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Interpretation of mixed agreements

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I. Introduction

In relation to the jurisdiction of the Court of Justice to interpret mixed agreements, it has been argued that:

'[whilst] the case-law [is] copious, … successive developments, far from offering a smooth passage, have constructed a long and winding path, whose complex route demands certain adjustments in order to help its confused users find their way'.[1]

This argument was made by Advocate General Colomer in his Opinion in Case C-431/05 Merck. In the same Opinion, he refers to the 'deficiencies' of the relevant case-law as well as the latter's 'illogical' consequences.[2]

This Chapter will examine whether this statement is borne out by the case-law of the Court of Justice. The analysis is structured in thee parts. First, it will examine the origin of the Court's approach to its jurisdiction. Second, it will set out the parameters of the wide construction of its jurisdiction in the contest of the preliminary reference procedure. Third, it will outline its approach as developed in the context of enforcement proceedings. Finally, it will analyse the above developments in the light of the more recent judgment in Case C-431/05 Merck. Throughout this analysis, the threads which bring together the different strands of the Court's case-law and the quest for identifying the Community interest, as well as the methods which would serve it best, will be examined.

II. The origin

The question of the existence and the limits of the jurisdiction of the Community judiciary to interpret mixed agreements was not addressed by the Court until the mid 1990s. The Court avoided the question of the scope of its jurisdiction to interpret mixed agreements in a number of cases. These included Haegeman in relation to the prohibition on customs duties set out in the Association Agreement with Greece,[3] Razanatsimba on the treatment of nationals and companies of the Member States and the African, Carribean and Pacific Group States under the First Lomé Convention,[4] and Sevince[5] and Kus[6] in relation to decisions of the Association Council established under the Association Agreement with Turkey on free movement of workers.

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[1] Case C-431/05 Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co. Inc., Merck Sharp & Dohme Ld[a] [2007] ECR I-7001, para. 33 of his Opinion.

[2] Ibid, para. 60 and 59 respectively.

[3] Case 181/73 Haegeman v Belgium [1974] ECR 449.

[4] Case 65/77 [1977] Razanatsimba ECR 2229.

[5] Case C-192/89 Sevince v Staatsecretaris van Justitie [1990] ECR I-3461.

[6] Case C-237/91 Kus v Landeshauptstadt Wiesbaden [1992] ECR I-6781.

It is a testament to the ability of the Community legal order to adjust pragmatically to political realities that questions central to one of the most important aspects of its external relations should have been avoided for so long without undermining either the development of that system, or the capacity of the EC to comply with its international law obligations. In this respect, the approach of the Court of Justice was not dissimilar to that it followed in relation to the effects of World Trade Organisations rules under EC law.[7]

The first time where the Court's jurisdiction to interpret mixed agreements was challenged expressly was in Demirel.[8] The German and United Kingdom Governments argued that the Court did not have jurisdiction to rule on the interpretation of the provisions the Association Agreement with Turkey on free movement of workers. They argued that such issues fell within the exclusive competence of the Member States. The Court ruled that the latter was not the case: [9]

Since the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, Article [310] must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty. Since freedom of movement for workers is, by virtue of Article [39] et seq of the EEC Treaty, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238. Thus the question whether the Court has jurisdiction to rule ion the interpretation of a provision in a mixed agreement containing a commitment which only the member states could enter into in the sphere of their own powers does not arise.

Furthermore, the jurisdiction of the Court cannot be called in question by virtue of the fact that in the field of freedom of movement for workers, as Community law now stands, it is for the Member States to lay down the rules which are necessary to give effect in their territory to the provisions of the Agreement or the decisions to be adopted by the Association Council.

As the Court held in … Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community which has assumed responsibility for the due performance of the agreement.

The above extract is interesting for three main reasons. First, it leaves open the question of the Court's jurisdiction by focusing on the issue of competence. Second, it is confined to the argument put forward by the German and British Governments about the nature of the competence of Member States in the area and does not address at all the issue of the existence of such competence. Third, on the other hand, by referring to Kupferberg, a case about the tax provisions of the Free Trade Agreement with Portugal, the Court transposes its case-law on purely Community agreements to that of mixed agreement, and then relies upon it in order to stress the duty of Member

[7] See Case C-183/95 Affish [1997] ECR I-4315, Joined Cases C-364/95 and 365/95 T. Port GmbH & Co v Hauptzollampt Hamburg-Jonas [1998] ECR I-1023, Case C-53/96 Hermès International v FHT Marketing [1998] ECR I-3603.
[8] Case 12/86 Demirel v Stadt Schwabisch Gnuend [1987] ECR 1545.
[9] Paras 9-11.

States towards the Community to ensure respect for commitments assumed by the latter.[10]

III. The principle

Subsequent case-law addressed the question of the Court's jurisdiction and its scope in a more direct way. In Case C-53/96 Hermès,[11] the Court received a preliminary reference from the Netherlands about the interpretation of Article 50(6) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). This rule is about the enforcement of trademarks by means of provisional measures and provides that, upon request by the defendant, such measures shall be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period. The duration of the latter is to be determined by the judicial authority ordering the measures or, in the absence of such a determination, it should not to exceed 20 working days or 31 calendar days, whichever is the longer.

Three Governments intervened and challenged the Court's jurisdiction.[12] They argued that the rule in question fell beyond the Community's competence, as the Court had ruled in Opinion 1/94 that the Community was not exclusively competent to conclude TRIPs because, amongst other reasons, no general common rules on protection of intellectual property rights had been adopted.[13]

An interesting feature of this case was that the subject-matter of the action before the referring court was a national, rather than a Community, trademark. However, this did not prevent the Court from concluding that it the interpretation of Article 50(6) TRIPs in that case fell within the scope of its jurisdiction. This conclusion was substantiated on the basis of a number of interrelated factors. First, the Court referred to the absence of any reference in the EC Decision concluding the WTO Agreements to the division of competence between the Community and the Member States.[14] Second, it pointed out that the TRIPs provision which it had been asked to interpret was of a procedural nature and would be applicable to Community trademarks, the relevant EC instrument having been adopted a month prior to the signing of the WTO Agreement by the Community.[15] After all, Article 99 of Regulation 40/94 provides for the adoption of provisional measures for the protection of the Community trademark. The Court then ruled that,[16]

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[10] On the implications of the judgment, see amongst others A.F. Gagliardi, 'The Right of Individuals to Invole the Provisions of Mixed Agreements before the National Courts: A New Message from Luxembourg?,' (24 ELRev 276 at 286, C. Kaddous, Le droit des relations extérieures dans la jurisprudence de la Cour de de justice des Communauts européennes (Helbing & Lichtenhahn 1998) 76-78, A. Rosas, 'Mixed Union – Mixed Agreements' in Koskenniemi, M. (ed.), International Law Aspects of the European Union (The Hague: Kluwer Law International, 1998) 125 at 140-1.

