

OPINION 1/94 OF THE COURT OF JUSTICE

15 November 1994

By a request made under Article 228(6) of the EC Treaty, the Commission sought the opinion of the Court on the competence of the European Community to conclude the Agreement establishing the World Trade Organization and, in particular, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods (TRIPs).

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Description of the request

I. Agreements resulting from the Uruguay Round

The 'most complex negotiations in world history' (in the words of the Council) ended with the signature in Marrakesh on 15 April 1994 of the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations. Those nego-

tiations took seven years, starting with the Punta del Este Ministerial Declaration of 20 September 1986. The representatives of the governments and of the European Communities who drew up the Final Act agreed on the desirability of its coming into force on 1 January 1995 or as early as possible thereafter.

The Final Act contains an agreement establishing the World Trade Organization (hereinafter 'the WTO Agreement') to provide a common institutional framework for the conduct of trade relations among the members. That agreement does not comprise any provisions of a substantive nature. Such provisions are contained in the annexes, which contain various '*multilateral* trade agreements' forming an integral part of the WTO Agreement.

They include:

- the Multilateral Agreements on Trade in Goods, including GATT 1994 (Annex 1A);
- the General Agreement on Trade in Services (Annex 1B);¹

- the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C);²

- an understanding on rules and procedures governing the settlement of disputes ('the Dispute Settlement Understanding') (Annex 2);

- a trade policy review mechanism (Annex 3).

The WTO Agreement and its annexes form a single 'package'. States wishing to become members of the WTO are obliged to accept all the *multilateral* agreements negotiated in the Uruguay Round. The procedure for the settlement of disputes applies to all those multilateral agreements. Under that procedure, recourse may be had, in the last resort, to what is known as 'cross-retaliation'. The breach of any one element of the agreements as a whole (whether in the sector of goods, services or intellectual property rights) can be redressed by retaliation in a different sector (Article 22(3)(b) of the Dispute Settlement Understanding) or under another agreement (Article 22(3)(c) of the Understanding). Moreover, as the Commission

1 — The abbreviation GATS is generally used in all languages.

2 — The abbreviation TRIPs is generally used in all languages.

states, 'compensation similarly can be offered in another sector or under a different agreement than the one where the breach took place'.

This single 'package' system brings to an end what has been termed 'GATT à la carte'. The individual agreements resulting from the Tokyo Round involved variable levels of participation. Furthermore, each agreement had

its own procedure for the settlement of disputes.

Also annexed to the WTO Agreement are four *plurilateral* agreements (relating respectively to government procurement, trade in civil aircraft, the dairy sector and bovine meat). In those fields, an exception is allowed to the principle of a single 'package'; the agreements are to be binding only on those members of the WTO who accept them. However, the dispute settlement procedure is to apply in the relations between parties who accept them.

II. The status of the European Communities in the WTO

Two provisions of the WTO Agreement refer expressly to the European Communities.

Moreover, Article XI(1), which concerns the original members of the WTO, provides:

Article IX, which concerns decision-making, provides that, in the case of decisions taken by voting, 'at meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote' and that 'where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are Members of the WTO'.

'The contracting parties to GATT 1947 as of the date of entry into force of this Agreement and the European Communities which accept this Agreement and the Multilateral Trade Agreements and for which Schedules of Concessions and Commitments are annexed to the GATT 1994 and for which Schedules of Specific Commitments are annexed to the General Agreement on Trade in Services in Annex 1B shall become original Members of the WTO.'

III. Negotiation and signature of the WTO Agreement

The Punta del Este declaration, which launched the negotiations, was approved by the Council and by the representatives of the governments of the Member States 'to the extent that they were concerned'. The negotiations were conducted on behalf of the Community and the Member States by the Commission alone. The Council states that 'in order to ensure the maximum consistency in the conduct of the negotiations, it was decided that the Commission would act as the sole negotiator on behalf of the Community and the Member States'. The minutes of the meeting at which the Council approved the Punta del Este declaration state, however, that 'this decision (authorizing the Commission to open the negotiations provided for in the declaration) does not prejudice the question of the competence of the Community or the Member States on particular issues'.

The WTO Agreement was signed, on the one hand, by the President of the Council and Sir Leon Brittan, Member of the Commission, on behalf of the Council of the European Union and, on the other, by the representatives of the Member States on behalf of their respective governments. That procedure was followed in pursuance of the decision taken by the Council and the representatives of the Member States at a meeting on 7 and 8 March 1994. It is apparent from the Council's observations that the Commission, for its part, secured the inclusion in the minutes of that meeting of its declaration that 'the Final Act (...) and the agreements annexed thereto fall exclusively within the competence of the European Community'.

IV. Questions asked by the Commission and procedure

A. Questions asked by the Commission

an Opinion under Article 228(6) of the EC Treaty.

On 6 April 1994, some days before the date on which the WTO Agreement was to be signed at Marrakesh but several weeks after the approval of the Final Act by the Trade Negotiations Committee (a body set up by the Punta del Este conference to conclude the Uruguay Round negotiations), the Commission submitted to the Court a request for

The questions are as follows:

'As regards the results of the Uruguay Round GATT trade talks contained in the Final Act of 15 December 1993:

1. Does the European Community have the competence to conclude all parts of the Agreement establishing the WTO concerning trade in Services (GATS) and the trade-related aspects of intellectual property rights including trade in counterfeit goods (TRIPs) on the basis of the EC Treaty, more particularly on the basis of Article 113 EC alone, or in combination with Articles 100a EC and/or 235 EC?
2. Does the European Community have the competence to conclude alone also those parts of the WTO Agreement which concern products and/or services falling exclusively within the scope of application of the ECSC and the EAEC Treaties?
3. If the answer to the above two questions is in the affirmative, does this affect the ability of Member States to conclude the WTO Agreement, in the light of the agreement already reached that they will be original Members of the WTO?

B. Procedure

In accordance with Article 107(1) of the Rules of Procedure of the Court of Justice, the request for an Opinion was served on the Council of the European Union (hereinafter 'the Council') and on the Member States. Written observations were submitted by the Council and the Danish, German, Greek, Spanish, French, Netherlands, Portuguese and United Kingdom Governments. The European Parliament was permitted, at its request, to submit observations.

V. The admissibility of the request

Without formally challenging the admissibility of the request, the *Council* observes that, in all previous cases in which the procedure under Article 228(6) has been used, 'the request was submitted prior to signature of the agreement'. According to the Council, 'there are ... serious grounds for doubting whether it is still possible to seek a *preliminary* Opinion (in relation to an "envisaged" agreement) ... once obligations have been

created at an international level'. The *Netherlands Government* shares those doubts.

The *Spanish Government* raises a formal objection of inadmissibility in relation to the request. The procedure for requesting an Opinion can, it says, only be initiated where the Community has not yet entered into any international commitment. The Spanish

Government observes that signing served to authenticate the texts which were the outcome of the negotiations and entailed an obligation to submit them for the approval of the respective authorities.

