.R. at 752 (amending EEC Treaty by adding art. 130n, provisions on research and development); *id.* art. 25, O.J. L 169/1, at 11 (1987), [1987] 2 C.M.L.R. at 754 (amending EEC Treaty by adding art. 130r, provisions on environment).

71. EC Treaty, *supra* note 1, art. 109(4), O.J. C 224/1, at 38 (1992), [1992] 1 C.M.L.R. at 644 (Provisions on economic and monetary union); *id.* art. 130y, O.J. C 224/1, at 54 (1992), [1992] 1 C.M.L.R. at 673 (Provisions on development cooperation).

policies,⁷² but the so-called ERTA effect⁷³ of internal EC rules on external relations powers is excluded by the Protocol Relating to Article 73j(2)(a).⁷⁴ In addition, the Declaration Relating to Article 73k(3)(a) exists.⁷⁵ Significantly, the Maastricht Treaty left questions about external relations with respect to the Economic and Monetary Union unresolved. For example, should a distinction be made between economic policy and monetary policy? How will the Community be represented in the International Monetary Fund? How should the position of EC Member States to stay out of the Monetary Union be dealt with? These questions were not addressed by the Amsterdam Treaty either.⁷⁶ Even with these subsequent additions, the constitutional provisions do not address important parts of the external face of the single market.

The same myopia is often displayed by the drafters of secondary EC legislation, in particular when harmonizing Member States' legislation. Directives such as those dealing with the disclosure requirements for branches of non-EC companies,⁷⁷ the position of non-EC financial institutions⁷⁸ or non-EC insurance companies,⁷⁹ or on requirements for non-EC providers of invest-

72. See Treaty of Amsterdam, *supra* note 5, art. 2(15)b, O.J. C 340/1, at 28-32 (1997) (inserting tit. IIIa into EC Treaty); Consolidated EC Treaty, *supra* note 23, tit. IV, O.J. C 340/3, at 200-05 (1997), 37 I.L.M. at 89-91 (tit. IIIa of EC Treaty).

73. See *Commission v. Council*, Case 22/70, [1971] E.C.R. 263 (ERTA) (holding that implied powers of Community to act in external affairs can be derived from actualization of EC competence in internal affairs in that area).

74. Treaty of Amsterdam, *supra* note 5, Protocol on external relation of the Member States with regard to the crossing of external borders, O.J. C 340/1, at 108 (1997).

75. *Id.*, Declaration on Article 73k(3)(a) of the Treaty establishing the European Community, O.J. C 340/1, at 134 (1997).

76. For an analysis, see Jean-Victor Louis, *Union monétaire européenne et Fonds monétaire international*, WÄHRUNG UND WIRTSCHAFT. DAS GELD IM RECHT: FESTSCHRIFT FÜR HUGO J. HAHN ZUM 70. GEBURTSTAG 201 (Albrecht Weber ed., 1997).

77. Eleventh Directive of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of companies governed by the law of another State, § II, O.J. L 395/36, at 38 (1989).

78. Second Council Directive No. 89/646 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, tit. III, O.J. L 386/1, at 5-6 (1989).

79. Council Directive No. 90/619 of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life insurance laying down provisions to facilitate the effective exercise of freedom to provide services, art. 8, O.J. L 330/50, at 54 (1990).

ment services in the securities field,⁸⁰ are the exception rather than the rule.

Short of inserting into the EC Treaty provisions making clear that EC powers in various areas include the power to deal with the extra-EC aspects of these areas, there are essentially three ways to enable the Community to act in the international sphere. One is to rely on Article 235, according to which appropriate measures may be taken by the Council acting unanimously and after consulting the European Parliament where such measures are necessary to attain one of the EC objectives and the EC Treaty does not provide the necessary powers. Several cases followed this approach.⁸¹ The second and third ways are to interpret sensibly the relevant EC Treaty provisions to that effect. As Article 113 of the EC Treaty does not define the scope of the common commercial policy, one could interpret this article as covering the external face not only of the customs union, i.e., trade in goods, but also of the other areas of the common market.⁸² The Commission defended this interpretation in its request for an advisory opinion on the Uruguay Round. As already indicated, the ECJ rejected the broad interpretation covering GATS and the TRIPs Agreement.

