

# The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise? –

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## I. Joint Competences for the Conclusion of the WTO

It was hardly a surprise. On the European side the WTO could only be concluded as a mixed agreement. The European Court of Justice (ECJ) ruled on 15 November 1994:

- (1) The Community has sole competence, pursuant to Article 113 of the EC Treaty (ECT), to conclude the multilateral agreements on trade in goods.
- (2) The Community and its Member States are jointly competent to conclude GATS.
- (3) The Community and its Member States are jointly competent to conclude TRIPS.

Indeed, States are sensitive when it comes to limitations of their foreign relations powers which are still considered to be the hard core of the ageing concept of national sovereignty. If it has already been difficult for them to accept constitutional restraints,<sup>1</sup> it seems even more difficult for them to consent to being bound institutionally in relation to the process of European integration or international cooperation.

Within the EC the Commission had requested the ECJ under the procedure of Article 228(6) ECT<sup>2</sup> to confirm the exclusive competence of the EC to conclude the WTO Agreement which had been negotiated within the framework of the Uruguay Round. The Advisory Opinion given by the Court has to be seen in the light of the present atmosphere within various Member States as to the future development of the European Union. Moreover, the Court's own case-law has recently tended more towards understanding and protecting the legitimate interests of the EC Member

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1 See recently R. Hofmann, *Grundrechte und grenzüberschreitende Sachverhalte* (1994).

2 Art. 228(6) ECT: 'The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article N of the Treaty on European Union'.

States. Therefore it was hard to believe that the Court would recognize the exclusive competence on the side of the EC to conclude all the agreements annexed to the WTO Agreement.

It certainly was not an easy decision for the Court. On the one hand, the Court's case-law as to the scope and evolving dimension of the powers under the Common Commercial Policy (CCP) offered at least the possibility of covering all the agreements to be concluded under the WTO. Even the contracting parties outside the EC would have understood and probably accepted the EC becoming the sole contracting party under the WTO. Were not the agreements under the WTO considered to be a 'single undertaking'? Was not the extension of the GATT to the areas of services and TRIPS well justified if not necessary due to modern trends within the international economy? One internal market and one common commercial policy? Was not Article B(1) 2nd indent, of the Treaty on the European Union (ETU) aimed at the assertion of the 'international identity' of the EU? Did not the preamble of the TEU underline the reinforcement of the 'European identity'?<sup>3</sup>

On the other hand, the Council and eight Member States stood against the Commission having requested the Advisory Opinion. In their written observations with respect to this procedure some of the Member States have used rather strong language by qualifying the Commission's position a.o. as 'extravagant'.<sup>4</sup> During the entire history of the GATT the Member States of the EC had always been contracting parties, in recent times alongside with the EC – at least with respect to some particular agreements. Should the mere fact that the GATT was being extended to the areas of services (GATS) and of intellectual property (TRIPS) mean that from now on the membership of the EC Member States should come to an end by formally recognizing the exclusive competence of the EC with regard to the conclusion of the WTO?

Thus the ECJ was set to arbitrate between the Commission and the EC Member States.

In the following the Advisory Opinion 1/94 of 15 November 1994 will be analysed to investigate whether it convincingly supports the overall conclusion of the Court that GATS and TRIPS had to be concluded as a mixed agreement. Some attention will first be given to the origin of this dispute (II) and to the procedural set-up of this case (III). Then the Court's Opinion will be scrutinized as to its arguments in the light of the CCP as well as of possible implied powers and whether

3 Preamble TEU, 9th indent: 'Resolved to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world [...]'; and Art. B, 2nd indent: 'The Union shall set itself the following objectives: [...] – to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence'.

4 Cf. I-37 of the Court's Opinion (not yet published).

these justify the above-mentioned overall assessment of the competences of the EC (IV). Some preliminary conclusions will be drawn stressing that it will be largely the Member States themselves which will have to take the responsibility of strengthening the position of the EC within the WTO (V).