The *French Government* criticizes the Commission more from policy aspects. Without referring to inadmissibility, it states that, by waiting until the last moment to make its request, when the WTO Agreement was to be signed and concluded, despite the fact that

disagreement about the competence of the national governments had been apparent since 1992, the Commission showed a lack of cooperation and adopted an attitude which was inconsistent with a coherent approach by the Community and the Member States. The Member States can hardly submit the WTO Agreement for the approval of their parliaments when the question of competence has not yet been resolved. Nor can the Council table before the European Parliament a motion for a decision in favour of the conclusion of the Agreement when the legal basis of that decision and the question of competence remain uncertain.

VI. The wording of the questions

The *Council* criticizes the way in which the Commission has worded the questions.

According to the Council, since the proceedings relate to an agreement which has been signed by the Community and its Member States pursuant to their respective powers, the question is not whether the Community can conclude that agreement alone (a hypothetical question, in its view) but instead whether 'the joint conclusion by the Community and the Member States of the agreements resulting from the Uruguay Round is compatible with the division of powers laid down by the Treaties establishing the European Communities'.

According to the *Portuguese Government*, the questions formulated by the Commission

correspond to a stage in the process of concluding the Agreement which has already passed. The point which really needs to be determined is whether or not the 'mixed-agreement' form is compatible with the principles and rules of the EC and ECSC Treaties relating to the division of powers between the Community and the Member States.

The *United Kingdom* considers the questions in an order different from that chosen by the Commission. It explains, first, the competence of the Community pursuant to the doctrine of implied powers, whilst pointing out the parallel competence of the Member States, and indicates, second, why Article 113 cannot be the basis for the conclusion of the agreements.

VII. The essence of the dispute

The issues to be resolved do not concern all of the multilateral agreements annexed to the WTO Agreement, nor even the Agreement establishing the WTO.

As the Council notes, the points at issue are first and foremost the *substantive provisions*. The institutional provisions do not raise any particular problems as regards competence: competence to participate in the institutional arrangements necessarily arises from that which exists in relation to the substantive provisions; the aim of the institutional arrangements is to ensure the 'management' of the substantive arrangements. There is no need, therefore, to describe those institutional arrangements here.

The Council explains that, amongst the substantive provisions, those which fall to be considered are the three major agreements on goods (GATT 1994), services (GATS) and intellectual property (TRIPs).

As regards trade in goods (which forms the subject-matter of GATT 1994 and of various interpretative understandings), the Council, the Governments which have submitted observations and the European Parliament are agreed that the Community is competent. The only reservations relate to ECSC products (reservation expressed by the Council

and by all the Governments which have submitted observations), the Agreement on Technical Barriers to Trade (reservation expressed by the Netherlands Government alone) and the need also to use as the legal basis in relation to agriculture Article 43 of the EC Treaty (however, that latter reservation, expressed by the Council, the United Kingdom and the European Parliament, does not call in question the exclusive competence of the Community).

It is services and intellectual property which constitute the focal point of the disagreement. The Commission's standpoint in that regard is disputed by eight Member States (all except for the Kingdom of Belgium, the Grand Duchy of Luxembourg, Ireland and the Italian Republic) and the European Parliament. The divergence is, in short, as follows.

The Commission considers that the Community's competence is exclusive (by virtue either of the common commercial policy or, in the alternative, of implied powers or, more precisely, the existence in parallel of internal and external competence). The Member States which have submitted observations

take the view that competence is shared between the Member States and the Community. In any event, those Member States and the Parliament rule out competence

under the common commercial policy. The Parliament does not express any formal view as to the validity of the Commission's alternative argument.

VIII. Points on which there is no dispute between the parties

Before setting out the points of divergence and the arguments relied on in support of the positions adopted by the various parties, the points on which they appear to agree should be noted.

— The fact that the Council and all the Member States have signed the WTO Agreement and its annexes shows that they agree on the expediency and, indeed, necessity of concluding that agreement.

— It is common ground that the conclusion of the WTO Agreement requires, in

accordance with the second subparagraph of Article 228(3) of the EC Treaty, the assent of the European Parliament, because that agreement provides for the establishment of a specific institutional framework.

— The Commission has noted that 'for political, if not legal, reasons, ... unanimity will be needed for the conclusion of the Uruguay Round in its entirety'. Neither the Council nor the Member States which have submitted observations have disputed this.

IX. The Multilateral Agreements on Trade in Goods

The Multilateral Agreements on Trade in Goods comprise, principally, GATT 1994, the interpretation of which is clarified in various understandings, agreements on certain products (agriculture and textiles) and agreements on the use of restrictive regulations such as technical barriers to trade, the application of sanitary and phytosanitary measures and TRIMs (trade-related investment measures).

The *Commission* considers that all those agreements 'concern trade in goods and all have as their common objective the expansion of international trade by eliminating barriers and distortions to trade', and that they fall within the scope of Article 113 of the EC Treaty.

The *Council* acknowledges that 'the exclusive competence of the Community covers

almost all of the provisions of GATT and its annexes' and that such competence 'derives principally from Article 113'. However, it notes that it is necessary to rely on Article 43 in relation to the agreements on agriculture and sanitary and phytosanitary measures, since they 'concern not only the commercial measures applicable to international trade in agricultural products but ... above all the internal system for the organization of agricultural markets'.

The United Kingdom notes that those measures concern agricultural products originating in the Community, whereas the usual instruments of commercial policy (quantitative restrictions, tariffs) concern imported, not indigenous, products. It infers from this that those measures come within the scope of Article 43.

As regards agriculture, the *United Kingdom* supports the Council's view with reasoning based on concrete examples.

Those observations on agriculture do not call in question the exclusive competence of the Community.

It offers 'two examples of the impact of agreements contained in Annex 1A to the Agreement establishing the World Trade Organization on the Community's internal regime for agricultural products. Firstly, the provisions of the Agreement limiting "domestic support" will have a direct effect on the amount of aid producers and processors of agricultural products will receive under the common organizations of agricultural markets, all of which were adopted under Article 43 of the EC Treaty, and thus a direct effect on the operation of those organizations. Secondly, the provisions of the Agreement on Agriculture limiting export subsidy commitments will affect the Community's system of export refunds for Community agricultural products, which was established and is managed under Article 43. Nearly every common organization contains provision for the payment of export refunds and the system is administered under subsidiary Council and Commission Regulations made under the provisions of the common organizations'.

The *European Parliament* also considers that it is necessary to rely on Article 43, given the considerable significance of the Agreement on Agriculture. It points out that the Generalized System of Preferences is based both on Article 113 and on Article 43 of the Treaty (Council Regulation (EEC) No 3917/92 of 21 December 1992 (OJ 1992 L 396, p. 1) and Council Regulation (EEC) No 3668/93 of 20 December 1993 (OJ 1993 L 338, p. 22)).

