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Analysis of the European Court of Justice's Decision on Competence in the World Trade Organization: Who Will Call the Shots in the Areas of Services and Intellectual Property in the European Union?

JAMES J. CALLAGHAN*

I. INTRODUCTION

Contracting parties signed the Final Act of the Uruguay Round of multilateral trade negotiations (Final Act)¹ under the General Agreement on Tariffs and Trade (GATT)² on April 15, 1994, in Marrakesh, Morocco. The signing of the Final Act concluded the most far-reaching liberalization operation of world trade in history.³ The Uruguay Round, which lasted 2,643 days, succeeded in cutting tariffs, opening markets, and "bringing new areas of cross-border economic activity under international rules for the first time."⁴

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1. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, reprinted in *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS* (World Trade Org. 1995) [hereinafter Final Act].

2. GATT was established after World War II to deal with recurring problems of protectionism in the international trade arena. The GATT contract is an agreement in itself and an institutional manifestation of the trade agreement process. The role of GATT was to provide a structure for the process of trade liberalization. See GILBERT R. WINHAM, *THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS* 43 (1992).

3. *The Uruguay Round*, RAPID, Apr. 12, 1994, at 1, available in LEXIS, Europe Library, ALLEUR File.

4. *Id.*

The successful conclusion of the Uruguay Round directly impacts the European Union (EU) because the EU accounts for twenty percent of exports in world goods and approximately thirty percent of exports in services.⁵ Significantly, exports of goods and services account for almost twenty-five percent of the EU gross domestic product (GDP). The estimated one-time gain to the EU from the Uruguay Round is a sixty-five billion Ecus boost to the EU economy.⁶ The Uruguay Round also will lead to the creation of several hundred thousand new jobs throughout the EU.⁷

The problem for the EU is that the World Trade Organization (WTO) encompasses two areas pertaining to international trade: (1) trade in services under the General Agreement on Trade in Services (GATS),⁸ and (2) trade-related intellectual property issues (TRIPS).⁹ Article II of the Final Act sets forth the scope of the WTO and states that "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements *and associated legal instruments included in the Annexes to this Agreement.*"¹⁰

This Article examines the recent decision¹¹ of the European Court of Justice (ECJ)¹² regarding the respective competencies of

5. *Id.*

6. *Id.* The Ecu or "European Currency Unit" was established out of a basket of currencies that participated in the European Monetary System (EMS). The EMS was to provide an exchange rate mechanism (ERM) linking the currencies of the Member States with limits on how much each currency would be permitted to fluctuate against its partners. One of the goals of the EMS was to pave the way for the full-scale monetary union. See DEREK URWIN, *THE COMMUNITY OF EUROPE: A HISTORY OF EUROPEAN INTEGRATION SINCE 1945* 182-83 (1992). Beginning on January 1, 1999, the single European currency will be known as the "Euro." This name is meant as a full name and not as a prefix to be attached to the national currency names. See *EU: Madrid Summit*, Reuter Textline, Dec. 18, 1995, available in LEXIS, TXLTNE Library.

7. *Id.*

8. Final Act, *supra* note 1, Annex 1B.

9. *Id.* Annex 1C.

10. *Id.* art. II (emphasis added).

11. Opinion 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property—Article 228(6) of the EEC Treaty* (Nov. 15, 1994) (forthcoming, on file with author) [hereinafter WTO Opinion].

12. The ECJ is charged with judicial review of the Community's acts and those of the Member States. See Martin Shapiro, *The European Court of Justice, in EURO-POLITICS: INSTITUTIONS AND POLICY MAKING IN THE "NEW" EUROPEAN COMMUNITY* 124 (Alberta M. Sbragia ed., 1992) [hereinafter INSTITUTIONS AND POLICY MAKING]. Each institutional organ of the Community may judicially "challenge the legality of one another's acts without the need to show any particular injury." *Id.* Member States may challenge acts of the Community by bringing an action before the court. *Id.* Individuals may also seek review

the Member States and the institutions of the EU (Community)¹³ in the newly formed areas of GATS and TRIPS.¹⁴ The EU Commission (Commission)¹⁵ instituted a request for the ECJ's decision pursuant to Article 228(6)¹⁶ of the Treaty Establishing the European Community (EEC Treaty). The Commission sought confirmation from the ECJ that the Community, rather than the Member States, had exclusive competence to act for the EU in the areas of GATS and TRIPS.¹⁷ In response, the ECJ affirmed the Community's exclusive competence in matters pertaining to international trade in goods.¹⁸ The ECJ's decision, however, also stated that the Community must share competence with the Member States in matters pertaining to GATS and TRIPS.¹⁹

Part II of this article provides background to the Community and the ECJ decision. Part III examines GATS and TRIPS in order to understand their potential effect on European law. The

where they can show "some particularized, individual detriment flowing from a Community act." *Id.* at 125. Under Articles 169 and 170 of the EEC Treaty, the Commission or a Member State may bring an action in the ECJ against another Member State for violating its obligations under the Treaty. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 100A(4).

13. The entity that has become the EU has gone through many changes since its inception in 1957, including several name changes. The original "European Community" was the European Coal and Steel Community (ECSC). See Mark Jones, *Treaty Establishing the European Economic Community*, 2 B.D.I.E.L. 3 (1994). It was followed by the European Economic Community (EEC) and the European Atomic Energy Community (EAEC). *Id.* The most important of the Communities is the EEC, which first changed its name to the European Community (EC) in the Single European Act of the 1992 Project. *Id.* The former EC changed its name to the European Union (EU) after the Treaty on European Union, or Maastricht Treaty; however, the term "community" still refers to the institutional structure of what is now known as the EU. *Id.*

14. *Id.*

15. The Commission is the executive of the Community and has driven the EU toward further integration. The Commission has a virtual monopoly on the ability to propose legislation, but it is dependent on the Council of Ministers (Council) to adopt those proposals. See *infra* note 28, for an explanation of the Council. For further discussion on the Commission, see B. Guy Peters, *Bureaucratic Politics and the Institutions of the European Community*, in INSTITUTIONS AND POLICY MAKING, *supra* note 12, at 85-89. See also Peter Ludlow, *The European Commission*, in THE NEW EUROPEAN COMMUNITY: DECISION MAKING AND INSTITUTIONAL CHANGE 85 (Robert O. Keohane & Stanley Hoffman eds., 1991) [hereinafter INSTITUTIONAL CHANGE].

16. EEC TREATY art. 228(1). This article mandates that "the Council, the Commission or a Member State may obtain an opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the Treaty." *Id.*

17. Stephen Nisbet, *Court Rules On Shareout of EU Trade Powers*, Reuter European Community Report, Nov. 15, 1994, available in LEXIS, Europe Library, TXTWE File.

18. *Id.*

19. *Id.*

"internal" and "external" characteristics of both GATS and TRIPS are particularly significant in relation to their effect on the Community. These distinctions figure prominently in the ECJ's decision regarding shared competence.