[11] Case C-53/96 Hermès International v FHT Marketing [1998] ECR I-3603.

[12] These were the French, the Netherlands and the UK Governments.

[13] Opinion 1/94 [1994] ECR I-5267 at para. 104 where reference was made, exceptionally, to Council Reg. 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods '1986] OJ L 357/1.

[14] Council Dec. 94/800 [1994] OJ L 336/1.

[15] Council Reg. 40/94 on the Community trade mark [1994] OJ L 11/1.

[16] Paras 28-29.

…since the Community is a party to the TRIPs Agreement and since that agreement applies to the Community trade mark, the courts referred to in Article 99 of Regulation No 40/94, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPs Agreement

It follows that the Court has, in any event, jurisdiction to interpret Article 50 of the TRIPs Agreement.

The national nature of the subject matter of the dispute before the referring court, that is a trademark protected under the Netherlands law, was dismissed as immaterial on the basis of the autonomy of national courts to determine the questions referred to the Court of Justice under Article 234 EC, as well as the Community interest: in relation to the latter, it was pointed out that,[17]

… where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply...

Whilst the judgment in Hermès construed the jurisdiction of the Court to interpret mixed agreements in broad terms, it was not clear quite how broad this was.[18] After all, there were a number of features in Hermès which rendered its legal and factual context quite specific: not only had the Community adopted legislation within the area covered by the provision of the agreement in question prior to the signing of the latter, but that provision was also of a procedural nature which could apply to the relevant Community measure in the future, and the conclusion of the agreement was not accompanied by an allocation of the Community's competence and that of its Member States. In the absence of any of these features, would the jurisdiction of the Court be maintained? And even if all these features were present, would any variation affect its scope? For instance, would the Court's jurisdiction exist even in the presence of a Community measure which, whilst within the scope of the relevant provision of the mixed agreement broadly understood, covered a subject-matter distinct from that in the case referred under Article 234 EC? Would it exist if there was no secondary measure at the time of the reference, but the adoption of a legislative proposal was pending?[19] And what if the provision of a mixed agreement falls within the exclusive competence of the Member States?

[17] Para. 32.

[18] See A. von Bogdandy, casenote on Case C-53/96 Hermès, (1999) 36 CMLRev 663, A. Dashwood, 'Preliminary Rulings on the Interrpetation of Mixed Agreements' in D. O'Keeffe and A. Bavasso (eds), Judicial Review in European Union Law – Liber Amicorum in Honour of Lord Slynn of Hadley Vol 1 (The Hague: Kluwer, 2000) 167, J. Heliskoski, 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements', (2000) 69 Nordic Journal of International Law 395

[19] In his Opinion in Joined Cases 300/98 and 392/98 Parfums Christian Dior [2000] ECR I-11307, AG Cosmas argued that, 'in the context of Article [234] of the Treaty, to extend the Court's interpretative jurisdiction to TRIPs provisions relating to areas in which the (potential) Community competence has not yet been exercised would constitute pursuit of a policy of judge-made law in conflict with the constitutional logic of the Treaty and would be difficult to justify on grounds of expediency' (para. 51).

The subsequent case-law sought to shed some light on this. In Joined Cases C-300/98 and 392/98 Parfums Christian Dior,[20] the Court of Justice dealt with two references from The Netherlands (one from the Hoge Raad) about, again, Article 50 TRIPs and its application to trademarks and industrial designs disputes. In relation to the latter area, the Community had not adopted any secondary measure. One of the questions referred from the Hoge Raad was precisely whether the jurisdiction of the Court to interpret Article 50 TRIPs also extended to its provisions in cases where no trademarks were involved.

The starting point for the judgment was the articulation of the Court's jurisdiction in broad terms:[21]

'TRIPs … was concluded by the Community and its Member States under joint competence … It follows that where a case is brought before the Court in accordance with the provisions of the Treaty, in particular Article [234] thereof, the Court has jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret TRIPs'.

What is noticeable about this extract is the absence of any reference to the existence of secondary Community rules. In fact, the judgment reads as if Hermès was merely an example where the Court's jurisdiction would be exercised. Indeed, the Court goes on to point out that 'in particular, the Court has jurisdiction to interpret Article 50 TRIPs in order to meet the needs of the courts of the Member States when they are called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under Community legislation falling within the scope of TRIPs'.[22]

It then held as follows:

37. Since Article 50 of TRIPs constitutes a procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law, that obligation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation.

38. Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article [234] of the Treaty is in a position to ensure such uniform interpretation.

39. The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs is thus not restricted solely to situations covered by trade-mark law.

The ruling in Dior and Others not only confirms the broad scope of the Court's jurisdiction, but it also anchors it even more firmly to the need for uniformity of interpretation. This is the thread which links this judgment with Hermès where, it is

[20] Joined Cases 300/98 and 392/98 Parfums Christian Dior [2000] ECR I-11307.
[21] Para. 33.
[22] Para. 34 (emphasis added). It goes on to point out that 'likewise, where a provision such as Article 50 of TRIPs can apply both to situations falling within the scope of national law and to situations falling within that of Community law, as is the case in the field of trade marks, the Court has jurisdiction to interpret it in order to forestall future differences of interpretation' (para. 35).

recalled, reference was also made to the Community interest. However, whilst there was no doubt left as to the wide scope of its jurisdiction, the Court also makes it clear that that scope is not without limits. In fact, it holds that it is for the national courts to decide whether Article 50 of TRIPs grants rights to individuals upon which they may rely before national courts in areas where the Community 'has not yet legislated and which consequently falls within the competence of the Member States';[23] if, on the other hand, the Community has already legislated in a field to which TRIPs applies, then the national courts must follow the Court's case-law on the effects of WTO rules following the Portuguese Textiles judgment[24] and interpret national law as far as possible in the light of the wording and purpose of Article 50 of TRIPs.[25]