The *Netherlands Government* devotes its attention more particularly to the Agreement

on Technical Barriers to Trade. Unlike the Commission, which claims that the Community has exclusive competence in respect of that new agreement, the Netherlands Government considers that 'the Community has to a great extent acquired exclusive competence in the field of technical barriers to trade', but that 'the Member States continue to have a competence of their own, by reason of the nature of certain directives, but also because complete harmonization has not been achieved and is not envisaged in that field'.

In the realm of trade in goods, it is ECSC products which are the real apple of discord between the Commission, on the one hand, and the Council and the Governments which have submitted observations on the other.

According to the *Commission*, the Multilateral Agreements on Trade in Goods do not require any legal basis other than Article 113, even when they concern ECSC products or Euratom products.

The Commission seeks to diminish the importance attached by the other parties to Article 71 of the ECSC Treaty. The provision in Article 71 that the powers of the Governments are not affected does not reserve a right of the Member States within the meaning of Article 232(1) of the EC Treaty.

The Commission relies on Opinion 1/75 [1975] ECR 1364, particularly p. 1365, according to which Article 71 of the ECSC Treaty

'cannot in any event render inoperative Articles 113 and 114 of the EEC Treaty and affect the vesting of power in the Community for the negotiation and conclusion of international agreements in the realm of common commercial policy'.

Lastly, the Commission considers that another lawful way of concluding trade agreements under the ECSC Treaty is by recourse to the provisions of Article 95.

The *Council*, on the other hand, considers that 'the conclusion of GATT and its annexes by the Member States, inasmuch as the provisions thereof are covered by the powers in matters of commercial policy reserved to them by Article 71 of the ECSC Treaty, is clearly compatible with the Treaty'.

The *Spanish Government* emphasizes the exclusive competence of Member States in relation to ECSC products. The *Greek Government* shares that view, as does the *Portuguese Government*.

The *United Kingdom* also relies on Article 71 of the ECSC Treaty in support of its view that the Member States are competent, but it acknowledges that, as the Commission has stated, an equally lawful way of concluding the agreement would be to have recourse to Article 95 of the ECSC Treaty.

The *French Government* considers that 'the conclusion by the ECSC, on the basis of

Article 95 of the ECSC Treaty, of agreements relating to the commercial regime in respect of ECSC products has not resulted in the transfer to the ECSC of the powers granted to the Member States by Article 71 of that Treaty', and that 'consequently, the Member States may decide to conclude GATT and its annexes themselves as regards the provisions relating to trade in ECSC products covered by the powers reserved to them by Article 71 of the ECSC Treaty'.

X. Analysis of the GATS and the TRIPs Agreement

A. GATS

1. *The raison d'être of GATS*

Why is there a need for a general agreement on trade in services? In some developed countries, the services sector has become the dominant sector of the economy. According to the Commission, certain economists see this as 'a harbinger of a fundamental restructuring of the world economy in which ordinary manufacturing would shift more and more to developing economies and they would, therefore, become the main exporters of manufactured goods. The developed economies would mainly export services and goods with high value added (with a high knowledge component)'. 'The expansion of international trade in services was lagging

behind its growth inside national economies, because international rules providing operators with the necessary security and predictability did not exist. Hence the idea to create a framework for liberalization through the negotiation of new rules.'

2. *The substance of GATS*

GATS constitutes an attempt to transpose the principles of GATT into the realm of services, in which barriers to trade take the form not of customs duties or import quotas but of rules relating to market access and the qualifications of those providing services. The rules to be complied with have not yet been definitively established. As the French

Government points out in relation to the WTO more generally, GATS constitutes a negotiating framework for the elaboration of rules which have already been agreed and for the conclusion of agreements in new fields.

electrical installation project to a firm of engineers established in country B.

3. *Definition of services and of modes of supply*

The concept of services is very wide, since it encompasses 'any service in any sector except services supplied in the exercise of governmental authority'. The term 'services supplied in the exercise of governmental authority' covers 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers' (Article I(3)(b) and (c) of GATS).

— '*Consumption abroad*': the supply of a service in the territory of one member country to the service consumer of any other member country. Example: services supplied in country A to tourists from country B.

— '*Commercial presence*' (or 'presence of a juridical person'): the supply of a service by a service supplier of one member country, through commercial presence in the territory of any other member country. According to Article XXVIII(d), '*commercial presence*' means 'any type of business or professional establishment, including through

According to Article I(2) of GATS, trade in services comprises four types or means of supply of services:

— '*Cross-border supply*': the supply of a service from the territory of one member country into the territory of any other member country. The Council gives the following example of this: a firm of architects established in country A supplies an

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office,

within the territory of a member country for the purpose of supplying a service'.

This involves, therefore, as the Council notes, the establishment and supply of services in country B by undertakings or professionals from country A. Banking services constitute an example of this type of supply.

- The 'movement of persons' (or 'presence of natural persons'). This is the supply of a service by a service supplier of one member country through the presence of natural persons of that member country in the territory of any other member country. According to the Council, an example of this is where an undertaking from country A supplies services in country B by means of workers coming from country A. An obvious instance of this is the performance of construction works.

4. *The double 'universality' of GATS*

The Council observes that GATS possesses a double universality. First, it covers any service sector (see the definition of services given in paragraph X. A.3 above); in other words, it pertains to transport, financial services and insurance, telecommunications,

information technology and audiovisual services, the tourism sector, hotels and restaurants, building works, the professions and even education and health care, etc. Second, GATS covers all aspects of the establishment and activities of service suppliers. GATS applies to 'measures by Members affecting trade in services', as defined therein. It therefore encompasses:

- all conditions connected with the establishment (by the constitution or acquisition of a company or by the creation of a branch);
- all conditions governing the exercise of those activities (from the insolvency rules to the tax rules or the rules on staff).

5. *The nature of the obligations entered into*

A distinction should be drawn between general obligations and specific commitments.

(a) General obligations

The most significant obligation is the principle of most-favoured-nation treatment (Article II(1)). However, for a period not exceeding ten years (see the Annex on Article II exemptions), a country may maintain a measure involving discrimination between its trading partners in so far as that measure appears in the annex on exemptions and fulfils the conditions set out therein. Furthermore, Article V provides for permanent derogation from the principle of most-favoured-nation treatment for *regional* integration modelled on Article XXIV of GATT.

Another general obligation is that of transparency: each member country is obliged, in particular, to publish the measures or rules relating to services (Article III(1)), described in the agreement as 'measures of general application which pertain to or affect the operation of this Agreement'.

There is also the obligation to provide for procedures (judicial, arbitral or administrative) for the review of administrative decisions affecting trade in services (Article VI(2)).

Also of note is the obligation incumbent on each member country to ensure that any monopoly supplier of a service in its

territory does not act in a manner inconsistent with the principle of most-favoured-nation treatment *or* with its specific commitments (Article VIII(1)).