Part IV analyzes the ECJ's decision regarding shared competency for GATS and TRIPS within the context of Article 113, which delineates the Community's common external policy, and other relevant articles. As developed, the ECJ's decision could easily have found authority for exclusive competence to the Community. In addition, prior ECJ opinions give Article 113 a much broader interpretation than the Court used in its decision finding shared competency.²⁰ Part IV also examines *Missouri v. Holland*,²¹ a U.S. Supreme Court case that involved sovereignty issues in the area of treaty-making. The purpose is to compare the U.S. perspective on preemption with that of the Community.

Part V discusses the possible effects that sharing competence will have on the Community's ability to participate in the WTO in matters regarding GATS and TRIPS. A recent incident involving the French representative during a GATT dispute resolution process illustrates existing confusion and the potential difficulties from shared competence.²² Part V also examines the Council's Legal Service suggestions to the Community and the Member States for coordinating their policy efforts under shared competence.²³ Part VI concludes that the ECJ's decision has established an unwieldy framework that will result in confusion for the Community, Member States, and their trade partners.

II. BACKGROUND

Before the inception of the European Economic Community, GATT reviewed the Schuman Plan²⁴ and the EEC Treaty to

20. WTO Opinion, *supra* note 11, at 110.

21. 252 U.S. 416 (1920).

22. *European Economic Community—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins*, GATT Doc. C/MI/222 (June 16, 1988) (minutes of Council meeting) [hereinafter *Payments and Subsidies Paid*].

23. Council Legal Service Note 10779/93 on Detailed Arrangements for the Participation of Community and the Member States in the MTO [WTO], 1993 O.J. 1 [hereinafter *Legal Service Note*].

24. The Schuman Plan proposed that Western European countries and a new supranational authority conjointly administer coal and steel resources. The purpose of the Plan was to gradually eliminate all tariffs in these heavy industries as between the participating parties. See URWIN, *supra* note 6, at 44.

ensure conformity of the Community to GATT principles.²⁵ The Commission has been representing the Member States of the EU in GATT negotiations since May 4, 1964.²⁶ The mandate for the Commission's role as the EU's representative in GATT is located in Article 113 of the EEC Treaty, which states:

[T]he 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 liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.²⁷

The Council of Ministers (Council)²⁸ gives the Commission negotiators a precise mandate, a document that the Council has already heavily negotiated.²⁹ Provided Commission negotiators remain within the confines of their mandate, the Council is likely to approve any subsequent agreements.³⁰ Consequently, Commission negotiators are very restricted; otherwise, they risk having the Council overturn any agreement with their GATT partners.

This mandate structure creates inflexibility within the Community. The Community process creates constraints on its negotiators that are "legal, relatively well-known and certain, and

25. DOMINIK LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 7 (3d ed. 1984). Article XXIV of GATT provides for a set of criteria to which customs unions and free trade areas must abide. See Yuri Devuyt, *GATT Customs Union Provisions and the Uruguay Round: The European Community Experience*, 26 J. WORLD TRADE 15 (1992). Although the concepts of customs unions and free trade areas appear to directly contradict the concept of Most Favored Nation treatment embodied in Article I of GATT, Article XXIV stipulates that "[t]he contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements." *Id.* at 18.

26. LASOK & BRIDGE, *supra* note 25, at 6.

27. EEC TREATY art. 113.

28. The Council is an institution similar to one found in a conventional international organization. Peters, *supra* note 15, at 78. It is comprised of Member State ministers from various areas of policy-making and represents the interests of the Member States. *Id.* Its interactions depend heavily on diplomacy and bargaining among the representatives of the national governments. *Id.* The Council is the body in which legislation is either accepted or rejected, but the Council has no power to propose legislation. *Id.* at 78-79. See also Wolfgang Wessels, *The EC Council: The Community's Decisionmaking Center*, in INSTITUTIONAL CHANGE, *supra* note 15, at 133-55.

29. WINHAM, *supra* note 2, at 88.

30. *Id.*

especially felt during the negotiation."³¹ In contrast, constraints on U.S. negotiators "are political, uncertain, and especially felt at the end of the negotiation."³² These constraints create different negotiation capabilities, as evidenced in the Uruguay Round.³³ For example, the U.S. delegation was able to propose drastic options such as the complete elimination of agricultural subsidies. Because of its constraining mandate, however, the Community was unable to respond effectively to the flexible bargaining tactics of the United States.³⁴

From the beginning of the Uruguay Round, the Commission argued that it should have exclusive competence over the new areas in the WTO relating to international trade.³⁵ Pursuant to Article 113 of the EEC Treaty, the Commission enjoys exclusive competence over international trade in goods.³⁶ The Commission's position was that "[a]ny weakening of the Community's negotiating position due to its inability to agree on a joint approach could have serious implications for Europe's commercial future."³⁷

As the Uruguay Round neared completion, the Commission again pushed for exclusive competence in GATS and TRIPS. According to the Commission, "the EU's trading partners were not interested in negotiating 12 separate deals with the Member States and the completion of the Uruguay Round only confirmed the Commission's competence to speak for the EU as a whole."³⁸ The Member States, particularly Britain and France, backed by the Council and the European Parliament (EP),³⁹ argued that Article 113 did not encompass these new areas and that the Commission

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 88-89.

35. *See Programme of the Commission for 1986*, in BULL. EUR. COMMUNITIES, Supp. 1/86 (Feb. 19, 1986).

36. EEC TREATY art. 113.

37. *Programme of the Commission for 1986*, *supra* note 35.

38. *GATT/WTO: EU Court Rules On Mixed Commission/Council Trading Competence*, European Information Service, Nov. 16, 1994, available in LEXIS, Europe Library, ALLEUR File [hereinafter *GATT/WTO*]. With the accession of Austria, Sweden, and Finland, the EU now consists of fifteen Member States. *Id.*

39. The EP is the third main political institution of the EU and is comprised of members elected at the European level, or Euro MP's. *See Peters, supra* note 15, at 90-92. Although traditionally lacking significant power, the EP has begun to compensate for what many consider to be a democratic deficit in the Community. *Id.* The Single European Act and Maastricht Treaty substantially increased the powers of the EP. *Id.*

should share competence in these areas with the Member States. The Member States claimed that neither the EEC Treaty nor the WTO contained specific demands for a single negotiator to represent the Community in the new areas of GATS and TRIPS.⁴⁰

That the Member States should be concerned over who has competence in the newly-formed GATS and TRIPS might appear odd. The Commission has apparently done a successful job of representing the twelve countries in the Uruguay Round; however, the continuing battle over who holds competence in the various policy-making areas is a necessary characteristic of European integration.

The EU has an elaborate institutional framework for deciding whether the Community has exclusive competence, the Member States have retained competence, or the competence is shared.⁴¹ Areas over which the EU institutions have exclusive competence include competition policy,⁴² transportation policy,⁴³ and commercial policy.⁴⁴ Many other areas exist where the Member States share competence with the EU.⁴⁵ GATS and TRIPS constitute new areas of international agreement and therefore require another determination of competence between the Community and the Member States.