The role of national courts was even more pronounced in the judgment in Case C-89/99 Schieving-Nijstad, where the Court set out a number of specific issues regarding the interpretation of Article 50(6) TRIPs which they had to ascertain.[26] However, the delineation of Community and national competence is an exercise which national courts are bound to find fraught with problems. This is illustrated in Case C-431/05 Merck, where the referring court argued that it was for the Court of Justice to determine whether Article 33 TRIPs could be invoked by individuals before national courts, whereas the Court concluded that that was, in fact, a task for national courts.[27]

There are two further issues which the case-law examined in this section raises. The first is about the requirement of uniform interpretation which gives rise to the Court's jurisdiction to determine the effect of a provision of a mixed agreement in situations concerning national law.[28] The ruling in Hermès, as well as those in Dior and Others and Schieving-Nijstad, are about a procedural provisions of TRIPs, capable of applying both to situations covered by national law and to situations covered by Community law; it is this characteristic which, according to the Court, gives rise to the requirement of uniform interpretation and, therefore, the jurisdiction of the Court of Justice in the context of the preliminary reference procedure. However, this does not necessarily follow: uniform interpretation is a requirement which should govern the application of Community law, and any discrepancy between the latter and national law governing situations beyond the scope of Community law is not necessarily problematic. After all, provisions of domestic law are relevant in terms of their compatibility with Community law only in cases with an intra-Community element. The cases to which the Court refers in order to substantiate its line of reasoning do not necessarily support its conclusion either:[29] it is one thing for a Member State to adopt a solution of Community law within its domestic legal order and then to make a reference to the Court of Justice as to its interpretation, and quite

[23] Para. 48.
[24] Case C-140/96 Portugal v Council [1999] ECR I-8395.
[25] Para. 47.
[26] Case C-89/99 Schieving-Nijstad vof and Others and Robert Groeneveled [2001] ECR I-5851.
[27] See the analysis below.
[28] In his Opinion in Case C-89/99 Schieving-Nijstad vof and Others and Robert Groeneveled [2001] ECR I-5851, AG Jacobs pointed out that 'it is not easy to understand why Community law governs the effects of Article 50 of the TRIPs Agreement not only where a Community trade mark is involved but also in situations concerning national trade marks' (para. 40).
[29] In Hermès (para. 32), reference is made to Case C-130/95 Giloy v Hauptzollamt Frankfurt am Main-OSt [1997] ECR I-4291, para. 28, and Case C-28/95 Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen [1997] ECR I-4161, para. 34.

another for the Court to hold that the existence of Community law, even if not applicable in the case before it, would bring the dispute within its jurisdiction.

The second issue raised by the above line of cases is the conclusion about the determination of direct effect of provisions set out in TRIPs. This does not necessarily follow from either the preceding line of reasoning set out in the Dior judgment or the logic of interpretation. The conclusion about direct effect presupposes a distinction between interpretation and effect of the provision of a mixed agreement. However, the effect of such a provision, and in particular whether it may be invoked before national courts, is in itself a matter of interpretation. Quite what it is that should make direct effect prevail over the requirement of uniform interpretation is not clear, all the more so in the light of the central position of the latter in the construction of the Court;s jurisdiction in broad terms.

IV. Jurisdiction to interpret mixed agreements in the context of Article 226 EC

The issue of the interpretation of mixed agreements and the scope of the Court's jurisdiction has also arisen in a number of enforcement actions brought by the Commission under Article 226 EC.

In the Berne Convention case,[30] the problem was the failure by Ireland to update its copyright law and ratify the Berne Convention for the Protection of Literary and Artistic Work in accordance with Article 5 of Protocol 28 of the European Economic Area (EEA) Agreement. The United Kingdom Government intervened and challenged the jurisdiction of the Court on the basis of the mixed character of the EEA Agreement. In particular, it argued that only matters in relation to which the Community had adopted harmonising measures could be subject to the Court's review. Therefore, it alleged that the Berne Convention was a matter of international law, it fell within national competence and its application was excluded from the scope of the Court's jurisdiction.

This objection was dismissed as inadmissible, because no such argument was advanced by the defending party, that is Ireland.[31] In its judgment, the Court assimilated mixed agreements to purely Community agreements. It did so by relying upon previous pronouncements made in the context of association agreements in Demirel.[32] It, then, went on to conclude that the Berne Convention falls 'in large measure' within the scope of EC competence. It is interesting that this statement is substantiated in only one paragraph, with reference to a handful of related areas in which the EC has legislated and with no reference to specific secondary measures and no attempt to define the extent to which the mixed character of the Convention might affect the nature of the Community duty imposed on the Member States. Indeed, the Court's assessment of the extent to which there is coincidence between the subject-matter of the Convention and EC law is confined to affirmative statements 'in large measure' and 'to a very great extent'.[33]

[30] Case C-13/00 Commission v Ireland [2002] ECR I-2943.
[31] See Art. 37 of the EC Statute of the Court of Justice.
[32] nX above, para. 9.
[33] Paras 16 and 17 respectively.

This broad brush approach is not only bold in its implications, but also regrettable in its lack of clarity and the generalizations which it appears to introduce. Quite apart from the way in which references to secondary measures are made, the Court's reading of the extract from Demirel in order to assimilate mixed agreements to purely Community agreements appears rather strained. Be that as it may, this approach may be understood in the light of the specific circumstances of the action. On the one hand, the Irish Government had accepted the existence of the violation and had made it clear that national law acceding to the Convention had been at an advanced stage of scrutiny before the Irish Parliament. On the other hand, more crucially, the action was about adherence: as the convention was indivisible, the failure of a Member State to accede to it is clearly problematic in so far as it prevents the Community from adhering to it. However, this argument, whilst put forward by Advocate General Mischo,[34] was ignored by the Court.

An equally broad approach was adopted in the subsequent judgment in Etang de Berre.[35] France had not adopted measures to prevent, abate and combat heavy and prolonged pollution of a saltwater march named Étang de Berre, a failure which the Commission alleged to constitute a violation of the Convention for the Protection of the Mediterranean Sea against Pollution. The objection to the Court's jurisdiction put forward by the French Government was dismissed. Delivering the judgment without a submission from an Advocate General,[36] the Court referred verbatim to the judgment in Berne Convention. Again, the subject matter of the Convention was deemed 'without doubt [to] cover a field which falls in large measure within Community competence'.[37] This is substantiated by a very general statement about environmental protection and how it is 'in very large measure regulated by Community legislation, including with regard to the protection of waters against pollution', with references to measures concerning urban waste-water treatment, the protection of waters against pollution caused by nitrates from agricultural sources, the establishment of a framework for Community action in the field of water policy[38]. The Court went on to conclude as follows:

'Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest in compliance by both the Community and its Member States with the commitments entered into under those instruments'.