Lastly, there are obligations in respect of the recognition of the authorization, licensing or certification of services suppliers (Article VII).

(b) Specific commitments

The specific commitments contained in Parts III and IV of the Agreement and the annexes oblige each member country to *provide market access* to the services and service suppliers of any other member country and to accord to services and service suppliers of any other member country, in respect of all measures affecting the supply of services, treatment which is no less favourable than that which it accords to its own like services and service suppliers (the *principle of national treatment*).

The restrictions covered by the market access commitment are set out in Article XVI(2): in essence, they entail an obliga-

tion to refrain from imposing quantitative restrictions on the activities of service suppliers of other Members. The Council gives the following examples of such restrictions:

- a maximum number of television or transport undertakings controlled by undertakings or nationals from a non-member country;
- a maximum number of 'foreign' doctors;
- a maximum percentage of 'foreign' holdings in the capital of television companies, transport undertakings, etc.;
- a ban on the exercise of certain activities by banks and insurance companies under foreign control;
- the establishment of 'quotas' in the audiovisual sector in respect of productions from non-member countries.

Those commitments, which are neither unconditional nor absolute, are set out in *member countries' schedules*. A member country may state in its schedule that it is not affording unqualified market access, or that it is imposing conditions (for example, a commercial presence), or that it is imposing restrictions. Those conditions and restric-

tions are specified in its schedule. The same applies in relation to the national treatment commitment.

As regards the European Community, schedules have been submitted by the Community and by the Member States; however, the commitments entered into refer to each Member State by name and the conditions and restrictions are not the same in relation to all the Member States.

Those specific commitments are the result of multilateral negotiations in which reciprocity was sought not on a sector-by-sector basis but globally.

6. *The dynamic nature of the agreement*

GATS is intended to constitute a negotiating framework and is thus, as the Council observes, a dynamic agreement. The Council draws attention to Article XIX of GATS on the obligation to enter into successive rounds of negotiations with a view to achieving a progressively higher level of liberalization.

Also noteworthy are Article X, which provides for multilateral negotiations on the question of emergency safeguard measures based on the principle of non-discrimination, and Article XIII, which states that the principle of most-favoured-nation treatment and the specific commitments of market access and national treatment are not to apply to government procurement in services but provides that multilateral negotiations are to be held on that subject within a specific period. Lastly, Article XV provides for negotiations to be entered into with a view to developing the necessary multilateral disciplines to avoid the distortive effects resulting from subsidies.

B. *TRIPs*

1. *Objectives and raison d'être*

The primary objective of the *TRIPs* Agreement, as the French Government points out, is to strengthen and harmonize, on a global scale, the protection of intellectual property.

The French Government states that, in the light of the failure of the efforts made to achieve that aim in other contexts and, in particular, the work carried out between 1980 and 1984 in revising the Paris Convention for the Protection of Industrial Property, the developed countries insisted that

intellectual property rights should be included in the Uruguay Round in such a way as to take advantage of the dynamics of GATT as a whole (together with its provisions regarding negotiation) and its machinery for the settlement of disputes.

As the Commission points out, trade in counterfeit products in certain non-member countries (counterfeit trade marks, imitation products, infringement of patent rights in products or processes, pirated books, records and videocassettes) causes considerable harm to Community industry. The lack of effective protection of intellectual property rights in certain non-member countries is regarded as having the same effect on 'goods subject to intellectual property rights' as any other restriction on imports.

The Commission notes that retaliatory trade measures have been applied both by the United States and by the Community against countries which either provided inadequate protection for intellectual property or discriminated between their trading partners. Those measures have prompted developing countries to accept the idea of stronger protection of intellectual property, even though they hitherto tended to regard that branch of the law as an instrument of exploitation on the part of the industrialized economies. Furthermore, the Commission states that the developing countries are becoming more and more aware of the possible benefits of stronger protection of intellectual property,

including greater incentives for local innovation.

2. The scope of the TRIPs Agreement and the methods adopted for the achievement of its objectives

The TRIPs Agreement is extremely wide in scope, since it covers both literary and artistic property (copyright and related rights) and industrial property (trade marks, geographical indications of provenance and origin, patents, designs and models, know-how), excluding, however, new varieties of plants (Article 1(2) of TRIPs).

Part I (Articles 1 to 8) contains general provisions and basic principles. Part II (Articles 9 to 40) lays down standards concerning the availability, scope and use of intellectual property rights. Part III (Articles 41 to 61) lays down rules on the enforcement of intellectual property rights. Part IV (Article 62) covers procedures for the acquisition and maintenance of intellectual property rights. Part V (Articles 63 and 64) concerns the settlement of disputes. Part VI (Articles 65 to 67) contains transitional provisions and Part VII (Articles 68 to 73) lays down institutional and final provisions.

The TRIPs Agreement seeks to establish a minimum level of protection of intellectual property. The members countries are free under that Agreement both to implement more extensive protection and to determine the most appropriate method of giving effect to its provisions (Article 1(1) of the TRIPs Agreement).

The applicability of the agreement is determined according to a personal criterion (rights attaching to certain natural and legal persons who are nationals of other countries; Article 1(3) of the TRIPs Agreement).

The TRIPs Agreement lays down the principles of national treatment (Article 3) and most-favoured-nation treatment (Article 4). There are certain exceptions to those two principles. The principle of national treatment is subject to the exceptions already provided in the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and the Washington Treaty on Intellectual Property in Respect of Integrated Circuits. Furthermore, the national treatment obligation is restricted, as regards perform-

ers, producers of phonograms and broadcasting organizations, to the rights provided by the TRIPs Agreement itself (Article 3(1) of the TRIPs Agreement).

The specific substantive provisions are set out in Parts II, III and IV of the TRIPs Agreement.

As the Council observes, the objectives of the TRIPs Agreement are pursued in two different ways: first, by reference to international conventions which, in the words of the Commission, enjoyed 'a relatively wide degree of acceptance', that is to say, the Paris Convention on industrial property and the Berne Convention on literary and artistic works, which also seek to achieve the harmonization of rights and national treatment in non-harmonized fields; and, second, as the Commission observes, by means of certain substantive provisions ('plus-elements') 'in areas of intellectual property where the participating countries felt the immediate need to extend the areas of protection'.

There is one important issue which is not addressed by those specific substantive provisions: the exhaustion of rights. One of the general provisions of the TRIPs Agreement states as follows:

'For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 [national treatment] and 4 [most-favoured-nation treatment], nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.'

The reference to the Paris Convention encompasses all the substantive provisions of that convention, excluding only the institutional, final and transitional provisions (Article 2(1) of the TRIPs Agreement). The reference to the Berne Convention also covers all the substantive provisions of that convention apart from those relating to authors' moral rights (Article 9(1) of the TRIPs Agreement).