III. DISCUSSION OF GATS AND TRIPS

The issues of services and intellectual property figured prominently in the Uruguay Round. Services are crucial because the service sector has surpassed the industrial sector in its economic prominence in several developed countries. In his delivery speech at the Uruguay Round of GATT negotiations on September 16, 1986, Community negotiator Willy de Clercq noted:

40. *GATT/WTO*, *supra* note 38.

41. Generally, the EEC Treaty explicitly provides the boundaries of the Community's competence. *See, e.g.*, EEC TREATY tits. V-VII. The Community can also increase its competence by subsequent legislative acts. *Id.*

42. EEC TREATY tit. V (providing for common rules on competition, taxation, and approximation of laws).

43. EEC TREATY tit. IV (providing for common rules on transport policy).

44. EEC TREATY tit. VII (providing for a common commercial policy).

45. The recent passage of the Treaty on European Union, or the Maastricht Treaty, added a number of new areas in which the Community and the Member States enjoy concurrent competence. *See* Robert Lane, *New Community Competences Under the Maastricht Treaty*, 30 COMMON MKT. L. REV. 939, 945 (1993).

"Services today constitute one of the most dynamic features of the world economy [so it is] essential to negotiate a multilateral framework of principles and rules and to devise . . . specific disciplines by sector or group of sectors. The aim must be to increase transparency and to liberalize trade."⁴⁶ According to the Commission, certain economists see the area of services as

a harbinger of a fundamental restructuring of the world economy in which ordinary manufacturing would shift more and more to developing economies and they would, therefore, become the main exporters of manufactured goods. The developed economies would mainly export services and goods with high value added (with a high knowledge component).⁴⁷

The Commission attributes the lag in service industry growth outside of the Member States' borders to the lack of international rules providing security and predictability.⁴⁸

The primary objectives of the TRIPS Agreement are to reduce impediments to international trade, to promote effective protection of intellectual property rights, and to ensure that enforcement of intellectual property rights does not itself become a barrier to legitimate trade.⁴⁹ As de Clercq noted:

The absence of adequate protection in the case of intellectual property has led to considerable distortions in trade in certain sectors. The GATT can and must act in parallel with other institutions in framing principles and rules relating to the trade aspects of intellectual property. Our aim in this area . . . must be to create a favorable, dynamic climate which will give a fresh boost to the world economy.⁵⁰

The lack of effective protection for intellectual property rights in countries trading with the EU has much the same effect on goods subject to intellectual property rights as other restrictions on imports that were handled under the old GATT. The inclusion of GATS and TRIPS in the WTO is thus of major importance to the Community as it will boost trade in services and increase protection for the Community's intellectual property.

46. Willy de Clercq, Speech Delivered at the Uruguay Round (Sept. 16, 1986), in BULL. EUR. COMMUNITIES No. 9-1986, at 15 (1986).

47. WTO Opinion, *supra* note 11, at 14.

48. *Id.*

49. Final Act, *supra* note 1, Annex 1C, pmbl.

50. de Clercq, *supra* note 46, at 15.

A. *The Scope of GATS and the Adopted Methods for the Achievement of its Objectives*

The Marrakesh Agreement establishing the WTO includes GATS as Annex 1B. GATS attempts to transpose the principles of GATT into the area of services by lowering the trade barriers which take the form of rules relating to both market access and qualifications of those providing the services.⁵¹ Article I of GATS provides its scope and states: "This Agreement applies to measures by Members affecting trade in services."⁵² Article I(2) continues:

For the purposes of this Agreement, trade in services is defined as the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.⁵³

This concept of services is very broad. In effect, it encompasses "any service in any sector except services supplied in the exercise of governmental authority."⁵⁴

Article I(3) states:

For the purposes of this Agreement:

- (a) "measures by Members" [referred to in Article I(1)] means measures taken by:
 - I(i) central, regional, or local governments and authorities; and
 - (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

In fulfilling its obligations and commitments under the Agreement, each Member shall take such reasonable measures as may

51. WTO Opinion, *supra* note 11, at 14.

52. Final Act, *supra* note 1, Annex 1B, art. I(1).

53. *Id.* art. I(2).

54. *Id.* art. I(3)(b). For a discussion of the importance of Article I(2)'s categorization of the various types of services in the ECJ's division of competency under GATS, see *infra* part IV.

be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory.⁵⁵

Under Article I(3) of GATS, the EU must first determine which governmental body is appropriate when dealing with GATS: central, regional, or local governments of the individual Member States, or the collective institutions of the EU. This determination raises the further question of whether the individual Member States or the collective Community is responsible for compliance with GATS.

Article II of GATS provides for Most Favored Nation (MFN) treatment for trade in services.⁵⁶ The concept of MFN is responsible for the success of GATT in the realm of trade in goods. Paragraph 1 of this article states that "[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country."⁵⁷ Thus, if a Member of the WTO grants favorable treatment for services to another country, even if that other country is not a member of the WTO, it must grant like treatment to all other members of the WTO. Furthermore, when a WTO member lowers barriers to trade in services, it facilitates liberalization as to all other members.

Parts III and IV of GATS contain specific commitments with respect to service suppliers. Each Member promises to provide market access to the services and service suppliers of any other Member⁵⁸ and treatment that is no less favorable than it gives to its own services and service suppliers.⁵⁹ Article XVI(2) obligates Members to refrain from imposing quantitative restrictions on the activities of service suppliers of other Members.⁶⁰ These commitments, however, are neither unconditional nor absolute. Any

55. Final Act, *supra* note 1, art. I(3)(a).

56. *Id.* art. II(1).

57. *Id.*

58. *Id.* art. XVI.

59. *Id.* art. XVII. The principal of national treatment is another important component of GATT that has been transposed onto the realm of services. It ensures that suppliers of services from one Member will have an opportunity to compete with the domestic suppliers of the same service from another Member on a level playing field. *Id.*

60. *Id.* art. XVI(2).

Member may state in its schedule⁶¹ that it is not affording unqualified market access or that it is imposing conditions or restrictions.⁶²

One example of such restrictions, which the Council cited in the WTO Opinion, is "the establishment of 'quotas' in the audiovisual sector."⁶³ During negotiations in the Uruguay Round, the French were concerned with protecting their audiovisual sector from the flood of U.S. films that would result if France was forced to remove the existing restrictions. The issue of competence is important in determining whether France could maintain a certain level of restrictions on the importation of films. If the ECJ found the Member States competent in this area, France could set its own schedule of restrictions on foreign films. If the ECJ found that the EU has exclusive competence over GATS, however, whether these restrictions could be individually maintained or whether a unified schedule for the EU would eliminate France's special restrictions.

B. The Scope of TRIPS and the Methods Adopted for the Achievement of its Objectives

The preamble of Annex 1C, which deals with TRIPS, specifies the need to reduce distortions and impediments to international trade and to promote effective protection of intellectual property rights.⁶⁴ It also seeks to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.⁶⁵ TRIPS, however, seeks only to establish a minimum level of protection for intellectual property, leaving the Members free to implement more extensive protection

61. Article XX of GATS, entitled "Schedules of Specific Commitments," states, in part:

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
 - (a) terms, limitations and conditions on market access;
 - (b) conditions and qualifications on national treatment;
 - (c) undertakings relating to additional commitments;
 - (d) where appropriate the time-frame for implementation of such commitments; and
 - (e) the date of entry into force of such commitments.