80. Council Directive No. 93/22 of 10 May 1993 on investment services in the securities field, art. 7, O.J. L 141/27, at 34 (1993).

81. See, e.g., Decision of the Council and the Commission concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, O.J. L 95/47 (1995); Council Regulation No. 1488/96 on financial and technical measures to accompany the reform of economic and social structures in the framework of Euro-Mediterranean partnership, O.J. L 189/1 (1996); Council and Commission Decision on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, O.J. L 327/1 (1997).

82. Position defended partly with qualifications in the literature, i.e., by ALBERT BLECKMANN, *EUROPARECHT: DAS RECHT DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT* 461-462 (1985); Paul Demaret, *La politique commerciale: Perspectives d'évolution et faiblesses présentes*, in *STRUCTURE AND DIMENSIONS OF EUROPEAN COMMUNITY POLICY* 69 (Juegen Schwarze & Henry G. Schermers eds., 1988); PIET EECKHOUT, *THE EUROPEAN INTERNAL MARKET AND INTERNATIONAL TRADE: A LEGAL ANALYSIS* (1994); Georges Le Tallec, *The Common Commercial Policy of the EEC*, 20 *INT'L & COMP. L.Q.* 732 (1971); Pierre Pescatore, *La Politique Commerciale*, in *LES NOUVELLES: DROIT DES COMMUNAUTÉS EUROPÉENNES* 921-922 (Ganshof van der Meersch ed., 1969); P. WEISSENBERG, *DIE KOMPETENZ DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT ZUM ABSCHLUSS VON HANDELS- UND KOOPERATIONSABKOMMEN GEMÄSS ARTIKEL 113 EWG-VERTRAG* (Berlin 1978).

B. *Implied External Powers*

The other way to enable the Community to act in the international sphere is to deduce from the power to deal with a given subject matter in intra-Community trade, the power to deal with that matter in extra-Community trade. This approach has been followed by the ECJ in *ERTA*,⁸³ in which the ECJ expounded a doctrine that is often described as recognizing that the Community's external powers are co-extensive with its internal powers *in foro interno, in foro externo*. In fact, the doctrine is somewhat more complicated. So much so that there are divergent views among commentators as to how exactly it should be interpreted and applied.⁸⁴

In *ERTA*,⁸⁵ the issue submitted to the ECJ was whether the European Economic Community or the Member States had the power to conclude an international agreement called the European Agreement concerning the Work of Crews of Vehicles engaged in International Road Transport.⁸⁶ The ECJ held that the power to enter into international agreements,

may equally flow from other provisions of the Treaty and from measures adopted, within the framework of these provisions, by the Community institutions In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or collectively, to undertake obligations which affect those rules.⁸⁷

Several points should be made. First, in *ERTA* and in subsequent cases,⁸⁸ the ECJ distinguishes between the existence of implied external EC powers and the preemptive effect on Member States' powers. In *ERTA*, the test was whether international obligations undertaken by Member States would affect EC rules or alter the scope of such rules.⁸⁹ In *Kramer*, the ECJ held that be-

83. *Commission v. Council*, Case 22/70, [1971] E.C.R. 263 [hereinafter *ERTA*].

84. Meinhard Hilf, *The Single European Act and 1992: Legal Implications for Third Countries*, 1 *EUR. J. INT'L L.* 89, 95 (1990).

85. *ERTA*, [1971] E.C.R. 263.

86. *Id.* at 265.

87. *ERTA*, [1971] E.C.R. at 274, ¶¶ 16-17.

88. *Kramer and Bais SNC v. The Netherlands*, Joined Cases 3, 4, 6/76, [1976] E.C.R. 1279, [1976] 2 C.M.L.R. 440 [hereinafter *Kramer*].