It will be recalled that the principle of exhaustion precludes the holders of intellectual property rights from being able to rely on those rights in order to control the movement of products which they have themselves placed on the market or which have been placed on the market with their consent. According to the Commission, it follows from Article 6 of the TRIPs Agreement that 'if a TRIPs Member applies the principle of "national" exhaustion (or "regional" exhaustion for customs unions or free trade

areas), the dispute settlement provisions of TRIPs (including both violation and non-violation complaints) cannot be invoked'.

respect the provisions of EC law and to allow Community rightholders to conquer foreign markets [i. e. *those in non-member countries*] whilst maintaining some control on (re)importation of technology-based goods in the Community'.

The Member States of the Community, which are obliged to apply the principle of exhaustion in intra-Community trade, are free not to apply it if the product which is imported originates from a non-member country; the same applies in relation to the Community itself.

3. *The specific substantive provisions*

(a) Copyright and related rights

However, if a Member State does apply the principle of exhaustion to its nationals, without restricting it to goods put into circulation in a Member State of the Community, it must also apply it in that way to nationals of non-member countries, pursuant to the principle of national treatment. Similarly, the principle of most-favoured-nation treatment precludes any TRIPs Member from applying different rules depending on whether persons are nationals of one non-member country or of another.

Copyright protection extends to *expressions* and not to ideas, procedures, methods of operation or mathematical concepts as such (Article 9(2) of the TRIPs Agreement). The minimum *term* of protection is prescribed (Article 12).

According to the Commission, Article 6 of the TRIPs Agreement will enable a member country 'to continue opposing parallel imports of goods ... marketed abroad [i. e. *in a non-member country*] by the intellectual property owner or with his consent'. The Commission considers that the restriction of the principle of exhaustion to intra-Community trade 'is necessary in order to

Computer programs are protected as literary works under the Berne Convention (Article 10(1) of the TRIPs Agreement).

The *related rights* of performers, producers of phonograms and broadcasting organiza-

tions are recognized and defined (Article 14 of the TRIPs Agreement).

Rental rights are to be granted to authors of computer programs. Such rights are to be granted to the authors of cinematographic works only where such rental has 'led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in [*the member country in question*] on authors and their successors in title'.

term of registration and of any renewal thereof is prescribed (Article 18). Where use is required to maintain a registration, the TRIPs Agreement lays down a minimum period of non-use after which the registration of the trade mark may be cancelled (Article 19).

The protection of well-known marks within the meaning of Article 6*bis* of the Paris Convention is extended to marks relating to services (Article 16(2)) and beyond the ambit of similar products (Article 16(3)).

(b) Industrial property

(i) Trade marks

The protection to be given to trade marks applies both to those relating to goods and to those relating to services.

TRIPs Members may determine conditions for the licensing and assignment of trade marks. However, the compulsory licensing of trade marks is not permitted and a trade mark may be assigned without the transfer of the business to which the mark belongs.

Signs capable of constituting a trade mark are specified and the rights conferred by a trade mark are defined (Articles 15(1) and 16(1) of the TRIPs Agreement).

(ii) Geographical indications

The registrability of a mark may be made dependent on its use, but such use may not be a condition for filing an application for registration (Article 15(3)). The minimum

Section 3 of Part II of TRIPs lays down very detailed provisions regarding the protection to be given to geographical indications, which are defined as 'indications which identify a good as originating in the territory of a

Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin' (Article 22(1) of the TRIPs Agreement).

spirits not originating in the place indicated must also be available 'where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like' (Article 23(1) of the TRIPs Agreement).

Generally, the aim is to prevent:

However, those rules are to apply only for the future, since it is provided that:

- '(a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
- (b) any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention (1967)' (Article 22(2) of the TRIPs Agreement).

'Nothing in this Section shall require a Member to prevent continued and similar use of a particular geographical indication of another Member identifying wines or spirits in connection with goods or services by any of its nationals or domiciliaries who have used that geographical indication in a continuous manner with regard to the same or related goods or services in the territory of that Member either (a) for at least 10 years preceding 15 April 1994 or (b) in good faith preceding that date' (Article 24(4) of the TRIPs Agreement).

(iii) Industrial designs

Additional protection is to be provided for geographical indications for wines and spirits: the means of preventing the use of a geographical indication identifying wines or

Industrial designs are also covered by the TRIPs Agreement. Protection is to be

afforded to industrial designs which are new or original (Article 25(1)). The scope of such protection is laid down and its minimum duration is prescribed (Article 26).

(v) Layout designs (topographies) of integrated circuits

As regards textiles in particular, the requirements for securing protection must not be such that they unreasonably impair the opportunity to obtain such protection (Article 25(2) of the TRIPs Agreement).

The provisions relating to topographies of integrated circuits are intended to remedy the deficiencies in the Washington Treaty on Intellectual Property in Respect of Integrated Circuits. They define both the scope of the protection to be conferred (Article 36) and the term of protection (Article 38).

(iv) Patents

(vi) Protection of undisclosed technical information

Section 5 of Part II on patents first sets out provisions concerning patentability (Article 27). Patents are to be available without discrimination for any inventions, whether products or processes, in all fields of technology (*ibid.*). However, developing countries are permitted for a certain period to defer the obligation to extend product patent protection to areas of technology not so protectable under their national laws on the general date of application of the Agreement (Article 65(4)). The rights conferred by a patent are defined (Article 28) and must be for a term of at least twenty years (Article 33). Lastly, Article 31 lays down provisions limiting the circumstances in which compulsory licences may be granted.

TRIPs Members are obliged to protect undisclosed information against unfair competition (Article 39(1)). The lawful holders of such information are to have the possibility of preventing it from being 'disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices'. That protection is conditional on the information being secret, having commercial value because it is secret and having been subject to steps by the person lawfully in control of it to keep it secret (Article 39(2)).

(vii) Control of anti-competitive practices in contractual licences

rights (see (a) below) and, second, provides that the procedures by which such measures may be obtained must fulfil certain requirements (see (b) below).

The Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology (Article 40). Consequently, the TRIPs Agreement confers on them the right to specify practices or conditions which may constitute an abuse of intellectual property rights and to adopt appropriate measures to prevent or control such practices.

(a) Corrective measures

4. Specific procedural provisions (enforcement of intellectual property rights)

The TRIPs Agreement lays down measures for the termination and restraint of infringements of intellectual property rights (injunctions, damages, the confiscation or destruction of counterfeit objects, criminal sanctions) and also measures for the prevention of infringements of intellectual property rights (provisional measures, suspension of release by customs authorities).

It is not enough, in order to achieve a minimum level of uniform protection for intellectual property, to define the content of the various rights to be recognized. It is necessary in addition to provide 'effective and appropriate means' for their enforcement (see the preamble to the TRIPs Agreement). This is the reason for Part III of the TRIPs Agreement, relating to the procedures to be established by the Members to permit effective action against any act of infringement of intellectual property rights covered by the TRIPs Agreement (Article 41(1)). Part III sets out, first, the measures which the holders of intellectual property rights may require the judicial, administrative and customs authorities to take against infringements and threatened infringements of their

The judicial authorities are to have the authority to order a party to desist from an infringement of the intellectual property rights of a person bringing proceedings (Article 44(1)).

