

Opinion of the Court of 15 November 1994. - Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty. - Opinion 1/94.

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Swedish special edition Page I-00233
Finnish special edition Page I-00237*

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Keywords

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(EC Treaty, Art. 228(6))

2 International agreements - Prior opinion of the Court - Envisaged agreement - Concept

(EC Treaty, Art. 228(6))

3 International agreements - Agreements concluded by the Community - Dependent territories of a Member State which do not belong to the Community - Procedures for participating in agreements - Representation by the Member State concerned - No effect on the division of powers between the Community and the Member States

(EC Treaty, Art. 228)

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5 International agreements - Powers of the Community and of the Member States - Agreement imposing financial obligations on the Member States - Not relevant

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(EC Treaty, Arts 113 and 232(2); EAEC Treaty)

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(EC Treaty, Arts 113 and 232(1); ECSC Treaty, Art. 71)

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Summary

§§I. The opinion of the Court 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.

II. The Court may be called upon to state its opinion pursuant to Article 228(6) of the Treaty at any time before the Community finally expresses its consent to be bound by the agreement. Unless and until that consent is given, and even after it is signed, the agreement remains an envisaged agreement.

III. The dependent territories for whose international relations certain Member States are responsible, inasmuch as they remain outside the scope of the 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 territories dependent on them but not within 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 any given international agreement. However, the special position of those Member States cannot affect the solution of the problem relating to the demarcation, for the purposes of concluding such an agreement, of spheres of competence within the Community.

IV. 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.

V. Given that the World Trade Organization 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 of itself justify the participation of the Member States in the conclusion of the agreement.

VI. According to Article 232(2) of the EC Treaty, the provisions of that Treaty cannot 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.

VII. The ECSC Treaty, which was not intended, according to Article 232(1) of the EC Treaty, to be affected by that latter Treaty, and Article 71 of which provides that the powers of the Member States in matters of commercial policy are to remain unaffected by the application of the ECSC Treaty, can only have been intended to cover agreements with non-member countries relating specifically to ECSC products; it follows that 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. Article 71 of the ECSC Treaty cannot render inoperative

Article 113 of the EC 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.

VIII. In so far as the Agreement on Agriculture annexed to the Agreement establishing the World Trade Organization is intended to establish, on a worldwide basis, a fair and market-oriented agricultural trading system, and the Agreement on the Application of Sanitary and Phytosanitary Measures, which is also annexed to the aforementioned agreement, is confined 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, those two agreements can be concluded by the Community on the basis of Article 113 of the Treaty alone, even though the implementation of the commitments entered into under those Agreements will require measures to be adopted on the basis of Article 43 of the Treaty.

IX. The provisions of the Agreement on Technical Barriers to Trade annexed to the Agreement establishing the World Trade Organization 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; that agreement must therefore be regarded as falling within the ambit of the common commercial policy and may consequently be concluded by the Community alone, notwithstanding that, as Community law stands at present, the Member States retain certain powers of their own in the matter.

X. Having regard to developments in international trade, as borne out by the Agreement establishing the World Trade Organization (WTO) and its annexes, including the General Agreement on Trade in Services (GATS), which were the subject of a single process of negotiation covering both goods and services, it follows from the open nature of the common commercial policy that trade in services cannot immediately, and as a matter of principle, be excluded from the scope of Article 113 of the Treaty.

As regards cross-frontier supplies not involving any movement of persons, 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 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.

The same cannot be said of the other three modes of supply of services covered by GATS, namely:

- consumption abroad, which entails the movement of the consumer into the territory of the WTO member country in which the supplier is established;*
- commercial presence, that is to say, the presence of a subsidiary or branch in the territory of the WTO member country in which the service is to be rendered;*
- 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.*

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.

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.

XI. The particular services comprised in transport are the subject of a specific title of the Treaty, distinct from the title on the common commercial policy; consequently, international agreements in transport matters are not covered by Article 113 of the Treaty, despite the enactment by the Council and the Commission, on the basis of Article 113, of a series of embargoes involving the suspension of transport services. Since the embargoes related primarily to the export and import of products, they could not have been effective if they had not been accompanied by the suspension of transport services.

XII. 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 when deciding, prior to the adoption of a measure, the correct legal basis for it.

XIII. In so far as the section of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) relating to the means of enforcement of intellectual property rights contains specific rules as to measures to be applied at border crossing points, it has its counterpart in the provisions of Council Regulation No 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods. Since measures of that type can be adopted autonomously on the basis of Article 113 of the EC Treaty, international agreements in that field fall within the Community's competence in matters of commercial policy.

As regards the provisions of TRIPs other than those concerning the prohibition of the release into free circulation of counterfeit goods, 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, is not enough to bring those rights within the scope of Article 113 of the Treaty.

It is true that, in the field of intellectual property, the Community has internal competence 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. However, those measures are subject to voting rules or rules of procedure which are different from those applicable under Article 113. If the Community were to be recognized as having exclusive competence under Article 113 to enter into agreements with non-member countries with a view to protecting intellectual property and, at the same time, achieving harmonization at Community level, the Community institutions would be able to escape the internal constraints in respect of voting procedures and rules to which they are subject when seeking to take action in that sphere, which is not acceptable.

That conclusion is not altered by the fact that the Community institutions have developed a practice whereby, in order to protect the Community's intellectual property interests, they resort to autonomous measures falling within the ambit of commercial policy, namely the opening of procedures under the new commercial policy instrument and the suspension of generalized tariff preferences, or incorporate within trade agreements ancillary provisions relating to such property.

XIV. 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. 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; consequently, the Member States have not lost all their powers to conclude international agreements in that sphere.

Even supposing that the exercise of those powers entailed any risk of distortion in the flow of services and impairment of the cohesion of the internal market, there is nothing to prevent 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.

XV. The chapters of the Treaty 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. 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. It cannot therefore be inferred 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 the General Agreement on Trade in Services (GATS), which are covered by Article 113 of the Treaty.

Nor does the preservation of the coherence of the internal market justify the conclusion of GATS by the Community alone. 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.

Although the only objective expressly mentioned in the chapters of the Treaty 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 to be accorded

to nationals of non-member countries. 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. The same applies in any event, even in the absence of any express provision, where the Community has achieved complete harmonization of the rules governing access to a self-employed activity.

Since that is not the case in all service sectors, it follows that competence to conclude GATS is shared between the Community and the Member States.

XVI. It is undeniable that, where the harmonizing powers conferred by Article 100a of the Treaty 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.

The same applies in respect of Article 235 of the Treaty, which, whilst enabling 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.

XVII. As regards intellectual property, the harmonization achieved within the Community in certain areas covered by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is either partial or non-existent. With regard to the measures to be adopted to secure the effective protection of intellectual property rights, the Community is certainly competent to harmonize national rules on those matters pursuant to Article 100 of the Treaty, but the Community institutions have hitherto scarcely exercised their powers in that field.

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

XVIII. Problems which may arise in the implementation of an international agreement as regards the coordination necessary to ensure unity of action where the Community and the Member States participate jointly in that agreement are of no relevance to the question of the division of powers in respect of such participation.

XIX. Where it is apparent that the subject-matter of an international agreement or convention falls in part within the competence of the Community and in part within that of the Member States, the requirement of unity in the international representation of the Community is such that 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.

The duty to cooperate is all the more imperative in the case of agreements such as those annexed to the Agreement establishing the World Trade Organization, which are inextricably interlinked, and in respect of which a dispute settlement system is established involving cross-retaliation measures.

Grounds

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 II(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] ECR I-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] ECR 263, 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 listed 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 life 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.

Operative part

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.*