89. *ERTA*, [1971] E.C.R. at 275, ¶ 22.

cause at the relevant time the EEC had not yet fully exercised its functions in fisheries conservation, Member States were still entitled to conclude international agreements in that field.⁹⁰

Second, as the existence of external powers under this doctrine is derived from common rules, the ECJ analyzes to what extent common rules cover the same subject matter as the international agreement. For example, in Opinion 2/91⁹¹ relating to the Community's powers to conclude Convention 170 of the International Labor Organization ("ILO"), the ECJ rejected the Commission's view that the Community's power in the field of health conferred by Article 118a⁹² was exclusive. Instead, the ECJ noted that both the International Labor Organization Convention (the "ILO Convention") and Article 118a(3) only provide for minimum requirements and that the ILO Convention and EC rules based on Article 118a(3) could always be applied simultaneously. If the Community adopts rules that are less stringent than the ILO Convention, EC Member States may, under Article 118a(3), adopt more stringent measures. If the Community adopts rules that are more stringent than the ILO Convention, the ILO Convention would not prevent Member States from applying these EC rules, because under the ILO constitution Members may adopt more stringent rules.⁹³

As a third point, one should mention Opinion 1/76 relating to a draft international agreement establishing a laying-up fund for inland waterway vessels.⁹⁴ The ECJ noted that under Articles 74 and 75 of the EEC Treaty,⁹⁵ to attain the common transport policy, the Council is empowered to lay down any other provision. Recalling *Kramer*,⁹⁶ the ECJ was of the view that the Community had authority to enter into international agreements in cases in which internal power has already been used. It added that this authority is not limited to that eventuality by stating that "the power to bind the Community vis-à-vis third countries . . . flows by implication from the provisions of the Treaty creating

90. *Kramer*, [1976] E.C.R. at 1310, ¶¶ 35-39, [1976] 2 C.M.L.R. at 469-70, ¶¶ 16-17.

91. Opinion 2/91, [1993] E.C.R. I-1061, [1993] 3 C.M.L.R. 800.

92. SEA, *supra* note 1, art. 21, O.J. L 169/1, at 9 (1987), [1987] 2 C.M.L.R. at 750 (amending EEC Treaty by adding art. 118a).

93. See Opinion 2/91, [1993] E.C.R. at I-1079, ¶ 18, [1993] 3 C.M.L.R. at 806.

94. Opinion 1/76, [1977] E.C.R. 741, [1977] 2 C.M.L.R. 279.

95. EEC Treaty, *supra* note 1, arts. 74-75, at 44-45.

96. *Kramer and Bais SNC v. The Netherlands*, Joined Cases 3, 4, 6/76, [1976] E.C.R. 1279, [1976] 2 C.M.L.R. 440.

the internal power and insofar as the participation of the Community in the international agreement is, as here, *necessary* for the attainment of one of the objectives of the Community.”⁹⁷

In situations contemplated by Opinion 1/76, there is obviously no preemptive effect resulting from the existence of the EC external power. Consequently, this power is often referred to as “potential” external power. As it is up to the Council to assess whether the conclusion by the Community of an international agreement is necessary, the likelihood that Member States would agree in the Council to similar conclusions should not be rated very high.

C. *Opinion 1/94*

In its request for an ECJ opinion, the Commission put the implied external powers doctrine of *ERTA* and Opinion 1/76 forward as an alternative authority for the Community to conclude on its own GATS and TRIPs. The ECJ was of the view that the application of Opinion 1/76 to GATS cannot be accepted.⁹⁸ Instead, the ECJ interpreted its Opinion 1/76 by distinguishing it on the facts from the GATS case:

[t]hat 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 to nationals of Member States of the Community.⁹⁹

As to the TRIPs Agreement, the ECJ also dismissed the Commission’s argument based on Opinion 1/76:

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.¹⁰⁰

Most commentators think that Opinion 1/94 is a step back

97. Opinion 1/76, [1977] E.C.R. at 755, ¶ 4, [1977] 2 C.M.L.R. at 295-96 (emphasis added).

98. Opinion 1/94, [1994] E.C.R. I-5267, I-5413, ¶ 84, [1995] 1 C.M.L.R. 205, 324.

99. *Id.* at I-5414, ¶ 86, [1995] 1 C.M.L.R. at 325.