It is noteworthy that the Court should refrain from addressing a specific issue raised by the French Government, according to which there was no Community law regarding discharges of fresh water and alluvia into the marine environment, that is the specific obligations which France was alleged to have violated. Instead, this fact is not disputed by the Court which merely pointed out that it 'is not capable of calling that finding [that is the existence of the Community interest] into question'.[39]

[34] Para. 50 of his Opinion. This argument was also made by AG Maduro in Case C-459/03 Commission v Ireland (re: Mox Plant) [2006] ECR I-4635, para. 30.
[35] Case C-239/03 Commission v France [2004] ECR I-9325
[36] In accordance with Art. 20 subpara. 5 of the Statute of the Court of Justice, '[w]here it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General'.
[37] Para. 27
[38] Para. 28.;
[39] Para. 30

However, there seems to be a leap between the question which the Court set out to answer in order to define its jurisdiction and the one which it ended up answering: the former is whether the subject-matter of the mixed agreement in question falls within the scope of EC law; the latter is whether the subject-matter of the agreement is covered by EC legislation. This latter question is narrower: in the presence of secondary legislation, there can be no doubt that the subject-matter of the agreement would fall within the scope of EC law. The question which remains is whether the conclusion would have been different in the absence of Community legislation.

The most recent episode in this line of enforcement actions where the jurisdiction of the Court was in issue was the Mox Plant case.[40] The subject-matter of these enforcement proceedings was the initiation by Ireland of proceedings against the United Kingdom in the context of the United Nations Convention on the Law of the Sea (UNCLOS), a convention to which both the Community and the Member States are parties. In particular, Ireland had objected to the construction of Mox plant, a facility designed to recycle plutonium from spent nuclear fuel, at Sellafield and argued that the British Government violated substantive provisions set out in UNCLOS regarding the protection and preservation of the marine environment, as well as authorization and notification procedures. The Commission, on the other hand, viewed the initiation of proceedings by Ireland against another Member State beyond the Community legal framework as a violation of the duty of cooperation under Article 10 EC and the exclusive jurisdiction of the Court of Justice under Article 292 EC.

In the vein of the argument by the French Government in Etang de Berre, the Irish Government argued that no EC legislation at all existed in relation to the discharge of radioactive substances into the marine environment and notification and cooperation in the area of the transport of such substances by sea. In addition, it argued that no secondary EC rules featured any rule comparable to that laid down in the Convention.

The starting point for the judgment is the examination of whether the UNCLOS provisions relied upon by Ireland fall within the scope of EC competence. The judgment is underpinned by a clear emphasis on the existence of EC competence, rather than its nature: the Court points out that 'the question as to whether a provision of a mixed agreement comes within the competence of the Community is one which relates to the attribution and, thus, the very existence of that competence, and not to its exclusive or shared nature'.[41] The implications are clear:[42]

> … the existence of the Community's external competence in regard to protection of the marine environment is not, in principle, contingent on the adoption of measures of secondary law covering the area in question and liable to be affected if Member States were to take part in the procedure for concluding the agreement in question, within the terms of the principle formulated by the Court in paragraph 17 of the AETR judgment.

[40] Case C-459/03 Commission v Ireland [2006] ECR I-4635
[41] Para. 93.
[42] Paras 94-5.

The Community can enter into agreements in the area of environmental protection even if the specific matters covered by those agreements are not yet, or are only very partially, the subject of rules at Community level, which, by reason of that fact, are not likely to be affected

The Court, then, sets out to ascertain whether, by concluding UNCLOS, the Community chose to exercise its non-exclusive competence in the area of marine conservation. In doing so, it refers to two sources, namely the legal basis of the Council Decision concluding UNCLOs on behalf of the Community,[43] that is Article 130s(1) EC, and the Declaration of Competence submitted by the Community to UNCLOS and annexed to Council Decision 98/392. This states that the prevention of marine pollution falls within the Community's exclusive competence only to the extent that such provisions of UNCLOS or implementing legal instruments affect common rules established by the Community; however, when Community rules exist but are not affected, for instance in cases of minimum standards rules, the Member States have competence without prejudice to the Community's competence to act in this field.

On the basis of the above, the Court points out that[44]

It follows that, within the specific context of the Convention, a finding that there has been a transfer to the Community of areas of shared competence is contingent on the existence of Community rules within the areas covered by the Convention provisions in issue, irrespective of what may otherwise be the scope and nature of those rules.

The Court, then, goes further and looks at the appendix to the Declaration setting out the Community acts which refer to matters governed by UNCLOS and which the Court views as 'a useful reference base'.[45] With references to Directive 85/337 on environmental assessment,[46] Directive 93/75 on minimum requirements for vessels carrying dangerous or polluting goods,[47] and Directive 90/313 on the freedom of access to information about the environment,[48] the Court concludes that[49]

the matters covered by the provisions of the Convention relied on by Ireland before the Arbitral Tribunal are very largely regulated by Community measures, several of which are mentioned expressly in the appendix to [the] declaration [of Community competence attached thereto].

Using a different formulation, this is reaffirmed further down in the judgment by a statement that the UNCLOS provisions relied upon by Ireland, 'which clearly cover a significant part of the dispute relating to the MOX plant, come within the scope of Community competence which the Community has elected to exercise by becoming a party to the Convention'.[50]

[43] Council Dec. 98/392 [1998] OJ L 179/1.
[44] Para. 108.
[45] Para. 109.
[46] [1985] OJ L 175/40.
[47] [1993] OJ L 247/19.
[48] [1990] OJ L 158/56.
[49] Para. 110.
[50] Para. 120.

The Mox Plant case has attracted considerable attention.[51] For the purposes of this analysis, it is worth pointing out that the specific legal and factual framework of this case may explain the conclusion reached by the Court: on the one hand, there was a Declaration of Competence which referred to specific EC measures the interpretation of which the Irish Government invoked before the UNCLOS bodies; on the other hand, Article 282 UNCLOS expressly enables the parties to deviate from compliance with the enforcement procedures set out in UNCLOS and, instead, to submit a dispute concerning the interpretation or application of the Convention to a procedure set out in a general, regional or bilateral agreement that entails a binding decision.