## II. An Avoidable Conflict?

The history of the EC finally becoming a contracting party of the WTO is well known. It was a gradual process of 'substituting' its Member States according to the evolving CCP under Article 110ss ECT. Strictly speaking, it was neither a substitution nor a succession of its Member States within the framework of GATT as the EC did not formally become a contracting party under GATT. Whilst the Commission acted mainly as sole negotiator and spokesman on behalf of the Community and its Member States, the Member States continued to exercise their voting rights. Only some side-agreements under the Tokyo Round had been signed on behalf of the EC itself.<sup>5</sup>

According to Article XI(1) of the WTO Agreement, the contracting parties to GATT 1947 and the EC shall become original Members of the WTO. This text was agreed upon on the basis of negotiations under the Uruguay Round from 1986 up to 15 December 1993 when the Trade Negotiation Committee (TNC) approved the Final Act embodying the results of the Round. The Commission had been assigned the role of the sole negotiator on behalf of the Community and its Member States. But from the outset it was not clear whether all the issues under negotiation were part of the competences of the EC or of its Member States.<sup>6</sup> Not surprisingly, at the very end of the negotiations the issue of competences was still unresolved. On 7 and 8 March 1994 both the Council and the Member States decided that the Final Act and the WTO Agreement would be signed on behalf of the EC and the Member States at Marrakesh on 15 April 1994. The Commission still maintained that all matters covered under the WTO would fall under the exclusive competence of the EC.<sup>7</sup>

The ECJ in its Opinion noted a continuing 'total disagreement' between the Commission on the one hand and the Council, the European Parliament and the Member States which had submitted observations on the other.<sup>8</sup> Though this dispute might have been foreseen since the beginning of the Round (France had taken this

5 Cf. a.o. the Agreements Regarding Technical Trade Barriers and Regarding Civil Aviation Trade under the Tokyo Round, GATT BISD 26 Suppl. (1980) 8, 162 and OJ 1980 L 71/21, 79. An overall view is given in M. Hilf, E.-U. Petersmann, *The European Community and GATT, Studies in Transnational Law* (1986); G.M. Berrisch, *Der völkerrechtliche Status der Europäischen Wirtschaftsgemeinschaft* (1992).

6 Opinion, I-103 (No. 5ss).

7 Ibid.

8 Opinion, I-25.

position since at least 1992),<sup>9</sup> the Commission only decided to address the Court on 7 March 1994. Even the final and successful conclusion of the Round and the experience of a common negotiating power had not changed the mind of most Member States who definitely did not want to cede their chairs at the table of the WTO. Their international presence and appearance as individual sovereign States was after all too important for them to consent to the concept of an 'exclusive competence of the EC' in all matters covered under the WTO.

The Commission continually attempted to satisfy the ambitions of the Member States whilst at the same time securing an effective and unitary representation of the Community within the WTO. It 'offered' the Member States the option of becoming contracting parties to the WTO whilst at the same time accepting this unitary representation. The Commission even proposed 'for political reasons' a unanimous vote in the Council for the acceptance of the WTO Agreement and the assent of the European Parliament under Article 228(1)(2) ECT – both institutional requirements not foreseen under Article 113 ECT. No solution, however, was found. Commission, Council and Member States were unable to agree on a Code of Conduct<sup>10</sup> which would have avoided the actual dispute, but which would have left unresolved the underlying question of the attribution of the respective competences.

Thus the Commission pursued its request for an Advisory Opinion, thereby placing the ECJ under an unusual time constraint. The Agreement was to enter into force by 1 January 1995. Some new judges were appointed on 6 October 1994. The hearing, which astonishingly was not public and to which all Advocates General were invited to give their opinions,<sup>11</sup> could have been held only on 11 October 1994, and by 15 November 1994 the ECJ had already handed down its Opinion. In a 125 page judgment the Court dealt with a number of crucially important and disputed institutional and constitutional issues. It obviously tried to respect the principle of loyalty binding all institutions with respect to each other to do everything possible in order to allow the orderly functioning of each of them. In German constitutional law this inter-institutional obligation is recognized as *Verfassungsgorgantraue*.

Before turning to the legal issues of this Opinion, two side aspects are worth mentioning. The Commission did not act against the Member States' signing the WTO Agreement though it was convinced of the exclusivity of EC competences relating to the WTO. In addition the request for an Advisory Opinion was already pending at the time of signature.

9 Opinion, I-9.

10 A draft of an envisaged Code of Conduct was published in *Inside US Trade*, 23 September 1994, at 14, the ECJ refers in its Opinion to the efforts between the Commission and the MSs to adopt such a Code, I-81 and 985s. See also the Code agreed on the 'post-Uruguay Round' negotiation on services, *ibid.*, I-81s.