100. *Id.* at I-5417, ¶ 100, [1995] 1 C.M.L.R. at 327.

from the implied external powers as defined in Opinion 1/76.¹⁰¹ The “necessity test” in Opinion 1/74 meant in Opinion 1/94 that the attainment of an objective of the EC Treaty in the internal sphere must be inextricably linked to the external action. Even then, in reply to Commission arguments tending to show that this was the case in the transport sector, the ECJ added a “proportionality test”: “There is nothing in the Treaty which prevents the institutions from arranging, in the common rules laid down by them, concerted action in relations to non-member countries or from prescribing the approach to be taken by the Member States in their external dealings.”¹⁰²

As far as the ERTA doctrine is concerned, the ECJ recalled that notwithstanding the absence of an express reference to that effect in the EC Treaty, the Community may use the powers conferred to it with respect to the right of establishment and the freedom to provide services to specify the treatment that is to be accorded to nationals of non-member countries.¹⁰³ It should be noted, however, that the ECJ, perhaps as a result of the Commission’s argument about exclusive power, did not treat two distinct issues separately, i.e., whether the Community has the power to enter into GATS and TRIPs and whether that power is exclusive.¹⁰⁴ They concluded that “competence to conclude GATS is shared between the Community and the Member States”¹⁰⁵ and that “the Community and its Member States are jointly competent to conclude TRIPs.”¹⁰⁶

It is unclear what the ECJ exactly meant by this formula. It could mean that the Community and the Member States have concurrent powers. It could also mean that the Community only has power if the power is exclusive under the ERTA doctrine. If the latter interpretation is correct, then the ECJ would have further reduced the scope of its earlier case law.

The ECJ reiterated the requirement that in order to acquire

101. See *supra* note 64 and accompanying text. Advocate General G. Tesouro referred in his opinion in *Hermès International v. FHT Marketing Choice BV* (not yet reported) to “the new reading of Opinion 1/76, reducing its scope to the specificity of the case at hand, without however offering many explanations.”

102. Opinion 1/94, [1994] E.C.R. at I-5411-12, ¶ 79, [1995] 1 C.M.L.R. at 323.

103. *Id.* at I-5415, ¶ 90, [1995] 1 C.M.L.R. at 325.

104. See Opinion 2/91, [1993] E.C.R. I-1061, I-1079, ¶¶ 13 *et seq.*, [1993] 3 C.M.L.R. at 805 (discussing ILO Convention).

105. Opinion 1/94, [1994] E.C.R. at I-5417, ¶ 98, [1995] 1 C.M.L.R. at 327.

106. *Id.* at I-5419, ¶ 105, [1995] 1 C.M.L.R. at 328.

exclusive external power, common rules could be affected within the meaning of *ERTA* if Member States retained freedom to negotiate with non-member countries. The ECJ, however, tightened the *ERTA* doctrine by adding that this requirement implies that the Community has achieved complete harmonization, which was only the case for the rules governing access to a self-employed activity.¹⁰⁷ The ECJ came to a similar conclusion with respect to the TRIPs Agreement.¹⁰⁸

III. SOME COMMENTS

The law of the Community's external relations has significant constitutional implications that have to do with the Community's institutional system and the division of powers between the Community and its Member States. To that extent, it is to be expected that when dealing with constitutional cases, the ECJ's approach reflects the *Zeitgeist*. It is thus not surprising that there is some ebb and flow in the case law and that it is currently at a low water mark as seen from an integrationist perspective.

Opinion 1/94 offers a good example of where the ECJ was faced with constitutional implications. The ECJ referred to such implications in relation to the TRIPs Agreement, where it stated that if the Community were to be recognized as having exclusive external power, "the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and rules of voting."¹⁰⁹ It must have had this statement also in mind when dealing with the question of GATS. The ECJ could conceivably have reached a different conclusion. Under Article 228(3) of the EC Treaty, the European Parliament has to give its assent to the conclusion of the WTO Agreement.¹¹⁰ Certain important implementing measures are to be taken on the basis of other EC Treaty provisions involving the European Parliament in the decision-making process. In addition, practically all the rules as to voting that the EC institutions would have been able to escape if the WTO would have been

107. *Id.* at I-5416-17, ¶¶ 96, 97, [1995] 1 C.M.L.R. at 327.