The judicial authorities are to have the power to order the infringer to pay the

holder of the right infringed adequate damages where that infringer knew, or had reasonable grounds for knowing, that his action infringed an intellectual property right (Article 45(1)).

inaudita altera parte (Article 50(2)), although the defendant may subsequently apply for a review (Article 50(4)).

The judicial authorities are further to have authority to order that goods which infringe an intellectual property right be disposed of without compensation outside the channels of commerce or, unless this would be contrary to existing constitutional requirements, destroyed (Article 46).

On the other, the Members are to adopt procedures to enable a right holder who has valid grounds for suspecting that the importation of counterfeit trade mark or pirated copyright goods may take place to lodge an application in writing with the competent administrative or judicial authorities for the suspension by the customs authorities of the release into free circulation of such goods. Members may envisage similar measures in respect of other infringements of intellectual property rights (Article 51).

Criminal sanctions, extending to imprisonment, are to be applicable in cases of wilful trade mark counterfeiting or copyright piracy on a commercial scale (Article 61).

Such measures for the suspension of the release of goods into free circulation are also of a provisional nature. Their continuation is conditional on the initiation of proceedings to determine the merits of the case (see Article 55).

Preventive measures fall into two categories.

(b) Procedural safeguards

On the one hand, the judicial authorities are to have the authority to order prompt and effective provisional measures to prevent an infringement of any intellectual property right from occurring (Article 50(1)). Where appropriate, those measures may be adopted

Procedures concerning the enforcement of intellectual property rights must be fair and equitable (Article 41(2)). The requirement of

fair and equitable procedures is expressed in a number of different ways.

(Article 43). Decisions on the merits must be based solely on evidence in respect of which the parties were offered the opportunity to be heard and should preferably be in writing and reasoned (Article 41(3)).

The holders of rights are to have access to civil judicial procedures concerning the enforcement of intellectual property rights and defendants are to have the right to written notice which is timely and contains sufficient detail, including the basis of the claims (Article 42). The parties must be allowed to be represented by independent legal counsel and overly burdensome requirements must not be imposed concerning mandatory personal appearances (Article 42). All parties to such procedures are to be entitled to substantiate their claims and to present all relevant evidence (Article 42), and to require the production by the opposing party of evidence which is in its possession

The parties are to have an opportunity for review by a judicial authority of final administrative decisions and of initial judicial decisions (Article 41(4)).

There must exist authority to award damages against holders of intellectual property rights who abuse or have unjustified recourse to the procedures available to them (Article 48(1)).

XI. Common commercial policy, GATS and TRIPs: the positions adopted by the parties to the procedure

As has already been stated, there is total disagreement between the Commission, on the one hand, and the Council, the States which have submitted observations and the European Parliament, on the other, as to the inclusion of the matters covered by GATS and TRIPs within the common commercial policy, in respect of which the Community has exclusive competence under Article 113 of the EC Treaty.

A. GATS

The positions of the parties as regards respectively GATS and TRIPs are examined below.

The *Commission's* principal contention is that the services covered by GATS fall within the common commercial policy. That policy cannot be restricted to goods. The essence of the Commission's view is that any agreement which is liable to have a direct or indirect effect on the volume or structure of commercial trade is a commercial policy

agreement and must be concluded on the basis of Article 113.

What are its main arguments?

— First, the case-law of the Court to the effect that the concept of commercial policy has 'the same content whether it is applied in the context of the international action of a State or to that of the Community' (Opinion 1/75, cited above, specifically p. 1362, fourth paragraph). According to the Commission, none of the Member States would seriously maintain that trade in services does not constitute trade and that the agreements which it concludes in that regard are not part of commercial policy.

— The links and similarities noted by economists between goods and services, both sectors forming part of the balance of trade.

— The most recent academic views, which are practically unanimous that trade in services forms part of the common commercial policy. However, the Commission acknowledges that certain representatives of 'the more moderate' current of opinion exclude services provided through the intermediary of an establishment located in the country where the

services are rendered. In the Commission's view, there is no reason to make such a distinction between the direct, cross-frontier supply of services, which would be the only supply forming part of the common commercial policy, and supply of services through a commercial presence, which would be part of an external policy of establishment.

— The purpose of GATS, which is the liberalization of trade in services.

— The instruments used (most-favoured-nation treatment, transparency), which are the traditional instruments of trade policy. The same applies in relation to the provisions concerning market access and national treatment. The schedules of specific commitments, though they largely relate to regulatory barriers, are comparable to the tariff schedules of the Members in the goods sector.

For the rest, the Commission seeks to show that the provisions of GATS have their equivalents in comparable provisions of GATT.

A further indication of the overlap between goods and services is the possibility of cross-retaliation; that overlap shows that goods and services are part of one trade policy.

The provisions on further negotiation (see paragraph X. A.6 above, on the dynamic nature of GATS) 'cannot change the legal basis of this agreement'. 'Any further agreements resulting from these provisions must later be judged on their own merits in order to determine their legal basis.'

In the Commission's view, the competence of the Community is not called in question by the fact that the service sectors covered by GATS are not all harmonized under Community law and continue, in some cases, to be governed by national law. 'The GATT, and in particular its provision on national treatment, have affected domestic laws and regulations of the Member States (e. g. tax laws) for many years without it ever having been suggested that the GATT was in part Member State competence.'

In conclusion, the Commission makes two points regarding Articles 59 and 75 of the EC Treaty.

Any suggestion that the second paragraph of Article 59 of the EC Treaty, which empow-

ers the Council to extend the provisions of the Chapter on services to nationals of a non-member country who provide services and who are established within the Community, precludes trade in services from inclusion under Article 113 of the EC Treaty is dismissed by the Commission. Article 59 is an internal provision and not a commercial policy provision. 'It cannot serve as [a] legal basis for a conventional policy which is intended to cover all the modes of international supply of services, such as ... GATS.'

The Commission also rules out the possibility that, in so far as it concerns transport, GATS falls within Article 75, which confers internal competence on the institutions (see the *AETR* judgment on parallelism of internal and external competence, Case 22/70 *Commission v Council* [1971] ECR 263). The *AETR* precedent can still be relied on for concluding agreements in those areas of transport policy which are not of a trade nature. Furthermore, in the field of transport, the Council has adopted a number of measures on trade restrictions, in particular economic sanctions, which were based on Article 113 and entailed the interruption of trade in transport services.

All the other parties to the proceedings are resolutely opposed to the Commission's view.