11 Arts. 107, 108(2) of Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 (OJ 1991 L 176/7).

The second aspect relates to the uncertainty whether all the – then 12 – EC Member States would have ratified the WTO Agreement in time. The national procedures for ratification were also under time constraints and encountered a number of particular difficulties (such as the translation of the voluminous instruments). Above all for more political reasons one had to envisage the situation that one or other of the Member States would not have ratified in time. Though the WTO Agreement recognized the EC as an original Member (Article XI), this recognition must be read alongside the underlying assumption that *all* Member States would become contracting parties to the WTO at the same time. The EC has to ensure that it can take care of all questions relating to the entire agreement. Given the uncertain legal situation it would have been hazardous for the EC to go along with its own ratification process without all its Member States on its side. In the end it was a major political success to achieve ratification by all Member States together with the EC before 1 January 1995.

### III. Article 228(6) ECT – An Unusual, but Valuable Access to the ECJ

As has been indicated, the EC had to give its Opinion under rather unusual circumstances. Not only the evident time constraint has to be considered. The importance of the issues to be decided would have – normally – dictated more time for reflection and even public debate. It seems anachronistic that the procedure does not require a public hearing as the final outcome does not only concern the division of competences between the EC and its Member States, but has repercussions for the entire future case-law of the Court. The ten Advisory Opinions issued so far have often been referred to in other proceedings. Thus for the Opinion on the WTO, the former Opinion 1/76 (*Laying-Up Fund*) was as relevant as the *AETR* judgment, both of which will be referred to below.<sup>12</sup>

There were two *issues of admissibility*. France thought that the Commission was acting against the *principle of good cooperation* by introducing its requests only at the very last moment of the negotiating process thus creating a situation under which the Member States have to fulfil their ratification procedures without any definite resolution of the dispute on competences.<sup>13</sup> The ECJ did not address this issue, and dealt only briefly with the second admissibility issue raised by Spain, arguing that the request for Advisory Opinion may only be admissible until the very moment of signature – in the present case until 15 April 1994. Such a signature would of itself create certain legal obligations such as that of submitting the

12 See ECJ Opinion 1/76 on the Draft Agreement establishing a *European Laying-Up Fund for Inland Waterway Vessels*, [1977] ECR 741. See also Opinion 1/78 (*Rubber Agreement*) [1979] ECR 2871, and Opinion 1/75 (*Local Costs*) [1975] ECR 1362 as well as *AETR*, Case 22/70, *Commission v. Council*, [1971] ECR 263ss.

13 Opinion, I-9.

agreement for approval to the respective authorities.<sup>14</sup> The ECJ rather sweepingly dismissed this objection indicating that until the final consent to be bound is given, the agreement in question still remains an '*envisaged agreement*' in the very terms of Article 228(6) ECT.<sup>15</sup>

#### **IV. The Substance of the Opinion: The EC and its Member States are Jointly Competent to Conclude GATS and TRIPS**

In its discussion of the compatibility of the WTO Agreement with the ECT the Court touched upon numerous important issues under dispute without however dealing with all the possible aspects of the various agreements to be administered within the WTO. The Court concentrated its Opinion on the main issues, giving itself sufficient ground for its overall conclusion on the limited scope and extent of Article 113 ECT and of other implied powers, resulting in the statement that GATS and TRIPS could only be concluded by the EC together with the Member States as they are jointly competent in these fields.

Thus the Opinion does not establish a definite demarcation-line between the EC and its Member States and it is already apparent that internal quarrels as to the various aspects in the field of external economic relations continue to fill the agenda of Council and Commission. Even if the Court had tried to be more complete it would not have been successful in avoiding future disputes as the external competences of the Community are of an evolutionary nature and always go hand in hand with respective progress relating to the internal market.

Before turning to the focal points of disagreement one introductory statement of the Court should be highlighted which hopefully may settle a number of incomprehensible disputes between the Commission and various Member States. Mixity does not depend on whether the EC or its Member States contribute to the operating budget of a given organization.<sup>16</sup> The *contributions* of the EC Member States to the *operating budget* of GATT had always been considered to be one of the more important arguments for the continuing membership of the Member States within GATT.