General Agreement on Tariff and Trade, 1947, art. XX, reprinted in *LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION* (Joseph F. Denny ed., 1995).

62. WTO Opinion, *supra* note 11, at 17.

63. *Id.*

64. Final Act, *supra* note 1, Annex 1C, pmb1.

65. *Id.*

and determine the most appropriate method of giving effect to its provisions.⁶⁶

The TRIPS Agreement is extremely broad in its scope, covering literary and artistic property and industrial property.⁶⁷ TRIPS also incorporates the principles of national treatment⁶⁸ and MFN.⁶⁹ Certain exceptions, however, exist to these two principles. For example, the principle of national treatment is subject to the exceptions provided in other bodies of law dealing with intellectual property rights, such as the Paris Convention on Industrial Property⁷⁰ and the Berne Convention for the Protection of Literary and Artistic Works.⁷¹

The EU Council noted that the objectives of TRIPS are pursued in two different ways. First, TRIPS defines objectives by referring to international conventions, which, in the words of the Commission of the EU, enjoy "a relatively wide degree of acceptance."⁷² Second, the agreement defines objectives by means of certain substantive provisions "in areas of intellectual property where the participating countries felt the immediate need to extend the areas of protection."⁷³

IV. THE DECISION OF THE ECJ

The Council and the Member States of the EU broadened the Commission's scope after approving the Punta del Este Ministerial Declaration of September 20, 1986, the document that launched the Uruguay Round.⁷⁴ They decided that "in order to ensure the maximum consistency in the conduct of the negotiations, . . . the Commission would act as the sole negotiator on behalf of the Community and the Member States" in the areas of GATS and TRIPS.⁷⁵ The minutes of the meeting contain a notation that the

66. *Id.* art. 1(1).

67. TRIPS covers copyrights, trademarks, geographical indications of provenance and origin, patents, designs and models, and expertise. *Id.* Annex 1C, pt. II.

68. *Id.* Annex 1C, art. 3.

69. *Id.* art. 4.

70. Paris Convention for the Protection of Industrial Property, *done* July 14, 1967, 21 U.S.T. 1629, 828 U.N.T.S. 305.

71. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised*, Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

72. WTO Opinion, *supra* note 11, at 19.

73. *Id.*

74. *Id.* at 103.

75. *Id.*

Council's "decision [did] not prejudge the question of the competence of the Community or the Member States on particular issues."⁷⁶ Thus, the issue of competence was present from the very beginning of the negotiations.

At its meetings on March 7 and 8, 1994, the EU Council authorized the President of the Council and Commissioner Sir Leon Brittain to sign the Final Act and the WTO Agreement on behalf of the Council. Although certain Member States argued that those acts "also cover[ed] matters of national competence," they agreed to sign the Final Act and WTO Agreement.⁷⁷ The Commission, however, recorded in the minutes of the meeting that "the Final Act . . . and the agreements annexed thereto fall exclusively within the competence of the European Community."⁷⁸ On April 6, 1994, the Commission submitted its request for an Opinion to the ECJ seeking resolution of the following questions:

- (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 [European Coal and Steel Community] and the EAEC [European Atomic Energy Community] Treaties?⁷⁹
- (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

76. *Id.*

77. *Id.*

78. *Id.* at 103, 104.

79. *Id.* at 104. The Commission's exclusive competence over these areas was never disputed, and the ECJ spent little time on the subject except to affirm the Commission's competence. *Id.*

Members of the WTO?⁸⁰

Spain objected to the admissibility of the Commission's request for the opinion because "the procedure for seeking an opinion pursuant to Article 228 can be initiated only where the Community has not yet entered into an international commitment."⁸¹ Spain argued that the signing of the Final Act 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."⁸² The Council and the Government of the Netherlands also expressed doubts about whether a signed agreement could be subject to Article 228 given the language of the Article.⁸³

The ECJ, however, held that

[t]he 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.⁸⁴

The Council also criticized the Commission's wording of the questions. The Council argued that, because the agreement already had been signed by the Community and the Member States pursuant to their respective powers, the Commission should not limit the question to whether the Community may sign and conclude that agreement.⁸⁵ According to the Council, the proper question is 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."⁸⁶ The ECJ rejected both formulations of the questions and stated that the "fundamental issue is whether or not the Community has exclusive

80. *Id.* Because this question assumed that the Community had exclusive competence in all of the areas stated above, the court found it unnecessary to answer it, finding that the Community did not have exclusive competence in GATS or TRIPS. *Id.*

81. *Id.* at 105.

82. *Id.*

83. EEC TREATY art. 228(6).

84. WTO Opinion, *supra* note 11, at 105.

85. *Id.*

86. *Id.*

competence to conclude the WTO Agreements and its annexes.”⁸⁷

Despite some disagreement over the issue of competence in the area of ECSC products, the ECJ granted exclusive competence to the Community. 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.”⁸⁸ The ECSC explicitly acknowledges that Member States retain competence in commercial matters relating to coal and steel. The ECJ, however, noted that Article 71 of the ECSC Treaty had been drafted before the European Economic Community came into existence.⁸⁹ It further noted that, as it held in Opinion 1/75, Article 71 of the ECSC Treaty cannot “render inoperative Article[] 113 . . . 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.”⁹⁰ The ECJ thus held that the Community has exclusive competence, pursuant to Article 113 of the EEC Treaty, to conclude the multilateral agreements regarding trade in goods.⁹¹

Finally, the ECJ had two questions that this Article addresses: (1) whether the Community should have exclusive competence in the area of GATS; and (2) whether the Community should have exclusive competence in the area of TRIPS.

A. Article 113 and the Common Commercial Policy

The process of European integration involves the Member States relinquishing sovereignty over certain policy areas. This process gives the Community exclusive control over commercial policy under Chapter X of the EEC Treaty.⁹² Article 113(1) of the EEC Treaty states:

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 liberalization, export policy and measures to protect trade such as those to be taken in case of

87. *Id.*

88. Treaty Establishing the European Coal Steel Community, Apr. 18, 1951.

89. WTO Opinion, *supra* note 11, at 107, para. 27.

90. Opinion 1/75, 1975 E.C.R. 1355, 1365, [1976] 1 C.M.L.R. 85, 1975 O.J. (C 26818).

91. WTO Opinion, *supra* note 11, at 109.

92. See EEC TREATY chapt. X.

dumping or subsidies.⁹³

The Commission contended that this language is broad enough to encompass the new areas of GATS and TRIPS. The Council, various Member States, and the EP (which was permitted to submit observations) vigorously disputed this interpretation.⁹⁴

Although the language of Article 113 appears sufficiently broad to encompass trade in services and trade related intellectual property, the ECJ had to examine the Treaty as a whole to determine whether granting exclusive competence to the Community would ensure compliance with the Treaty.⁹⁵ The following sections examine whether the ECJ could have interpreted Article 113 to cover GATS and TRIPS in their entirety.