However, the line of reasoning followed by the Court raises two issues. First, the emphasis on whether the Community had elected to exercise its competence when it concluded UNCLOS is problematic. There are three main reasons for this. First, it conflates the position of the Community and the Member States towards the third parties regarding the implementation of, and the ensuing responsibility under, the UNCLOS rules with the integrity of the Community legal order and the exclusive jurisdiction of the Court of Justice – the former is external, whereas the latter is internal to the Community legal order. Put differently, whether the Community has exercised its non-exclusive competence under the UNCLOS provisions is a question which is narrower to whether Ireland violated its EC Treaty obligations by submitting a dispute against another Member State beyond the EC legal framework.[52] After all, a Member State is under a duty not to violate Community law even in areas which fall within the sphere of their competence. This is the case in relation to areas of activity as diverse as foreign policy,[53] the organization of the armed forces,[54] the organization of national health care systems,[55] and criminal law.[56]

The second reason which makes the emphasis on the exercise of the Community competence in Mox Plant problematic is that it appears to be at odds with the substance of the judgment. Indeed, the existence of Community legislation, which the Court deems indicative of the exercise of the Community's competence, in fact suggests that the dispute between Ireland and the United Kingdom falls within the scope of Community law. It is puzzling that the Court should choose to view the matter from this angle, when the facts of the case, and in particular the reliance upon EC secondary measures by the Irish Government before the UNCLOS tribunal, made

[51] See M. Bronckers, 'The relationship of the EC Court with Other International Tribunals: Non-Commital, Respectful or Submissive?', (2007) 44 CMLRev 601, R. Churchill and J. Scott, 'The MOx Plant Litigation: The First Half-Life', (2004) 53 ICLQ 643, N. Lavranos, 'The scope of the exclusive jurisdiction of the Court of Justice', (2007) 32 ELRev 83, N., Lavranos, 'The MOX Plant and Jzeren Rijn Disputes: Which Court Is the Supreme Arbiter?', (2006) 19 Leiden Journal of International Law 249.

[52] In this vein, see M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M. Cremona and B. De Witte (eds), EU Foreign Relations Law – Constitutional Fundamentals (Hart Publishing 2008) 125 at 150-2.

[53] Case C-125/95 The Queen, ex parte Centro-Com / HM Treasury and Bank of England [1997] ECR I-81 at para.27.

[54] Case C-273/97 Sirdar [1999] ECR I-7403, Case C-285/98 Kreil [2000] ECR I-69, Case C-186/01 Dory [2003] ECR I-2479. For a comment, see P. Koutrakos, 'How far is far enough? EC law and the organisation of the armed forces after *Dory'*, (2003) 66 MLR 759 and M. Trybus, European Union Law and Defence Integration (Hart Publishing 2005) Ch. 9.

[55] Case C-120/95 Decker v Caisse de maladie des employés privés [1998] ECR I-1831, Case C-158/96 Kohll v Union des caisses de maladie [1998] ECR I-1931, Case C-372/04 Watts [2006] I-4325.

[56] Case C-226/96 Criminal Proceedings against Lemmens [1998] ECR I-3711.

it very clear that what was at stake was the scope of EC law. Therefore, there appears to be a disjunction between the question which the judgment sets out to address, and which it views as central to the dispute upon which it is called to adjudicate, and the method pursuant to which it chose to address it, as well as the conclusion to which this led.

A third problem is raised by the heavy reliance in the judgment upon the declaration of competence. Whilst their objective is to enable the Community's partners to clarify issues of delineation of competence between the Community and the Member States, and, consequently, issues of responsibility, declarations of competence may be quite unhelpful. In his Opinion in Mox Plant, Advocate General Maduro refers to the 'lack of clarity and elegance' which characterizes the declaration attached to UNCLOS.[57] In fact, declarations of competence may prove to be a distinctly unreliable yardstick not only for third parties but also Member States seeking guidance as to how to exercise their international law rights and comply with their relevant duties in accordance with their Community law obligations.[58] These include statements aiming to outline in general terms the state of the law regarding the existence and nature of Community competence, as well as to convey the dynamic and incremental nature of that competence[59] - considering that the principles underpinning the scope, effects, and implications of the existence and exercise of EC competence are still a long way from being settled, it is quite a challenge to expect the third parties to which they are addressed to be able to navigate their way through the Community's declarations of competence.

V. The more recent twist

The latest episode in the saga examined in this Chapter is marked by the judgment which the Grand Chamber delivered in Case C-431/05 Merck Genéricos in September 2007.[60] This reference from the Portuguese Supreme Court was about the effect of Article 33 TRIPs which provides that patents are protected for a minimum period of 20 years from the filing date. Whilst the Portuguese Industrial Property Code, as amended in June 1995, provided for a 20-year period of protection, it also stipulated that patents filed before the entry into force of that provision were protected for 15 years, a period stipulated under prior law.

The claimant in the main proceedings sold a pharmaceutical product under the trade mark 'Enalapril Merck'. This was claimed to be the same as a product under the trade mark 'Renitec' and was sold at considerably lower prices. The patent holder of the latter product brought an action against Merck Genéricos arguing that selling their product without an authorization constituted a violation of their patent right. Whilst

[57] Para. 30 of his Opinion.

[58] B. De Witte, 'Too much constitutional law in the European Union's Foreign Relations?' in M. Cremona and B. De Witte (eds), EU Foreign Relations Law – Constitutional Fundamentals (Hart Publishing 2008) 3 at 14-5 and P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in ibid, 171 at 183.

[59] See, for instance, the Declaration on competence submitted by the Community on its Accession to the Hague Conference on Private International Law set out in Annex II to Council Dec. 2006/719/EC [2006] OJ L 297/1 at 5, and the one submitted in matters covered by the Convention establishing a Customs Cooperation Council annexed to Council Dec. 2007/668/EC [2007] OJ L 274/11 at 13-4.

[60] Case C-431/05 Merck Genéricos – Produtos Farmacêuticos Lda v Merck & Co. Inc., Merck Sharp & Dohme Ldª [2007] ECR I-7001.

Merck Genéricos argued that the patent protection had expired in the light of the expiration of the 15-year period set out in Portuguese law for patents issued before June 1995, the patent holders counterargued that that provision was contrary to Article 33 TRIPs and that their patent was protected under the 20-year minimum rule set out therein.

The latter claim was accepted by the Court of Appear but was further challenged by Merck Genéricos before the Supreme Court, arguing that Article 33 TRIPs could not have direct effect. The referring court asked two questions: does the ECJ have jurisdiction to interpret Article 33 TRIPs? If it does, may this provision be invoked in disputes between individuals before national courts, either on their own initiative or at the request of one of the parties?