This argument is no longer valid. The Court distinguished its Opinion 1/78 on the International Rubber Agreement by distinguishing that Agreement as containing a financial policy instrument which might have been served by Member States' financial contributions. Only in such a case would it be relevant whether the EC or its Member States were going to serve such a financial policy instrument.

14 Opinion, I-9 and I-105.

15 The ECJ will have to decide soon whether one can already speak of an '*envisaged agreement*' if there have been no negotiations at all as in the case of the European Convention on Human Rights for which the Commission has only proposed the accession of the EC to the Council; see Request of the Council for an Opinion in 1994, No. 2/94.

16 See Opinion 1/78, *supra* note 12.

Contributions to the operating budget of the WTO, however, are certainly not sufficient in themselves to justify the participation of Member States in the conclusion of the entire Agreement.

#### A. Trade in Goods: Article 113 ECT

The Commission's main – and according to the United Kingdom 'extravagant' – assumption was that Article 113 ECT covers all issues under the WTO Agreement. Due to the non-exhaustive wording of Article 113 ECT, the Commission refers to the WTO as a single undertaking covering and combining all issues which developed to relate to or replace the traditional trade in goods. It argued that links and overlaps between the trade in goods and most aspects of GATS and TRIPS should lead to the conclusion that the EC should be exclusively competent to conclude the entire WTO Agreement including all its various annexes.

The Court did not follow this extensive approach but at the same time settled a number of long-standing disputes *in favour* of the Commission. Thus the Court states that

- (1) Article 113 ECT covers agreements which relate to *all goods* including agricultural products or those covered under the ECSC Treaty. The only exception admitted by the Court are agreements which specifically might relate only to ECSC products – which is not the case under the WTO.<sup>17</sup>
- (2) Even the Agreement on Agriculture shall be covered by Article 113 ECT as the focal issue and objective of this agreement is to establish a fair and market-oriented agricultural trading system.<sup>18</sup> Article 43 ECT thus will be of application only to adopt the relevant internal measures.<sup>19</sup>
- (3) Article 113 ECT also covers the Agreement on the Application of Sanitary and Phytosanitary Measures as well as the Agreement on Technical Barriers to Trade both of which are designed to minimize certain negative effects and unnecessary obstacles to international trade.<sup>20</sup>

Therefore, with regard to trade in goods, the Commission's claim for exclusive competence has been granted.<sup>21</sup> However, with respect to GATS and TRIPS the Court did not follow the Commission's main proposals.

In view of the wide range of services covered by the General Agreement on Trade in Services (so-called 'double universality') and given that the global economy is undergoing far-reaching structural changes within which trade in goods

17 According to the practice under GATT and on the basis of Art. 71 ECSC Treaty agreements relating to ECSC products had always been concluded by the EC Member States.

18 Opinion, I-108 (No. 29).

19 Ibid.

20 Ibid., Nos. 31-38.

21 The notion 'exclusive competences' might be misleading as most of the competences of the EC are of an evolutionary nature. Yet Art. 3 ECT, for the first time, refers explicitly to 'exclusive competences' leaving open the most disputed question as to what are exactly those 'exclusive competences'.

finds itself more and more frequently replaced by trade in services, the Court referred to the open nature of the CCP and confirmed that trade in services cannot be automatically excluded from the scope of Article 113 ECT as some governments had contended.<sup>22</sup> The Court referred to the distinction of four modes of the supply of services in the relevant Agreement, from which only cross-frontier supplies being 'not unlike trade in goods' fall within the scope of Article 113 ECT.

This introductory statement is important in the light of the rather limited precedent in Opinion 1/75,<sup>23</sup> which referred to the financing of local costs linked to export operations under Article 113 ECT. It is estimated that under this first mode of cross-frontier supplies some 75% of all operations in services using mainly electronic means seem to be covered by the Community's competence.<sup>24</sup> Important operations in the sectors of banking, insurance, telecommunications and even media are delivered by this 'invisible' mode which does not involve the cross-border movement of persons. However, not all aspects of transfrontier services lend themselves to an analogy with trade in goods. And there may be a number of 'mixed situations' which involve electronic operations on the one side but some minor elements of movement of persons on the other side. The dividing line in relation to the other three modes has still to be drawn.