1. Does Article 113 Cover GATS?

The ECJ in *International Agreement on Natural Rubber*⁹⁶ stated:

It would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of more elaborate means devised with a view to furthering the development of international trade. It is therefore not possible to lay down, for Article 113 of the EEC Treaty, an interpretation of 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 . . . to the exclusion of more highly developed mechanisms "A commercial policy understood in that sense would be destined to become nugatory in the course of time."⁹⁷

As the preceding excerpt indicates, the language of Article 113 is purposely broad to allow for areas other than traditional trade in goods to fall within its purview.

In *Natural Rubber*, the ECJ further stated that the "enumeration in Article 113 of the subjects covered by commercial policy . . . is conceived as a non-exhaustive enumeration which must not . . . close the door to the application in a Community context of any other process . . . intended to regulate external

93. *Id.* art. 113(1).

94. WTO Opinion, *supra* note 11, at 109.

95. EEC TREATY art. 164. Article 164 states that "the Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed," *Id.*

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

97. 1979 E.C.R. at 2912, [1979] 3 C.M.L.R. at 639.

trade.”⁹⁸ The Commission, noting the global economy’s dominant trend of trade in services, argued that the open nature of Article 113, as held by the Court in *Natural Rubber*, prevented the exclusion of trade in services from the scope of 113.⁹⁹

The previously noted categorization of the different modes of trade in services under Article I(2) of the EEC Treaty becomes crucial at this point.¹⁰⁰ In the WTO Opinion, the ECJ noted that with regard to the first category—cross-frontier supplies—a supplier established in one country renders the service to a consumer residing in another.¹⁰¹ In this scenario “[t]he supplier does not move to the consumer’s country; nor, conversely, does the consumer move to the supplier’s country.”¹⁰² Such a situation is difficult to distinguish from traditional trade in goods and should therefore be included within the realm of Article 113.¹⁰³ The ECJ thus found that the Community has exclusive competence over cross-frontier supplies.

Regarding the other categories covered under Article I(2) of GATS, the ECJ refused to apply the latitude that the Commission argued it had used in the past. The ECJ stated:

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.¹⁰⁴

The ECJ concluded, “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.”¹⁰⁵

The ECJ’s reasoning is peculiar for three reasons. First, the ECJ essentially stated that commercial matters and movement of persons are mutually exclusive because they are handled in

98. *Id.*

99. WTO Opinion, *supra* note 11, at 110, para. 41.

100. *See* Final Act, *supra* note 1, Annex 1B, art. I(2).

101. WTO Opinion, *supra* note 11, at 111, para. 44.

102. *Id.*

103. *Id.*

104. *Id.* para. 46.

105. *Id.* para. 47.

different paragraphs of Article 3 of the EEC Treaty. This is a far too restrictive reading of a document that is considered the constitution of the EU.¹⁰⁶ This document could not be expected to foresee specific types of commercial methods that might arise.

Second, the Community has competence over the issuance of visas to incoming nationals of third-countries. Article 100(c) empowers and obliges the Community to determine the third-countries whose nationals will require a visa to enter the Community.¹⁰⁷ Currently, the Council unanimously decides which third-country nationals should receive visas.¹⁰⁸ This decision, however, will revert to a qualified majority in 1996.¹⁰⁹

Third, the concern over the issuance of visas pertains to immigration problems and is not related to commercial issues. The entry of third-country nationals to the territory of the Member States as part of immigration policy was generally within the exclusive domain of the Member States.¹¹⁰ This view has been challenged, however, particularly where the Community's powers to regulate the legal status of specified categories of third-country nationals were examined as a result of the jurisdiction of the ECJ. In *Demirel*,¹¹¹ the ECJ interpreted Article 238 of the EEC Treaty as implying competence to the Community to extend market freedoms to nationals of associated States.¹¹²

The ECJ's reasoning in the WTO Opinion does not do justice to the importance of achieving the goals of GATS. Instead, it will fragment policy-making in the areas of GATS involving the

106. G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 596 (1989).

107. Lane, *supra* note 45, at 945. Article 100(c), paragraph 1 states that "[t]he Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, shall determine the third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States." EEC TREATY art. 100(c).

108. Lane, *supra* note 45, at 945-46.

109. *Id.* Where events in a third-country are likely to produce a sudden inflow of its nationals into the Community, the Commission may speedily impose visa requirements. *Id.* A uniform visa format is to be adopted by 1996. *Id.*

110. Kay Hailbronner, *Visa Regulations and Third-Country Nationals in EC Law*, 31 COMMON MKT. L. REV. 969, 971 (1994).

111. Case 12/86, *Demirel v. Stadt Schwabisch Gmund*, 1987 E.C.R. 3719, [1989] 1 C.M.L.R. 421 (Admin. Ct.) (Ger.).

112. *Id.* Article 238 provides that "[t]he Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and procedure." EEC TREATY art. 238.

movement of third-country nationals across Member States' borders. Although Member States are understandably concerned about immigration, the importance of achieving liberalization of trade in services outweighs such concerns.

2. Does Article 113 of the EEC Treaty Cover TRIPS?

The Commission argued that it has exclusive competence for TRIPS under Article 113 of the EEC Treaty. The Commission stated that "the rules concerning intellectual property rights are closely linked to trade in the products and services to which they apply."¹¹³

The ECJ in answer first noted that section 4 of part III of TRIPS, concerning the means of enforcing intellectual property rights, "contains specific rules as to measures to be applied at border crossing points."¹¹⁴ This section of TRIPS has a counterpart in the provisions of Council Regulation 3842/86 in the EEC.¹¹⁵ This Regulation provides measures for prohibiting the release of counterfeit goods into free circulation.¹¹⁶ This regulation falls under the purview of Article 113 because it relates to measures that customs authorities take in prohibiting the release of counterfeit goods into free circulation at the external frontiers.¹¹⁷ Thus, the ECJ held that because "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."¹¹⁸

Less clear, however, was the ECJ's reasoning on intellectual property matters not relating to the release of counterfeit goods into free circulation. The ECJ acknowledged a connection between intellectual property and trade in goods.¹¹⁹ It noted that "[i]ntellectual property rights enable those holding them to prevent third parties from carrying out certain acts."¹²⁰ These acts include prohibiting use of a trademark, the manufacturing of a

113. WTO Opinion, *supra* note 11, at 113, para. 54.

114. *Id.* para. 55.

115. Council Regulation 3842/86 EEC, 1986 O.J. (L 357) 34.

116. *Id.*

117. WTO Opinion, *supra* note 11, at 113, para. 55.

118. *Id.*

119. *Id.* para. 57.

120. *Id.*

product, and the copying of a design.¹²¹ The Court held, however, that this alone would not bring intellectual property rights 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."¹²²

What is troubling is that the ECJ did not explain its rationale for singling out internal trade as a justification for holding that TRIPS involves areas of Member States' competence. Arguably, Article 36 provides an exception to Article 30's prohibition against "quantitative restrictions on imports and all measures having equivalent effect" between Member States.¹²³ On the one hand, Article 30 lays down the fundamental principle of the free movement of goods. On the other hand, Article 36 safeguards intellectual property rights, which, owing to their territorial nature, inevitably create obstacles to the free movement of goods.¹²⁴ The EC Directive on the Legal Protection of Computer Programs (Directive) has further limited the ability to use an Article 36 exception in the area of intellectual property.¹²⁵ Nevertheless, subsequent case law has limited the Article 36 exception with the recognition that Articles 30 and 36 articulate a conflict between two competing interests.¹²⁶ The Directive harmonizes the laws protecting computer programs Community-wide.