In its reference, the Portuguese Supreme Court took the view that the interpretation of Article 33 TRIPS fell beyond the scope of the jurisdiction of the Court of Justice. This was because a number of Community measures existed in the area of patents, namely regarding the creation of a supplementary protection certificate for medicinal products,[61] the Community plant variety rights,[62] and the legal protection of biotechnological inventions.[63] However, it did accept that the above measures only covered certain limited areas of patent law and, therefore, the point required clarification by the Court of Justice.

Having summarized the development of the case-law by references to the binding effect of agreements concluded by the Community under Article 300(7) EC, the status of the WTO Agreement as an integral part of the Community legal order, the ensuing jurisdiction of the Court of Justice to interpret its provisions, and the absence of any allocation of competence between the Community and the Member States, the Court held that[64]

> It follows that, the TRIPS Agreement having been concluded by the Community and its Member States by virtue of joint competence, the Court, hearing a case brought before it in accordance with the provisions of the EC Treaty, in particular Article 234 EC, has jurisdiction to define the obligations which the Community ahs thereby assumed and, for that purpose, to interpret the provisions of the TRIPS Agreement.

It, then, focused on the question of direct effect and reaffirmed the Dior and Others dictum that Community law requires that TRIPS not be granted direct effect only in a field in which the Community has legislated, in which case national courts would only be required to interpret national law consistently with TRIPs as far as possible. Therefore, what became central was the question whether there is Community legislation in the area of patents. This is answered by what must be one of the shortest paragraphs to be found in a judgment delivered by the Court of Justice:[65]

> 'As Community law now stands, there is none'.

[61] Council Reg. 1768/92 [1992] OJ L 182/1.
[62] Council Reg. 2100/92 [1992] OJ L 227/1.
[63] Dir. 98/44/EC [1998] OJ L 213/13.
[64] Para. 33.
[65] Para. 40.

This conclusion is substantiated by the very limited scope of the existing Community measures: the only one in the field of patents itself, namely Directive 98/44, deals with the specific isolated case of biotechnological invention; Regulation 2100/94 on plant varieties sets up a system which is distinct from patent law (as, for instance, it provides for much longer terms of protection); Regulation 1768/92 and Regulation 1610/96[66] have a secondary function as they aim to compensate for the period which may elapse between the filing of a patent application and the granting of authorization to place the relevant product on the market. This assessment leads the Court to repeat the above statement, albeit in a rather qualified manner:[67]

> The fact is that the Community has not yet exercised its powers in the sphere of patents or that, at the very least, at internal level, that exercise has not to date been of sufficient importance to lead to the conclusion that, as matters now stand, that sphere falls within the scope of Community law.

The line of reasoning followed in the judgment is problematic on a number of grounds. In relation to the assessment of Community rules necessary in order to establish the Court's jurisdiction to rule on direct effect, one is left puzzled as to the required criteria which the scope and intensity of such rules would need to meet. What is it that would make them 'of sufficient importance' to render direct effect a matter of Community law? What are, as Advocate General Colomer put it, 'the parameters that would make it possible to ascertain the level of legislative activity sufficient to establish the competence of the community and therefore of the Court of Justice'?[68] This does not become clear in the judgment. Instead, it is as if one were to guess, almost intuitively, whether secondary measures amount to a sufficient body of law as to justify the existence of EC competence. In another area of external relations, that of exclusive implied competence, it took us more than twenty years to understand what 'common rules' meant in the context of the AETR judgment,[69] and the relevant principles still evolve. It would be regrettable if it took as long to determine the degree of EC legislative necessary activity to give rise to EC competence.

Another problem has to do with the intensity with which the Court is prepared to carry out its examination of the existing secondary legislation. There is a distinct shift between the judgment in Etang de Berre and that in Merck: in the former, the Court referred generally to environmental legislation and held that the absence of specific measures dealing with the specific subject-matter of the mixed agreement in question was irrelevant; in Merck, the Court examined the substance of the existing measures, only to conclude that they were not 'of sufficient importance' to give rise to Community competence. In a similar vein, whilst acknowledging that the existing patent measures were not sufficient to substantiate jurisdiction, Advocate General Colomer suggested in his Opinion the possibility of a broader test: should patent law be viewed as part of the broader area of intellectual property law, the Court would have jurisdiction to interpret the effects of Article 33 TRIPs. This suggestion echoes

[66] The latter message is about the creation of a supplementary protection certificate for plant protection products: [1996] OJ L 198/30.
[67] Para. 46.
[68] Para. 49 of his Opinion.
[69] See Opinion 2/91 (Re: Convention No 170 ILO on safety in the use of chemicals at work) [1993] ECR I-1061 and Opinion 1/94 (re: WTO Agreements) [1994] ECR I-5267.

the above approach adopted in Etang de Berre with which, however, the judgment in Merck sits uncomfortably.

It is also interesting, in this respect, that the Court should have made no reference to four legislative proposals pending at the time; these included measures on compulsory licensing of patents relating to pharmaceutical products for export to countries with public health problems,[70] the Community patent,[71] the conferment of jurisdiction on the Court of Justice in disputes relating to the Community patent,[72] and the establishment of the Community Patent Court and concerning appeals before the Court of First Instance.[73] The problems associated with basing competence on the above measures notwithstanding,[74] it is curious that they should have been ignored even as indicative of an incrementally developed legislative activity in the area.

In relation to the link between the judgment in Merck and prior case-law, it has been argued that the former expands the scope of the Court's jurisdiction considerably and unduly.[75] This argument is based on the wording of paragraph 31 of the judgment where it is pointed out that, following its conclusion by the Community, 'according to settled case-law, the provisions of that convention now form an integral part of the Community legal order… [w]ithin the framework [of which] the Court has jurisdiction to give preliminary rulings concerning the interpretation of that agreement'. In particular, it is pointed out that, contrary to previous case-law, this statement does not qualify the status of the mixed agreement, and consequently the jurisdiction of the Court, with reference to the scope of the Community's competence.[76] However, it is suggested that the implications of the formulation of this statement should not be exaggerated. On the one hand, it is difficult to see quite how the Court could justify its jurisdiction to interpret a provision of a mixed agreement falling within the exclusive competence of the Member States. On the other hand, the Court' approach in all the judgments examined in this Chapter (in fact, most of the judgments delivered in the area of EU external relations in general) is characterized by distinct reluctance to rule on issues not raised in the dispute before it and articulate general pronouncements. It would be inexplicable if this approach was changed in Merck in such an unobtrusive manner with such profound implications.