These are consumption abroad, commercial presence of a subsidiary or branch and presence of natural persons all of which involve a movement of persons which under Article 3 ECT is listed distinctly from the Common Commercial Policy<sup>25</sup> and are dealt with separately in the ECT in Articles 48, 52 and 59. The same is true of transport services for which a separate provision for the conclusion of international agreements is provided for in Article 75 ECT. The Court acknowledged that transport operations may be covered by Article 113 ECT if they can be considered as for example a 'necessary adjunct' of an embargo, the embargo being the principal measure.<sup>26</sup> A mere practice by the Council which was invoked by the Commission can, according to the Court, under no circumstances derogate from the rules of the Treaty.<sup>27</sup>

In the field of TRIPS the Court found that rules on intellectual property certainly do affect trade and are often designed to create such effects, but the TRIPS Agreement does not relate only to international trade. The Court admitted as rules falling under Article 113 ECT only those which are closely linked to international trade and are applied by the customs authorities as in the case of *counterfeit goods*. The Court accepted a similar practice relating to the application of the so-called

22 Opinion, I-110 (No. 41).

23 See *supra* note 12.

24 Reference is made to a statement of MP C. Randzio-Plath, European Parliament 16 November 1994, Minutes of Proceedings of 16 November 1994, 93.

25 See the objectives of the EC as listed in Art. 3(b) and (d), Opinion, I-10 (No. 46).

26 Opinion, I-112 (No. 51).

27 *Ibid.*, No. 52.



'New Instrument'<sup>28</sup> which under Article 113 ECT authorized countermeasures in response to a lack of protection in a third country of intellectual property rights held by Community undertakings. These measures are also unrelated to the process of harmonization which is the primary objective of TRIPS and for which, for example, Articles 100, 100(a) or 235 ECT provide the only and appropriate legal basis. These provisions may not be circumvented by Article 113 ECT by the simple expedient of agreeing to an international agreement on harmonization. Again the Court admits exceptional cases such as the so-called 'Europe Agreements' with Eastern European Countries in which some ancillary provisions on intellectual property are included and which, in addition, only bind the respective third countries to raise their level of protection.<sup>29</sup> Thus Article 113 ECT only offers a rather restricted competence to deal with questions of intellectual property.

### **B. Are there any Community's Implied External Powers to Conclude GATS and TRIPS?**

To justify the exclusive competence of the EC the Commission, however, did not refer only to Article 113 ECT, but also to other external powers deriving implicitly

- (1) either from competences in the Treaty,
- (2) or from existing secondary legislation, i.e. from common internal rules (AETR judgment) or
- (3) from Articles 100, 100(a) or 235 ECT.

In addressing these issues, in relation to which no external powers are explicitly conferred on the EC, the Court had to discuss and finally distinguish its prior case-law in AETR and in Opinion 1/76.<sup>30</sup> These cases had given the Community the possibility of assuring the consistency – or better – the coherence in the sense of Article A and C TEU between its internal legislation and external powers not explicitly mentioned in the Treaties. The arguments based on this case-law by the Commission on the one side and the Council and the Member States on the other showed a wide range of possible interpretations. In the present context only the final approach by the Court can be summarized which, in effect, has chosen a rather narrow interpretation and understanding and which, in the final resort, leaves it to the Member States themselves to ensure the coherence of external and internal action.

The Court's Opinion states:

- (1) Exclusive external competences do not automatically flow *from Treaty powers* which only open up powers for secondary legislation at the internal level – for example from Articles 100 or 235 ECT.

28 Council Regulation (EEC) No. 2641/84 of 17 September 1984 on the Strengthening of the CCP with regard to protection of illicit commercial practices (OJ 1984 L 252/1); now the 'trade barriers regulation', OJ 1994 L 349/71.

29 Opinion, I-115 (No. 68).

30 See *supra* note 12.

- (2) Only when internal legislation has provided for common rules in the sense of a *complete harmonization* does an implied exclusive external competence of the Community have to be recognized in order to avoid such common rules being affected if the Member States retained their individual freedom to negotiate with non-member countries.<sup>31</sup>
- (3) With reference to Opinion 1/76 the Court restates one exception in cases where an envisaged internal legislation may not be put into operation effectively unless at the same time rules are set up with reference to the treatment of nationals of non-member countries in the Community or to the treatment of nationals of Member States of the Community within the jurisdiction of non-member countries. In short, the Community has to demonstrate that the exercise of given internal powers is *inextricably linked* to the exercise of implied external powers at the same time.<sup>32</sup>