108. *Id.* at I-5418, ¶ 103, [1995] 1 C.M.L.R. at 327-28.

109. *Id.* at I-5406, ¶ 60, [1995] 1 C.M.L.R. at 319.

110. EC Treaty, *supra* note 1, art. 228(3), O.J. C 224/1, at 77 (1992), [1992] 1 C.M.L.R. at 714.

concluded in its entirety under Article 113 of the EC Treaty, provide for qualified majority voting as does Article 113.

The difference in scope between external powers and internal powers, i.e., the situation that would result if in the external sphere a matter would come under EC powers, while in the internal sphere similar matters would remain under Member States' power, is an issue that other legal systems also face.¹¹¹ The issue can be resolved by means other than interpreting restrictively the external powers, especially in the case of the Community where the procedure for negotiating and concluding international agreements protects the interests of individual Member States much more than similar procedures in most federal states protect the interests of states, provinces, and cantons.

One of the major underlying concerns of some Member States is that interpreting broadly or extending the EC external relations powers would correspondingly alter the balance of powers between the Community and the Member States in the internal sphere. Some Member States fear that in the EC legal system an action of the Community in the external sphere beyond the limits of the ERTA doctrine would lead to a "reverse ERTA effect."¹¹² It is doubtful that under the EC constitution and constitutional practice as they stand, the exercise by the Community of external powers for a given subject necessarily results in Member States losing their powers to deal with that subject matter in the internal sphere. This loss need not be the case. It would suffice to provide that the Community's external powers are without prejudice to the powers of EC Member States in the internal sphere.

The current ECJ case law relates to opposite situations, i.e., where the exercise by the Community of its powers in the internal sphere leads to a corresponding loss of Member States' powers in the external sphere. Moreover, there are contrary indications in ECJ case law. In Opinion 1/94, with respect to trade in goods, the ECJ distinguished between the external and the internal sphere. The ECJ took the view that the WTO Agreement on

111. See, for example, the description of the position in Australia, Canada, Switzerland, and the United States in *Les États fédéraux dans les relations internationales*, XVII REVUE BELGE DROIT INTERNATIONAL (1983).

112. Alan Dashwood, *Why Continue to Have Mixed Agreements at All?*, in LA COMMUNAUTÉ EUROPÉENNE ET LES ACCORDS MIXTES. QUELLES PERSPECTIVES, *supra* note 64, at 96.

Agriculture¹¹³ could be concluded under Article 113 of the EC Treaty and be implemented in the internal sphere under Article 43 of the EC Treaty.¹¹⁴ The distinction is not necessarily or solely a question of legal basis. This distinction also has to do with the division of powers between the Community and Member States.

In Opinion 1/94, again the Netherlands claimed that the Community did not have the power to conclude the WTO Agreement on Technical Barriers to Trade under Article 113, on the grounds that certain EC directives in that area were optional and that complete harmonization in that area had not been achieved and was not contemplated.¹¹⁵ The ECJ took the position that the provisions of this agreement "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" and thus, fall "within the ambit of the common commercial policy."¹¹⁶ The ECJ did not say that the Netherlands was wrong when describing the current situation in the internal sphere. Nor did the ECJ say that the division of powers in the internal sphere necessarily parallels the division of powers in the external sphere and conversely, as the Netherlands appeared to assume. Thus, it implied that the Community could have powers in the external sphere over a given matter, i.e., technical regulations and standards, to the extent necessary to avoid obstacles to international trade, while the same matter remained under Member State powers in the internal sphere.

In addition, the "*parallélisme des compétences*" theory,¹¹⁷ which assumes that the Community's external powers are somehow an appendix of its powers in the internal sphere, is no longer justified as a general proposition. The EC system has evolved in important ways. There was a time when common commercial policy at the EC level was seen only as the necessary complement of

113. Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, *supra* note 48, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125 (1994).