The questions raised by the approach of the Court, even prior to the judgment in Merck, and the ensuing lack of clarity were addressed by Advocate General Colomer in his Opinion in the latter judgment. He put forward an alternative approach, based on the unlimited jurisdiction of the Court to interpret TRIPs. He substantiated this view on a number of grounds:[77] the need for the Community to accommodate the

[70] COM(2004) 737 final and SEC (2004) 1348.
[71] COM(2000) 412 final [2000] OJ 337E/278.
[72] COM(2003) 827 final.
[73] COM(2003) 828 final.
[74] AG Colomer points out that 'harmonising legislation is wanting, and the creation of a Community patent has met with insuperable resistance in the Council. At this stage, the Hermès case-law, as altered by the judgment in Étang de Berre, which calls for applicable legislation, collapses, although uncertainty immediately arises concerning the parameters that would make it possible to ascertain the level of legislative activity sufficient to establish the competence of the Community and therefore of the Court of Justice' (para. 49).
[75] See R. Holdgaard, annotation on Case C-431/05 Merck, (2008) 45 CMLRev 1233 at 1241-2.
[76] Ibid.
[77] Paras 55-59 of his Opinion.

'constitutional' framework set out by the WTO Agreements by rendering it part of the Community legal order and ensuring the Community's compliance with their provisions; the requirement that the duty of cooperation set out in Article 10 EC be understood as binding the Community and the Member States in the implementation of WTO agreements in good faith and ensuring their effectiveness; the need to interpret TRIPs in a uniform manner. The Advocate General points out that the unlimited jurisdiction of the Court would not entail any transfer of competence to the Community: 'on the contrary, if there were uniform interpretation, binding o everybody, even in the fields in which there is as yet no Community legislation, the Member States could more easily comply with the provisions of Article 10 EC, making use of [legislative] powers'.[78]

Furthermore, Advocate General Colomer suggests that his approach is necessitated by the current state of the law which he attacks in quite strong terms: 'the Court of Justice ought to be aware of the deficiencies in its case-law and try to resolve the constant unease regarding its power to examine mixed agreements, by daring to change course and to assume its responsibility, in order both to reformulate its case-law and adapt it to the fundamental principles of international law, and to invest it with the legal certainty required by institutions at intra-Community level'.[79]

This approach has two interrelated advantages: on the one hand, it is clear and easy to apply and, on the other hand, it would enable the Court to respond to the increasing regularity of disputes regarding the interpretation of mixed agreements. Advocate General Colomer pointed out that, '[w]ith the gradual increase in shared competence in the many and varied fields which are "communitised", it is predicted that an avalanche of questions will fall on the Court of Justice, requiring it to rule on its jurisdiction in the matter, and it will not always be able to avoid examining the relevant Community legislation'.[80]

However, and with the utmost respect, whilst addressing the shortcomings of the current position, the approach suggested by Advocate General is based on certain assumptions which are far from evident. For instance, the assertion that the WTO Agreements have 'virtually become a "constitutional" framework',[81] with the implications this may entail, expresses an ideal rather than a fact. Whilst there is a healthy debate about the constitutionalisation of the WTO rules,[82] the assumption put forward in his Opinion is not borne out by the positions adopted by the contracting parties or the relevant rules. In any case, and the above notwithstanding, it by no means follows that the Court's unlimited jurisdiction is the necessary corollary of his

[78] Para. 59.
[79] Para. 60.
[80] Para. 52 of his Opinion.
[81] Para. 55.
[82] From the voluminous literature, see D.Z. Cass, The Constitutionalization of the World Trade Organization (OUP 2005), J.L., Dunoff, 'Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law', (2006) 17 EJIL 647, Jackson, Sovereignty, the WTO and Changing Fundamentals of International Law (CUP 2006), E.-U. Petersmann, 'Multilevel Constitutionalism and Judicial Protection of Freedom and Justice in the International Economic Law of the EC' in A. Arnull. P. Eeckhout and T. Tridimas (eds), Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs (OUP 2008) 338, N. Walker, 'The EU and the WTO: Constitutionalism in a New Key' in G. de Búrca and J. Scott (eds), The EU and the WTO – Legal and Constitutional Issues (Hart Publishing 2001) 31.

assumption. The full integration of WTO rules within the Community legal order would not necessarily negate a multilevel system of interpretation and application.

In fact, the position suggested by Advocate General Colomer appears to be linked to his suggestion that the Court reverses its case-law on the effects of the WTO law within the Community legal order. In the remainder of his Opinion, he attacks the denial of direct effect of WTO rules on various grounds, including its incompatibility with the principle pacta sunt servanda, its lack of subtlety in its approach to the margin of negotiation enjoyed by the Community institutions, its undue emphasis on the WTO system for settling disputes at the expense of the binding nature of the obligations undertaken by the Community, and a formalistic reading of the DSU provisions.[83] Whilst he concludes that Article 33 TRIPs would not be directly effective, as its application is dependent on action by the national legislature, he advocates the reversal of the existing case-law on direct effect in principle.

This approach is quite radical[84] and at odds not only with earlier case-law, starting from the Portuguese Textiles judgment, but also more recent case law, such as the judgment in Van Parys, which reaffirmed the state of the law in quite emphatic terms.[85] Following the judgment in Merck, the Court delivered its ruling in FIAMM[86] where it reaffirmed the principles of the preexisting case law with considerable force. It is beyond the scope of this analysis to examine this aspect of the Court's approach to the effects of the WTO rules.[87] Suffice it to point out that the analysis by Advocate General Colomer appears to bring together two issues which are not necessarily linked.

VI. Conclusion: which Community interest?

There is a thread which brings together the judgments analysed in this Chapter, namely the acknowledgment of the broad jurisdiction of the Court of Justice. Viewed within the broader context of EC external relations law in general and mixed agreements in particular, this becomes one of the twin pillars aiming to ensure that the prevailing role of mixed agreements would not undermine what the Court calls 'the Community interest' - the other pillar is the duty of cooperation which binds the Community institutions and the Member States in the process of negotiation,

[83] See paras 71 et seq.