These statements are spelt out more in detail in the Opinion, which certainly will again give rise to varying interpretations. One thing is certain – the concept of a potential external competence flowing implicitly from Treaty provisions which do not mention any external powers is clearly ruled out. However, the Court accepts such implied external powers if common rules have been set up by the exercise of the explicit internal powers. Internal competences can only give rise to exclusive external competence when they are exercised or whenever legislative provisions have been laid down relating to external aspects such as the treatment of nationals of non-member countries or conferring expressly powers to the Community to negotiate with non-member countries to assure a necessary degree of reciprocity. This seems not always to be necessary; the Court, especially in the field of TRIPS, finds that harmonization of intellectual property rights in the Community context does not necessarily have to be accompanied by agreements with non-member countries in order to be effective.<sup>33</sup> With the exception therefore of Community rules on the release for free circulation of counterfeit goods,<sup>34</sup> the Court could not find any evidence of full harmonization in the area of TRIPS. The Community's legislation in the field of trade marks is qualified by the Court as being only partial and not amounting to a complete harmonization. In other fields such as patents or industrial design *no* Community legislation has been adopted or been envisaged so far.<sup>35</sup>

In trying to interpret its relevant case-law and evidently to narrow the extent of implied external competences, the Court also made one additional statement which might help to overcome endless discussions between the Commission and the Council with respect to the Community's competences – it refers to the ever disputed competence of the Community to lay down or harmonize *rules of enforcement* within and by the legal order of the Member States.<sup>36</sup> The TRIPS Agreement refers to an obligation to adopt measures to secure the effective

31 Opinion, I-117, 121 (Nos. 76ss and 96).

32 Opinion, I-119 (No. 86) referring to Opinion 1/76, *supra* note 12.

33 Opinion, I-121 (No. 100).

34 Opinion, I-122 (No. 104).

35 *Ibid.*, No. 103.

36 *Ibid.*, No. 104.

protection of intellectual property rights such as to secure fair and just procedures, the right to be heard, the right of appeal and finally the right to have damages repaired. Though some Member States claimed that such measures are within the 'domain reserved' to the Member States, the Court refers only to the wording of Article 100 ECT allowing harmonization of all national rules that directly affect the establishment or functioning of the Common Market. The Court does not refer to sanctions of criminal law – another very sensitive and disputed area.<sup>37</sup> But the relevant statement nevertheless appears to go along with the 'trend' of the entire Opinion: strengthening the competences of the EC in the area of its core competences whilst being rather reluctant to recognize additional competences for the Community if this is not met by the support of the Member States.

### C. Joint Competences and the Duty of Cooperation

The final statement of the Opinion relates to the future administration of the agreements within the framework of the WTO. All the arguments presented by the Commission in support of its claim for exclusive competences for the EC and relating to the danger of undermining the Community's unity of action if the Court turned down its claim, did not convince the Court to rule in favour of the Commission.

The Court however tried to *compensate* for this outcome by expressly underlining and recognizing the 'quite legitimate' concern of the Commission to ensure overall unity of action, a concern which, however, could not modify the answer to the question of competences.<sup>38</sup> According to the Court, Community and Member States have to ensure a close cooperation in the processes of negotiation, conclusion and fulfilment of any commitments within the WTO. The Court refers to the 'requirement of unity in the international representation of the Community'.<sup>39</sup> It declared this duty 'all the more imperative' in the light of the possibility of cross-retaliation which may affect the Community and its Member States even in cases in which their proper competences are not involved. As this division is invisible for the other contracting parties outside the Community, this internal division should be of no interest to them. Moreover, any third contracting party would be entitled to address any claim either to the Community or to all or even one Member State as they are all signatories of the WTO Agreement. There has been no open declaration as to how the competences are divided between the Community and its Member States. Even on the basis of the Opinion of the Court it would be most difficult to draw such a line and to have it agreed upon by the Community and its Member States. The written statements to the Court show an even higher degree of disagreement as can be seen from the final Opinion given by the Court. The only

37 See for example, Case C-240/90, *Federal Republic of Germany*, [1992] ECR I-5423.

38 Opinion, I-123 (No. 107).

39 *Ibid.*, No. 108 and Opinion 1/78, (*Rubber Agreement*) [1978] ECR 2151 (Nos. 34-36); see also Opinion 2/91, (*EEC II*) [1991] ECR 1061 (No. 36).

precedent in which the Community and its Member States have been able to agree on such a declaration of competences seems to be the relevant declaration given in relation to the Law of the Sea Convention of 1982.