114. Opinion 1/94, [1994] E.C.R. at I-5397-98, ¶ 29, [1995] 1 C.M.L.R. at 313.

115. *Id.* at I-5398, ¶ 32, [1995] 1 C.M.L.R. at 314.

116. *Id.* at I-5398, ¶ 33, [1995] 1 C.M.L.R. at 314.

117. Jean Groux, *Le Parallélisme des Compétences Internes et Externes de la Communauté Economique Européenne*, 14 CAHIERS DE DROIT EUROPÉEN 3 (1978).

the customs union,¹¹⁸ without which this customs union could not work properly. Similarly, there was a time when the only rationale for implicit EC external powers was to prevent the undoing in the external sphere of what had been done in the internal sphere. Currently, similar considerations are no longer the only purpose and reason of EC action in the external sphere. Today, EC action in the external sphere may be justified simply as the best way to defend the Member States' interests and citizens. This development was in fact recognized in the previous intergovernmental conference, even though an amendment to the EEC Treaty to that effect¹¹⁹ was not accepted because there was no unanimous agreement on it.

The *Zeitgeist* is not the only explanation for the low ebb reached in Opinion 1/94. Thirteen years ago, Thijmen Koopmans already announced a return to minimalism and prophesied that in the future the ECJ's willingness to construct a solid legal basis on its own initiative might diminish.¹²⁰ In addition, on the issues with major constitutional implications raised in the request for an advisory opinion, the ECJ was faced with the views of the Commission and with opposing views put forward by the European Parliament, i.e., the branch of the legislature directly representing EC citizens, by the Council, i.e., the other branch of the legislature, and by eight of the then twelve Member States that still exercise the constitutional powers in the Community. This conflict occurred precisely at a time when the Intergovernmental Conference was launched to review the EC constitution.

One can only speculate, but it does not appear improbable that at this particular juncture the ECJ preferred to leave it to the collective wisdom of the Member States, reviewing the EC constitution to draw conclusions from the development of the case law, to bring some order in the *ad hoc* and piece-meal way in which the Community's external powers were organized, and to

118. Or more widely of the "Common Market," as the external face of the internal market. EECKHOUT, *supra* note 82, at 23-24.

119. See the lead-in of Article 228 of the EEC Treaty proposed by the Luxembourg presidency, "Si des accords avec un ou plusieurs Etats tiers ou organisations internationales doivent être négociés dans des domaines couverts par le présent Traité." AGENCE EUROPE, May 3, 1991, at 15.

120. Thijmen Koopmans, *The Role of Law in the Next Stage of European Integration*, 35 INT'L & COMP. L.Q. 925, 931 (1986).

draw some conclusions from the *de facto* larger responsibilities that Member States are entrusting to the Community.

In the EC system, as in other systems, there is a dialectic between legislative and regulatory activity and judge-made law that is occasionally also at work on the constitutional level. The direct effect and supremacy doctrines of the ECJ are included in the *acquis communautaire* to which the Acts of Accession of new Member States, which are instruments of a constitutional character, refer. The case law of the various EC commerce clauses, in particular Article 30,¹²¹ the broad interpretation of which can be partly explained by the relative inaction of the EC legislative branch, has led to the so-called new legislative approach towards harmonization of legislation focusing on mutual recognition and reliance of private standardizing bodies. This development, in turn, probably explains in part the reversal of the ECJ's interpretation of Article 30 in *Keck and Mithouard*.¹²² It is, at any rate, noteworthy that the ECJ's interpretation of Article 113 as excluding trade in services and trade related intellectual property rights and its tightening of the ERTA and Opinion 1/76 doctrines have been followed by the inclusion by the Intergovernmental Conference of these subjects matters in the scope of the foreign trade policy powers, albeit under a condition precedent of a unanimous vote in the Council.

121. EC Treaty, *supra* note 1, art. 30, O.J. C 224/1, at 15, (1992), [1992] 1 C.M.L.R. at 602.

122. *Keck and Mithouard*, Joined Cases C-267-268/91, [1993] E.C.R. I-6097, I-6131, [1995] 1 C.M.L.R. 101, 124-25.