According to the *Council*, the interpretation of the common commercial policy advocated by Commission leads to the transformation of that policy into a common policy on external economic relations. In the world economy, exchange rate fluctuations and differences between wage costs have a more significant influence on the volume and flow of international trade than, for example, customs tariff variations. 'If the Commission's argument were to be accepted, one would necessarily have to conclude that the Community has exclusive competence under Article 113 to regulate the exchange rates of the currencies of the Member States or to implement a salary-fixing policy. Such an interpretation would totally negate the competence of Member States in matters of economic policy, at least as regards external relations.'

At the Intergovernmental Conference on Political Union, the Commission had proposed such an extension of Community competence. The concept of a common commercial policy was to be replaced by that of a common policy on external economic relations, comprising in particular 'economic and trade measures in respect of services, capital, intellectual property, investment, establishment and competition' with the possibility of extension of that ambit. That policy was to fall within the exclusive competence of the Community (Article Y 17, paragraph 2, of the Commission's proposal). The Community was to be exclusively represented by the Commission in its relations with non-member countries and international organizations and at international conferences.

According to the Council, the Commission is seeking in its request for an Opinion to

have implemented, by means of judicial interpretation, proposals which were rejected at the Intergovernmental Conference on Political Union. The same argument appears in the observations of the French Government, the Danish Government and the United Kingdom.

The Council does not really draw any distinction between its arguments for the exclusion of services from commercial policy and those it puts forward on the basis of examination of the idea of parallelism of internal and external competence, in order to conclude that the Community should have joint competence.

According to the Council, GATS relates principally to the supply of services by a commercial presence in the country of the recipient of those services. That stems from the very nature of services. They are consumed or used at the time when they are rendered, and cannot be stored or transported; consequently, they have to be consumed at the place where they are rendered. Laying down rules regarding commercial presence is tantamount to regulating the conditions of establishment of companies from non-member countries and the legal regime which is to apply to them after establishment.

According to the Council, the regime in respect of *primary* establishment is governed

by national law and is not covered by the concept of common commercial policy. Similarly, as regards consumption abroad (for example, Indian tourists visiting France), the Council observes that competence in relation to tourism continues to be held by the Member States and that a proposal to confer competence in that regard on the Community was rejected at the Intergovernmental Conference on Political Union. As regards the 'movement of persons', the Council notes that entry and residence in Member States of the Community by natural persons who are nationals of non-member countries and who are employed by a supplier of services from a non-member country are matters for national law and are within the competence of Member States alone. As regards cross-frontier supplies, the Council observes that the competence of the Member States to regulate such 'international trade in services' has never been challenged. 'A Member State may introduce "screen quotas" requiring cinemas to reserve a minimum proportion of their screenings to films produced in the Community and thus to restrict the showing of non-Community films'. In short, the Council states, international trade in services falls within Article 113 only in so far as the services in question are directly linked to the supply of goods (for example, the assembly of a machine).

The *United Kingdom* sets forth more specific arguments as to the scope of the concept of common commercial policy.

It states, first, that, as far as services are concerned, the chapters of the Treaty on establishment and services are confined to nationals of Member States. It is only a national of a Member State who may establish a primary establishment in a Member State. It is only a national of a Member State established in a Member State who may establish a secondary establishment in another Member State. Once again, only nationals of Member States may take advantage of the freedom to provide services, although the second paragraph of Article 59 provides for the possibility of extending the benefit of freedom to provide services to nationals of non-member countries established in a Member State.

Next, the *United Kingdom* maintains that a literal interpretation of Article 113, limiting that provision to trade in goods, is entirely consistent with the scheme of the Treaty. 'If the Member States could retain different commercial policies, viz., different rules for tariffs and quotas as regards imports from third countries, the consequences would be trade diversion'. By contrast, there is no such risk in the case of services: 'the possibility of ... service suppliers or persons intending establishment seeking entry into a Member State which imposes restrictions on third country nationals via a Member State which has more permissive rules does not arise. If one Member State allows a national of a third country to provide a service in that State, that national does not thereby acquire the right to provide a service in any other

Member State, because that national of a third country is not a national of a Member State'. 'There is ... no logic ... that requires an exclusive common commercial policy for services, whereas there is a compelling logic which requires an exclusive common commercial policy as regards trade in goods.'

Although the term 'trade in services' is used, the issues which it raises are different from those arising in connection with products. As regards services, the essential issues are the establishment of, and direct investment by, foreign companies, the free movement of personnel required for the provision of services and the rules concerning access to service-providing professions.

Lastly, the United Kingdom points out that GATS also covers transport services and that its annexes cover air transport and negotiations on maritime transport. It refers to Articles 61(1) to 74 of the EC Treaty and to the relevant case-law (the *AETR* judgment, cited above, and Opinion 1/76 on the draft agreement establishing a European laying-up fund for inland waterway vessels, [1977] ECR 741) in support of its view that 'it is the Transport Title and the Transport Title alone which provides the Treaty basis for agreements with third countries concerning the provision of transport services'.

The United Kingdom further relies in that regard on the practice of the Council. When the Council has adopted external measures which have the predominant aim of regulating transport, it has done so on the basis of the Transport Title. The United Kingdom cites in that connection: Council Decision 80/50/EEC of 20 December 1979 setting up a consultation procedure on relations between Member States and third countries in the field of air transport and on action relating to such matters within international organizations (OJ 1980 L 18, p. 24); Council Decision 82/505/EEC of 12 July 1982 concluding the Agreement between the Communities on the one hand and Austria, Finland, Norway, Portugal, Sweden, Switzerland and Turkey on the other on the International Carriage of Passengers by Road by means of Occasional Coach and Bus Services (ASOR) (OJ 1982 L 230, p. 38); Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and third countries (OJ 1986 L 378, p. 1); Council Decision 92/384/EEC of 22 June 1992 concerning the conclusion of an Agreement between the European Economic Community, the Kingdom of Norway and the Kingdom of Sweden on civil aviation (OJ 1992 L 200, p. 20); Council Decision 92/577/EEC of 27 November 1992 concerning the conclusion of the Agreement between the European Economic Community and the Republic of Austria on the transit of goods by road and rail (OJ 1992 L 373, p. 4); Council Decision 92/578/EEC of 30 November 1992 concerning the conclusion of the Agreement between the European Economic Community and the Swiss Confederation on the carriage of goods by road and rail (OJ 1992 L 373, p. 26). The United Kingdom observes that the Commission had proposed Article 113 of the EEC Treaty as the legal

basis for the latter two decisions but that the Council adopted them on the basis of Article 75 of the EEC Treaty.

The *French Government* draws attention, first, to the very wide scope of the WTO Agreement, which:

'potentially covers every economic matter connected with the development of trade. Its scope may thus embrace all the policies of the Community. That clearly does not mean that those policies, when projected externally within the framework of the WTO and on the ostensible basis of their having a commercial impact, should be wholly diluted in the common commercial policy. Such a dilution would pose serious problems with regard to consistency, for example in environmental matters: the same measures would, if envisaged, on an internal level or in other external areas, as forming part of environmental policy, fall under shared competence, whereas, if discussed within the WTO, they would fall within the common commercial policy and thus the exclusive competence of the Community'.