The ECJ stated that the Commission itself had conceded that no Community harmonization measures exist in some of the fields laid down by TRIPS.¹²⁷ The above discussion on the Directive,

121. *Id.*

122. *Id.*

123. Notably, "the authors of the [EEC] Treaty were clearly aware of the provisions of . . . [GATT] when they drafted Articles 30 to 36." See Eric L. White, *In Search of the Limits to Article 30 of the EEC Treaty*, 26 COMMON MKT. L. REV. 235, 239 (1989). Article XI, paragraph 1 of GATT is entitled "General Elimination of Quantitative Restrictions," and the language is similar to that of Article 30 of the EEC Treaty. *Id.* at 239-40. Similarly, paragraph 2 of Article XI of GATT provides for certain exceptions, which are listed in Article XX. *Id.* at 240. "This latter provision contains remarkable similarities to Article 36 [of the EEC Treaty]." *Id.*

124. *Id.*

125. Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs, 1991 O.J. (L 122/42) 17, reprinted in BRIDGET CZARNOTA & ROBERT J. HART, LEGAL PROTECTION OF COMPUTER PROGRAMS IN EUROPE-A GUIDE TO THE EC DIRECTIVE 203 (1991).

126. See Case C-10/89, SA CNL-Sucal NV v. HAG GFAG, 3 C.M.L.R. 571 (Fed. Sup. Ct. 1990) (Ger.).

127. WTO Opinion, *supra* note 11, at 113, para. 58.

however, would tend to dispute the absence of Community harmonization measures in the area of TRIPS. In fact, the legal basis of the Directive, as stated in the Directive's Appendix I, is Article 100(a).¹²⁸ The Community is competent to harmonize Member States' laws in the area of intellectual property pursuant to Articles 100 and 100(a).¹²⁹

Article 235 also may be used to superimpose new rights on national rights, as it was in the Council Regulation of December 20, 1993 on Community Trademark.¹³⁰ Exclusive competence on an internal level would allow the Community to exercise exclusive competence in external matters, such as the WTO. The ECJ, however, made clear that the processes set out in the Treaty, under which these powers are granted to the Community, cannot be usurped merely because the act would benefit the common market. The ECJ stated:

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.¹³¹

128. Council Directive 91/250/EEC, *supra* note 125, app. I. continues, noting that [t]he [Directive] will favour the free circulation of computer programs in so far as industry in those countries with clear and established protection of computer programs is currently in a more favorable position than that in countries where protection is uncertain; such differences in legal protection distort the conditions of establishment and of competition in Member States for firms which engage in activities concerned with computer programs. . . . In addition, by harmonizing the conditions under which the results of research and development in the computer program field are legally protected on a uniform basis in the Member States, innovation and technical progress throughout the Community will be encouraged.

Id. para. 5.4.

129. EEC TREATY art. 100. Article 100 states that the Council shall, acting *unanimously* on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations, or administrative provisions of the Member States as directly affect the establishment or functioning of the common market. *Id.* (emphasis added). Article 100(a) provides other procedural guidelines for the approximation of laws. *Id.*

130. WTO Opinion, *supra* note 11, at 113, para. 59. Article 235 states that "[i]f action by the Community should prove necessary to attain . . . 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 Assembly, take appropriate measures." EEC TREATY art. 235.

131. WTO Opinion, *supra* note 11, at 114, para. 60.

This stance appears consistent with some commentators' views of the ECJ's current role in the Community.¹³² Although the ECJ played a crucial role in shaping the Community with some of its early decisions, other organs of the Community have now taken from the ECJ the constitution-building role.¹³³ The ECJ's WTO Opinion appears in stark contrast to these earlier opinions, and perhaps needlessly so, because the Treaty contains adequate grounds for finding exclusive competence for the Community.

B. Comparing the U.S. Approach to Competence Relating to International Treaties: Missouri v. Holland

The United States has adopted a different approach to competence between the federal government and the individual states regarding international treaties; this is not surprising because the United States has a federal government that has been developing for two hundred years. The individual states completely ceded their sovereignty in the realm of international agreements. A side effect of this arrangement is that the federal government can achieve domestic policy goals through international treaties that it normally could not achieve through statutes. An example of this phenomenon appears in *Missouri v. Holland*.¹³⁴

Missouri v. Holland involved the Treaty for the Protection of Migratory Birds between the United States and Great Britain.¹³⁵ The Treaty bound both powers to propose to their law-making bodies the necessary measures for carrying out the purpose of the Treaty. Pursuant to the Treaty, the United States passed an act that prohibited the killing, capturing, or selling of any of the migratory birds included in the terms of the Treaty.¹³⁶

132. Shapiro, *supra* note 12, at 123.

133. *Id.* See also Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425 (Ger.) (establishing the doctrine of supremacy of EC law); Case 26/62, *Nederlandse Administratieve der Belastingen v. Van Gend & Loos*, 1963 E.C.R. 1, [1963] 3 C.M.L.R. 105 (Neth.) (establishing the principle of direct effect, which allows individuals in the Member States to rely on EC law); Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 663 [1978] 3 C.M.L.R. 494 (Ger.) (holding that a product lawfully marketed in one Member State could not be banned in another State, except for limited exceptions articulated in Article 36).

134. 252 U.S. 416 (1920).

135. Treaty for the Protection of Migratory Birds, Aug. 16, 1916, U.K.-U.S., 39 Stat. 1702.

136. Migratory Birds Treaty, July 3, 1918, U.S.-U.K., 40 Stat. 755.

The State of Missouri brought a bill in equity preventing a U.S. game warden from enforcing the act. The state argued that the statute was an unconstitutional interference with the rights reserved to the states by the Tenth Amendment. Missouri reasoned:

Under the ancient law, the feudal law, and the common law in England, the absolute control of wild game was a necessary incident of sovereignty. When, therefore, the United Colonies became "Free and Independent States" with full power to do all "acts and things which Independent States may of right do," the power to control the taking of wild game passed to the States.¹³⁷

Missouri further argued that "[w]hen the power of the States over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed."¹³⁸

Indeed, the district court had held invalid an act of Congress, created before any treaty, which attempted to regulate the killing of migratory birds within the states.¹³⁹ The court reasoned that migratory birds were owned by the states in their sovereign capacity for the benefit of their people and that this control was one that Congress could not displace.¹⁴⁰

The Supreme Court in *Missouri v. Holland* held that, although it was true that, as between a state and its inhabitants, the state may regulate the killing and sale of migratory birds, "it does *not* follow that its authority is *exclusive* of paramount powers."¹⁴¹ Valid treaties "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States."¹⁴² In the U.S. Constitution, the supreme law of the land consists of three things: (1) the Constitution; (2) the laws of the United States made in pursuance thereof; and (3) all treaties made or which shall be made under the authority of the United States.¹⁴³

In *Missouri v. Holland*, the Solicitor-General argued that "[t]he power of Congress to make treaties effective is not limited

137. *Missouri v. Holland*, 252 U.S. at 417.