There may be room for some justified optimism that ultimately the Community will be able to manoeuvre successfully within forthcoming WTO negotiations. All the Member States are quite aware of the importance of the EC's bargaining power; none of them could have an interest in undermining this power by refusing the required cooperation.<sup>40</sup> And indeed though no Code of Conduct could be agreed on when the request for an Advisory Opinion was still pending, at least the collaboration during the Uruguay Round seems to have been both politically possible and rather effective. The history of this collaboration and its successes and deficiencies during the Uruguay Round Negotiations still has to be written...

The Court is rather brief as to the legal basis of this duty of cooperation. It only refers to its prior case-law relating to the requirement of unity in the international representation of the Community.<sup>41</sup> The Court could have referred to the general *principles of mutual loyalty* as an emanation of the principle of good faith (Article 5 ECT) and of *coherence* which has been stressed as a fundamental principle relevant to all activities under the umbrella of the European Union<sup>42</sup> as well as to Article 116 ECT which – to the astonishment of some – has been deleted in the Maastricht Treaty.

## V. Some Conclusions

It is difficult, at this point, to draw any firm conclusions on the merits of this Advisory Opinion. It was not a surprise – certainly not from a political perspective. In the delicate post-Maastricht climate one could hardly have expected to see the Court decide against all Member States having submitted written observations. But whether the Opinion was wise and legally helpful will have to be seen in the light of future cooperation of the EC and its Member States within the WTO framework. For the time being some conclusions may be possible.

1. From a *procedural point of view* the request of the Commission for an Advisory Opinion can be considered to have been successful. The Court delivered its Opinion in time without endangering the envisaged date of 1 January 1995 for the entry into force of the WTO Agreement. As to the substance, the Opinion will not have satisfied the Commission, but it may help to resolve future disagreements as to the internal division of powers in the field of international economic relations. The Court has certainly respected the duty of 'inter-institutional loyalty'. As to the future, it remains to be seen to what extent Commission, Council and Member

40 See the statement of the UK in Opinion, I-102.

41 See *supra* note 39.

42 See Arts. A and C TEU as well as Art. J(1) and Art. K(5).

States will make use of this procedure which does not require the demonstration of any particular legal interest in order to be admissible.

From a comparative perspective, some Member States may consider adopting similar procedures before final ratification of important international instruments such as the WTO or the TEU. In systems operating under the control of constitutional courts – such as the EC! – it would be risky to wait for an *ex post* control which might declare a given instrument to be unconstitutional.<sup>43</sup>

2. As to the substance, the content of the Opinion is no surprise; *mixture of competences* still seems to be a continuing reality within the EC. The Court has resolved some long-standing issues in favour of the EC competence (ECSC and agricultural products as well as non-tariff barriers to trade to fall under the exclusive competence under Article 113 ETC).

Furthermore, it has maintained the competence of the EC Member States in sensitive areas in which the movement of persons is involved and for which no Community legislation had been adopted.

However, it remains to be seen whether the exact demarcation-line between competences of the EC on the one side and those of the Member States on the other will be clear enough to prevent future 'endless discussions'. The Court has used – or rather – had no choice but to use rather imprecise notions in order to classify the various issues. It was looking for the 'ambit' of a given competence, for the 'objective' or whether an agreement is more of a 'general' or a 'specific' nature relating to certain products and the relevant competences. The Court looks for example for prior 'full harmonization' of internal legislation or tries to classify whether an issue is only 'ancillary' or 'inextricably linked' to a given competence or is a 'necessary adjunct'. In addition, the Court recognized that the CCP is of an evolutionary nature so that the given demarcation-line will probably shift again in favour of the EC unless the Member States are bringing the process of creating an internal market to an end.

3. The outcome of this Opinion gives an indication of the difficulties which would be encountered in trying to draft a *catalogue* in order to define more clearly the ambit of the competences of the EC by revising the ETC. Even trying to define only the 'exclusive' competences would be hazardous given the evolutionary nature of these powers. In addition it remains questionable whether it is correct to use the notion 'exclusive' as it seems clear that – unlike the CCP – there is no exclusivity from the outset but only when the EC has exercised its relevant powers.