[84] This is recognised by AG Colomer himself who acknowledges that 'I can glimpse no chance of abandoning the dualistic system by which, on an uncertain legal basis, the Court of Justice has transformed the implementation in the Community of the ius gentium, and of the WTO agreements, into a means of evading its obligations' (para. 78) and further that '[a]s the arguments of he Court of Justice belong rather to the political than the legal sphere, it is pointless to examine the dispute in depth and to trust that the criticisms of academic lawyers will overcome the resistance to accepting Advocate General Saggio's view [in Case C-149/96 Portugal v Council [1999] ECR I-8395] that a provision in an agreement can as a rule, by virtue of its clear, precise and unconditional terms, constitute a criterion of legality of Community acts, and that individuals are entitled to rely on it before the national courts only if it is implicit in the general context of the agreement that its provisions may be invoked before the courts' (para. 79).

[85] Case C-377/02 Van Parys 2005] ECR I-1465. AG Colomer finds the denial of direct effect in the latter 'absolute in time' (para. 71 of his Opinion) as well as 'surprising' (ibid) in terms of its implications for compliance with the Court's judgments.

[86] Case C-120/06 P FIAMM and FIAMM Technologies v Council and Commission, judgment of 9 September 2008, not yet reported.

[87] See P Koutrakos, EU International Relations Law (Hart Publishing 2006) Ch. 7.

conclusion and implementation of mixed agreements and which has been given increased prominence in the law of EC external relations.[88] The link between these principles underpins the judgments of the Court on the scope of its jurisdiction: in Dior and Others, and even more so in Schieving-Nijstad, a considerable role is carved out for national courts regarding the interpretation of TRIPs and substantiated pursuant to Article 10 EC and the function of the referring courts within the context of the preliminary reference procedure. Put differently, the broad construction of the duty of cooperation and its application to national courts too has as a corollary the broad construction of the jurisdiction of the Court of Justice to interpret mixed agreements.

However, the pillar of mixity to which the Court's broad jurisdiction amounts is of a curious shape and uncertain foundation. Whilst broad, the jurisdiction of the Court remains ill-defined and questions as to which parameters are to constitute the basis for its definition persist. In this respect, two qualifications may be raised. First, the divergence of approach in the judgments examined in this Chapter may be explained in the light of the different contexts in which the relevant cases reached the Court. Put differently, it does not follow that the Community interest which the Court's judgment aim to serve is identical in all the cases on the interpretation of mixed agreements brought before it.[89] The judgments in Hermès, Dior and Others and Schieving-Nijstad, as well as that in Merck, were all rendered in response to preliminary references from domestic courts; this suggests that the 'Community interest'[90] in relation to the mixed agreement in question is defined in the light of the more general objective of the legal context within which it is pursued, namely that of uniform application of Community law.[91] Furthermore, in all the above cases, with the exception of Merck, the provision of the mixed agreement whose interpretation was in issue was of a procedural nature which could apply in situations falling either within the scope of national or Community law. This was not the case in Merck where Article 33 TRIPs was not a procedural provision and would not apply to situations falling withint he scope of Community law. In a similar vein, the judgments in Berne Convention, Etang de Berre and Mox Plant were rendered in the context of the enforcement proceedings brought by the Commission and the Community interest was defined in terms of compliance with Community law.[92] As Cremona points out, the existence of Community law in an area covered by a mixed agreement renders the participation of the Member States along with the Community in that agreement subject to the Member States' loyalty obligation.[93]

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[88] See Opinion 2/91 [1993] ECR I-1061, Opinion 1/94 (re: WTO Agreements) [1994] ECR I-5267, Case C-25/94 Commission v Council (FAO) [1996] ECR I-1469, Case C-13/00 Commission v Ireland [2002] ECR I-2943, Opinion 2/00 (re: Cartagena Protocol) [2001] ECR I-9713, Case C-266/03 Commission v Luxembourg [2005] ECR I-4805. For an analysis, see M Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in M. Cremona and B. De Witte (eds), EU Foreign Relations Law – Constitutional Fundamentals (Hart Publishing 2008) 125

[89] Thanks to Marise Cremona for raising this point.

[90] See para. 32 of Hermès and para. 38 of Dior and Others (where, whilst not mentioned, it is implied).

[91] See the early pronouncement to that effect in Case 166/73 Rheinmühlen [1974] ECR 33 at 38.

[92] In Berne Convention this was about the accession of all EEA parties to the Convention (para. 19), in Etang de Berre about compliance with the provisions of the Convention for the Protection of the Mediterranean Sea Against Pollution (para. 29), and in Mox Plant about the exclusive jurisdiction of the Court of Justice and the autonomy of the Community legal order (para. 154).

[93] M. Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in EU Foreign Relations Law – Constitutional Fundamentals (Hart Publishing 2008) 125 at 151-2.

Whilst different interests may be identified in the approach to different questions pursuant to different procedures, this does not fully explain the current state of affairs. On the one hand, the lack of clarity which defines the case-law in the area is also apparent in judgments which are delivered within the same context: in Dior and Others, for instance, the Court defines its jurisdiction in terms broader than those suggested earlier in Hermès. On the other hand, the two Community interests identified above, namely uniformity of application of mixed agreements and compliance with the latter's provisions, may not be understood as entirely distinct. In fact, they both serve the same ultimate objective, namely the correct implementation of mixed agreements within the Community legal order. It is not immediately apparent, for instance, why the different legal contexts within which the judgments in Etang de Berre and Merck were rendered justified a broad construction of existing Community law in the former but not in the latter.

A second qualification to an overall criticism of the Court's position has to do with the following: it is not realistic to expect the Court to provide us with a crystal-clear tool the sharp edge of which would determine precisely in any given case where its jurisdiction would end. In relation to judgments delivered in response to preliminary references, the nature of the procedure set out in Article 234 EC and the function of the Court of Justice to respond to specific questions, and, more generally, the divergent nature of mixed agreements and their constant evolution, all suggest that complete clarity is illusionary. In the internal market law, the principle of proportionality in the area of free movement and the Keck rule in the context of Article 28 EC[94] are only examples of how the Community legal order and its students have learnt to live with principles which determine the outcome of a number of cases without enabling us to predict their application with certainty.

However, what traders, their legal counselors, and national judges do expect is a better reasoning in the judgments which are delivered and in the ways in which their specific questions are addressed. There ought to be a balance struck between addressing the specific issues raised before the Court and ensuring legal certainty. This Chapter suggested that the balance has yet to be struck correctly.

[94] Joined Cases C-267-8/91 Criminal Proceedings against Keck and Mithouard [1993] ECR I-6097