138. *Id.* at 420.

139. *Id.* at 432.

140. *Id.*

141. *Id.* at 434 (emphasis added).

142. *Id.*

143. *Id.* at 432.

to the subjects with respect to which it is empowered to legislate in purely domestic affairs."¹⁴⁴

Since the power was expressly granted to Congress to enact legislation necessary and proper to put into execution a treaty, the validity of such legislation cannot depend upon whether its subject-matter is included within the general legislative powers of Congress. Rather, it depends upon whether the treaty which is being enforced is within the treaty-making power of the United States.¹⁴⁵

Therefore, so long as the treaty is within the treaty-making power of the United States, Congress can enact any legislation that is "necessary and proper" to accomplish the goals of the treaty, even if such legislation would not have been permissible in a purely domestic setting.

If the ECJ had adopted this rationale in its WTO Opinion, the ability to legislate in the areas of GATS and TRIPS would undoubtedly fit in the category of "necessary and proper" to accomplish the proper execution of the WTO Agreement. Furthermore, the EEC Treaty contains language that the ECJ could have used to render a decision consistent with *Missouri v. Holland*. The Commission raised Article 235 as an argument for finding exclusive competence for the Community. Article 235 provides that "[i]f action by the Community should prove necessary to attain . . . 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 . . . take appropriate measures."¹⁴⁶ The argument that the Member States still hold some competence in the areas of GATS and TRIPS then becomes subordinate to the Community's interest of achieving the goals of the WTO.

The EU, however, is not a federal system, and the Member States retain more sovereignty than do the states in the United States. Some commentators accuse the ECJ of engaging in excessive judicial activism.¹⁴⁷ Without exclusive competence in the areas of GATS and TRIPS, however, the Community will not

144. *Id.* at 424.

145. *Id.* at 425; *Ross v. McIntyre*, 140 U.S. 453, 463 (1891).

146. EEC TREATY art. 235.

147. See Mancini, *supra* note 106, at 180 (citing Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585, [1964] 3 C.M.L.R. 425 (Ger.)).

achieve the benefits of the WTO. Therefore, in this case, a little judicial activism might be advantageous.

V. WHAT EFFECT WILL THE ECJ'S DECISION HAVE ON THE EU'S ABILITY TO PARTICIPATE IN THE WTO?

At the hearing for the determination of competencies under the WTO, the Commission called the ECJ's attention to problems that would arise with the administration of agreements if the Community and the Member States shared competence in GATS and TRIPS.¹⁴⁸ The second paragraph of Article C of the EEC Treaty stipulates:

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its prospective powers.¹⁴⁹

Undoubtedly, the decision of the ECJ on the issue of competence under the WTO will make ensuring consistency in external activities a difficult task.

The Committee of Permanent Representatives¹⁵⁰ requested that the Council prepare a working document containing a preliminary analysis of the detailed arrangements for participation of the Community and the Member States in the WTO.¹⁵¹ The Council's Legal Service predicted some form of shared competence before the ECJ's decision on competence. The Council identified some of the problems and solutions in its report. The Commission, on the other hand, identified problems that would occur if the Community was not granted exclusive competence.

A. External Cohesion

Article J.1(4) of the EEC Treaty states that the Member States "shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force

148. WTO Opinion, *supra* note 11, at 599, para. 106.

149. EEC TREATY art. C, para. 2.

150. The Committee of Permanent Representatives (COREPER) is composed of senior civil servants from the Member States who assist in preparing and managing the work of the Council. See Peters, *supra* note 15, at 79-85.

151. Legal Service Note, *supra* note 23.

in international relations.”¹⁵² The participation of fifteen Member States, each concerned with its own national interests, would seriously impair the effectiveness of the EU as a cohesive force in the WTO. This self-interest would undermine the rationale of Article 113. The EU must act as a union in order to be effective in the international arena.

The Council, however, maintained that the question of Member State competence, particularly in the area of intellectual property, was not in dispute until the Commission raised it with regard to the WTO. The Council further stated that the Member States have consistently exercised their competence at the international level, for example in the WIPO.¹⁵³ This involvement allegedly “has not prevented the progressive development of internal Community law and of international action by the Community.”¹⁵⁴ In its own Legal Service Note, the Council refers to the ECJ’s International Labour Organization Opinion, which stressed:

[Agreement may be concluded in an area where] competence is shared between the Community and the Member-States. In such a case, negotiation and implementation of the agreement require joint action by the Community and the Member States When it appears that the subject matter of an agreement or contract falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure that there is close association between institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into. The duty of co-operation . . . results from the requirement of unity in the international representation of the Community.¹⁵⁵

This language creates a legal obligation to find formulae that “ensure ‘consistency’ of the EU’s external action, while ensuring ‘joint action’ by the Community and the Member States and ‘close association’ between the Member States and the Community

152. EEC TREATY art. J.1(4).

153. Convention Establishing the World Intellectual Property Organization, July 14, 1967, T.I.A.S. No. 6932 (as amended 1979).

154. WTO Opinion, *supra* note 11, at 86.

155. Case 2/91, *Re International Labour Organization Convention 170 on Chemicals at Work*, [1993] 3 C.M.L.R. 800.

institutions.”¹⁵⁶

Significant problems in the Community's negotiating procedures under the old GATT, however, posed considerable constraints on the negotiators and caused enormous confusion. An example is an incident that involved the French representative in the oil-seeds dispute under GATT. During the discussions on the establishment of a panel, the representative for the Community asked the Chairman of the proceedings to allow France to express its views on the oil-seeds issue.¹⁵⁷ The French representative stated:

In the present circumstances . . . where important measures in the agricultural sector had recently been taken by big trading partners, [the French government] would want to make an overall assessment of the agricultural disputes connected to the Uruguay Round negotiations. Accordingly, France could not agree at the present meeting to the establishment of a panel as requested by the United States.¹⁵⁸

The French delegation then requested that the Community take note that contracting parties lacked consensus and therefore could not establish a panel.¹⁵⁹

The EEC representative responded that although France was a contracting party to the Treaty, France no longer had competence on matters of trade policy. He further explained that the Community had exclusive competence in this area and the Commission of the EEC represented the Community in the Council of GATT by the Commission of the EEC. “The issue of representation had arisen from the very outset, and it was in that way that the Community had assumed the competence that the member States no longer assumed on a national basis.”¹⁶⁰

It would be a most unwise course to introduce an element of insecurity into what had been accomplished in this institution in the past The Community had assumed responsibility for trade policy on behalf of the Member States; that was the guarantee and the security for other contracting parties. To take the French views into consideration would put into question all

156. Legal Service Note, *supra* note 23, at 6.

157. *Payments and Subsidies Paid*, *supra* note 22, at 10.