4. Of interest is the statement of the Court that *institutional practice* cannot change the given balance of competences.<sup>44</sup> This confirms the doctrine which negates the existence of any customary Community law as it is always the ECJ which in the last resort has the power and responsibility to conclusively define the

43 For further discussion see Hilf, 'Gutachten des Bundesverfassungsgerichts zu völkerrechtlichen Verträgen?', *Festschrift für U. Everling* (1995 forthcoming).

44 Opinion, I-112, 114 (Nos. 52 and 61).

extent of EC competences. The same conclusion may be true for any legal order in which a constitutional court has the power to interpret the relevant constitution in the last resort.<sup>45</sup>

5. The Court confirms the *present trend* of its case-law by

- (1) effectuating the core-competences of the EC such as the CCP and at the same time by
- (2) limiting the implied extension of the competences of the EC to the detriment of the Member States.

The narrower interpretation of its prior case-law, especially in the cases AETR and Opinion 1/76, indicates that the Court no longer rules predominantly in favour of the process of integration, but understands itself perhaps more as an arbiter between the EC and its Member States. This trend corresponds entirely with the atmosphere of the TEU which in its introductory and fundamental provisions (preamble, Articles B and F(1) TEU) highlights the principle of enumerated powers, of subsidiarity and national identity. The Court did not want to take away their seats from the international table of the WTO without a clear indication of Member State consent.

6. The Court could have chosen another approach, again on the basis of the TEU and the international awareness of the *unitary and important role* of the EU. The Preamble and Article B TEU mention the European identity as well as the *international identity* of the EU. In addition the TEU highlights the fundamental principle of coherence (Articles A and C TEU), aiming at unitary action combining policies under the EC Treaty and under the cooperation amongst Member States. In addition, the other contracting parties within GATT and now within the WTO, by accepting the EC as a contracting party in Article XI seem to be more and more willing to accept unitary representation of European interests. They would even have accepted the EC taking over the unitary representation of all its Member States within the WTO on the basis of exclusive competences recognized by its Court. It was the EC which had successfully pleaded for consideration of the entire WTO and all its agreements as a 'single undertaking'. In this context it seems unusual that only the EC itself, i.e. through the Opinion of its Court, states a situation of mixity of competences and thus will have the Member States alongside with the EC as contracting parties in the framework of the WTO. A missed opportunity?<sup>46</sup>

7. Whether a *unitary representation* of interests can be assured now depends mainly on the Member States themselves. A major and prolonged disunity amongst them and endless quarrels along the demarcation-line may finally bring back the Court this time evaluating more the 'duty of cooperation' which should result in

45 See A. Dashwood, D. Wyatt, *European Community Law* (1993), and giving a profound analysis, C. Tomuschat, *Verfassungsgewohnheitsrecht?* (1972).

46 In this sense also Bourgeois, 'L'avis de la Cour de justice des Communautés européennes à propos de l'Uruguay Round: un avis mitigé', 4 *RMUE* (1994) 11ff. See for a general assessment of the future of the EC's participation in international organizations J. Sack, 'Die Europäische Gemeinschaft als Mitglied internationaler Organisationen', in *Gedächtnisschrift Grabitz* (1995) 631ss.

having the Commission to speak with one voice on behalf of the Community and its Member States within the WTO.

8. Is life more difficult within the EC than within the *constitutional systems* of other contracting parties? It seems that the results of the Uruguay Round are of such importance that all the contracting parties encountered major internal obstacles before finally ratifying the voluminous instruments. The ratification process in the US for example was apparently not any easier and had to overcome certainly no less obstacles than those encountered on the European side.

9. The Opinion of the Court will probably only have a marginal effect on the *future* of the participation of the EC in the framework of the WTO has not been heavily obscured by the Opinion of the Court. The Opinion perhaps accords more with the present political reality than with integrationist ambitions which had been formulated by the Commission in its request. It will be interesting to see how the EC and its Member States will perform within the WTO when organizing internally their contributions to the ongoing process of further negotiations and also of the effective implementation of the agreements, including the ambitious system of dispute settlement. The response to the question whether the Opinion was wise can, in the final analysis, be supplied only by the Member States themselves.