158. *Id.*

159. *Id.* at 11.

160. *Id.* at 13.

the current Community's obligations and rights.¹⁶¹

The growing complexity of the WTO increases the areas covered and will undoubtedly cause further confusion, thereby making the EU a very difficult partner to deal with in the WTO.

1. "Spokesperson" for the Community and the Member States

Given the problems mentioned above, the importance of the EU presenting a united front is clear. The Community must devise a method of speaking with one voice—even in matters involving GATS and TRIPS. The Council proposed that the best and simplest formula for instituting a single spokesperson would be to retain the Commission in its traditional role. From the beginning of the Uruguay Round, the Commission was the single spokesperson for issues within the Community's competence and issues falling within the competence of the Member States.¹⁶² The Council noted that it would be desirable for the Commission to continue to act as the spokesperson in matters relating to the WTO as a whole, in particular vis-a-vis the EU's external partners.¹⁶³ This formula does not require a significant conceptual leap because the Commission merely carries out the predetermined mandate of the Council, which is composed of representatives of the Member State governments.¹⁶⁴ In fact, the Council carefully distinguished the question of the role of the "spokesperson" from that of internal procedures within the EU. This distinction of roles is necessary for deciding what the spokesperson should express, negotiate or possibly agree.¹⁶⁵

2. Internal Procedures for Defining the Positions to be Adopted within the WTO

The ECJ recognized that where it is apparent that the subject matter of an agreement or convention falls partly within the competence of the Community and partly 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

161. Legal Service Note, *supra* note 23, at 14.

162. *Id.*

163. *Id.*

164. See *supra* note 28 (explaining the make-up function of the Council).

165. Legal Service Note, *supra* note 23, at 7.

commitments entered into.”¹⁶⁶ The ECJ, however, did not provide any structure for this cooperation between the Member States and the Community, leaving the institutional mechanisms provided in the EEC Treaty to ultimately resolve this matter. Indeed, the ECJ in *International Labour Organization Convention 170 on Chemicals at Work* stipulated that the Community institutions and the Member States must take all measures necessary to ensure cooperation between the two in areas involving shared competency.¹⁶⁷

In its Legal Service Note, the Council suggested an overall political solution for voting procedures to be applied to decision-making in the areas of GATS and TRIPS.¹⁶⁸ The suggested solution would apply qualified majority voting in areas where the Community has competence and the Treaty provides for such voting in articles such as 113.¹⁶⁹ The suggested solution requires unanimity where the Member states have competence. The Council, however, recognized that the latter solution would run into difficulties for two reasons:

- (i) owing to the possible divergence of views among Member States and between the Member States and the Community institutions with regard, in each instance, to the allocation of powers between the Community and the Member States; and
- (ii) because, in a field in which powers are shared between the Community and the Member States, a single issue could fall simultaneously within the competence of the Community and that of the Member States.¹⁷⁰

The Legal Service Note distinguished between cases where Member States jointly exercised their powers with those of the Community and cases where Member States exercised their powers separately. The Legal Service Note also suggested that the most expedient solution is for there to be one procedure for administering GATS and another for administering TRIPS.¹⁷¹

The above discussion hints at the difficulty of establishing a

166. WTO Opinion, *supra* note 11, at 123, para. 108.

167. Case 2/91, *Re International Labour Organization Convention 170 on Chemicals at Work*, 3 C.M.L.R. 800 (1993).

168. Legal Service Note, *supra* note 23, at 7.

169. *Id.* at 8.

170. *Id.*

171. *Id.* at 9.

coherent method of coordinating the positions of the Member States and the Community in the areas of GATS and TRIPS. The confusion that served as the basis for the Commission's argument to be granted exclusive competence is very likely to ultimately hamper the Community's ability to participate effectively in the WTO.

B. The Issue of Dispute Settlement

The issue of dispute settlement in the WTO, where GATS and TRIPS are involved, has two aspects: (1) third-countries bringing actions against either the Community or individual Member States, depending on who has competence in a particular area; and (2) the Community or a Member State bringing an action against third parties, again depending on the division of competence. Shared competence between the Community and the Member States makes it difficult for third parties wishing to bring an action for a violation of GATS or TRIPS to determine who the appropriate parties are, causing confusion in the dispute settlement system of the WTO. In many cases, the boundaries of competence are blurred and may involve both the Member States and the Community.

The Legal Service Note was unhelpful in outlining a solution for this problem, except to state that the Community "cannot impose on third-countries which are our partners in the [WTO] the burden of analyzing the respective powers of the Community and its Member States."¹⁷² Furthermore, it states that "[a] formal undertaking in the [WTO] on the part of the Community and its Member States not to oppose acceptance of a complaint for reasons of 'powers' (distribution of powers between the Community and its Member States) therefore seems necessary."¹⁷³ This ensures that issues of distribution of competencies remain an internal matter for the Community and the Member States, and does not hamper the implementation of the dispute settlement machinery by third parties.¹⁷⁴

Member States wishing to bring action against a third party for infringement of their rights under GATS or TRIPS also may trigger cross-retaliation. Cross-retaliation may prove difficult in the

172. *Id.* at 9-10.

173. *Id.*

174. *Id.*

EU because

if a Member State, within its sphere of competence, had been duly authorized to take cross-retaliation measures but considered that they would be ineffective if taken in the fields covered by GATS or TRIPS, it would lack the power under Community law to retaliate in the area of trade in goods, since that area falls . . . within the exclusive competence of the Community by virtue of Article 113 of the Treaty.¹⁷⁵

For example, if a GATT panel authorized France to cross-retaliate against the United States for a violation of GATS, France would not be able to cross-retaliate in areas outside the limited competence that the ECJ has granted it. In such a case, the Member State would have to request the Community to retaliate on its behalf, which further complicates matters both within the EU and for its trading partners.

VI. CONCLUSION

The ECJ's opinion on the issue of competence under the WTO leaves many questions unanswered. The ECJ could have granted the Community exclusive competence over the entire WTO for purposes of concluding agreements, including the newly formed GATS and TRIPS. The Commission made sound, legal arguments as to why the Community should have exclusive competence. So why did the ECJ find against the Commission and fragment GATS and TRIPS along complicated and seemingly arbitrary lines? The answer may be that the ECJ is backing down from its somewhat controversial activist role. Also, one should note that the EU is not a federal structure, even though it possesses many federal characteristics. The Community would be most efficient if it had the power to pursue any legislation "necessary and proper" to achieve the goals of a treaty, but the Community has not evolved to the point where the Member States are willing to grant the Community such latitude.

The Community does have the power to harmonize the laws in the areas of services and intellectual property within the EU, which would lead to corresponding competence in these areas in the international arena. The Community, however, must achieve these harmonization measures through institutional channels and

175. WTO Opinion, *supra* note 11, at 64.

with constant input of the Member States, who essentially shape the end result.

The problems stemming from this sharing of competence undoubtedly will limit the Community's effectiveness in the WTO. The Community institutions will have to formulate the framework for dealing with shared competence. This framework is likely to be unwieldy, causing future confusion for both the Member States of the Community and their trading partners in the WTO.