In response to the Commission's view with regard to services, the French Government advances various arguments already set forth above, such as that relating to the deliberations of the Intergovernmental Conference on Political Union, that of the link between the Customs Union and the common commercial policy in the light of the risk of

deflection of trade and, in addition, the argument that GATS covers modes of supply of services other than cross-frontier supplies. As regards the reference to the classic instruments of commercial policy (such as the most-favoured-nation clause or the principle of national treatment), to which the Commission attaches great importance, it merely observes that those instruments have been used in areas outside trading relations between States, for example, in a convention on the status of refugees. Lastly, it argues, as does the Council, that only services which are directly linked to the supply of goods fall within the common commercial policy.

The *Spanish Government* considers the four modes of supply of services covered by GATS and concludes that the last three (consumption abroad, commercial presence and the movement of persons) fall within the competence of the Member States: Articles 48, 52 and 59 of the EC Treaty regulate freedom of movement for workers, the right of establishment and freedom to provide services only in relation to nationals of other Member States of the Community.

The *Portuguese Government* observes generally that the nub of the dispute between the Commission and the Member States lies not in the instruments and purpose of the WTO Agreement but rather in the nature of the

matters governed by it. 'At the present stage of the internationalization of national economies, any internal or external measure, whether bilateral or multilateral, which is adopted in the context of economic relations is liable to have a direct or indirect effect on the volume or structure of commercial trade. For that reason, that criterion cannot serve as the sole basis for the definition of the exclusive competence of the Communities in the context of the common commercial policy Such an interpretation would entail transferring to the sphere of exclusive Community competence questions of policy in respect of commercial taxes, national currencies and direct and indirect wage costs.'

Specifically as regards services, the Portuguese Government observes that, even though cross-frontier supplies of services indisputably fall within the scope of Article 113, that is not the case with other modes of supply such as consumption abroad and the movement of persons: rules in respect of tourism, the entry and movement of nationals of non-member countries and the status of workers from countries outside the Community fall within the Member States' own competence. As regards commercial presence, the Portuguese Government notes that Article 52 of the EC Treaty does not give the Community its own competence in the sphere of the establishment of nationals of non-member countries.

The *Greek Government* considers that the conclusion of GATS necessarily entails the

joint involvement of the Community and of the Member States, by reason of the dynamic and evolutionary nature of the institutional structure which GATS establishes. The participation of the Member States is justified by the competence which is their own, such competence being 'concurrent with that of the Community, or taking priority thereover, or being exclusive'. The Hellenic Republic does not give any further details.

The *Netherlands Government* concentrates on the fact that cross-frontier supplies do not play an essential role in GATS and that GATS is in fact concerned with the establishment of service suppliers who are nationals of non-member countries and the carrying on of their activities within Member States. As an example of instances in which Member States have exclusive competence, it cites the movement by natural persons (nationals of non-member countries) into the territory of a Member State.

It further observes that the commercial policy and the transport policy were expressly conceived as distinct areas, and that external action in relation to transport cannot be based on Article 113.

As regards trade in financial services, it draws the Court's attention to certain Community measures: the Second Council

Directive on banking, which includes a Title devoted to relations with non-member countries,³ the First Council Directive on non-life insurance, which provides for the conclusion by the Community of agreements with non-member countries⁴ and the Council Decision approving the agreement concluded with Switzerland on non-life insurance.⁵ The first two of those acts are based on Article 57(2) and the third is based both on Article 57(2) and Article 235. Article 113 did not, therefore, come into the matter.

The *German Government* also concurs with the observations of the Council. It points out that GATS governs transport services, an area which, at Community level, is covered by Article 74 et seq. of the EC Treaty. According to the German Government, 'Article 113 of the EC Treaty is not enough to justify the competence of the European Union, since the broad area covered by GATS goes well beyond services connected with the free movement of goods'. Furthermore, it notes that, in certain sectors such as education and culture, the Community has only very limited competence, since basic cultural policy remains a matter for the Member States, as is apparent from Article 128 of the EC Treaty. Moreover, in other sectors, the Community has no competence whatsoever. The German Government gives

as an example of this matters such as the right of workers from non-member countries to enter, reside and work in connection with the provision of services, as well as the status of non-member country undertakings.

The *Danish Government* considers generally that Article 113 of the Treaty does not encompass foreign economic policy; and it refers, like the Council and other governments, to the deliberations of the Intergovernmental Conference on Political Union. With regard specifically to GATS, the Danish Government considers that Article 113 cannot be used for the conclusion of an agreement on services, particularly as regards transport. In its view, it is necessary to have recourse to other provisions of the Treaty (chapter on the right of establishment, or Title IV of the Treaty, relating to transport).

The *European Parliament* considers that the Commission is seeking to remove international economic relations as a whole from the common commercial policy and thus to bring within the scope of Article 113 of the Treaty matters which fall within the free movement of services, transport, taxation, the harmonization of laws, etc. It states that the Commission's arguments, which rely on economic assumptions, are debatable. What is called for is not economic theorizing and conjecture but consideration of the issue in its existing legal context.

3 — Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1).

4 — Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3).

5 — Council Decision 91/370/EEC of 20 June 1991 on the conclusion of the Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than life assurance (OJ 1991 L 205, p. 2).

The European Parliament concedes that the concept of commercial trade, considered from the standpoint of an absolute State structure, concerns not only finished products but all of the factors involved from start to finish, from the design stage to the sale to the ultimate consumer. Interesting though that view may be, it must nevertheless be subordinated to questions of legality, as currently construed within the Community.

A wide interpretation of the concept of common commercial policy would prejudice the powers of the European Parliament, which is incompatible with the constitutional principle of participation by the Parliament, as established in the 'Titanium dioxide judgment' (Case C-300/89 *Commission v Council* [1991] ECR I-2867).

The European Parliament asserts that Article 113 has not been applied by the Court other than in the context of goods either in Opinion 1/78 ('Rubber Agreement', [1979] ECR 2871) or in other cases brought before it.

The European Parliament notes that the second subparagraph of Article 228(3) of the EC Treaty, as amended at Maastricht, which provides for the assent of the Parliament to be obtained to agreements establishing an institutional framework, is a necessary legal basis for the conclusion of the WTO Agreement.

With regard to certain specific service sectors, the European Parliament expresses the view that the legal basis for the conclusion of international agreements on transport is Article 75 of the Treaty and not Article 113. Article 75 is to be regarded as a *lex specialis* by comparison with other provisions of the Treaty concerning the external relations of the Community. It is clear from the wording of Article 75(1)(a) and (c) that that provision may serve as the legal basis for any Community act which is intended to regulate matters relating to transport links with non-member countries, such as transit agreements or infrastructure measures serving frontiers with non-member countries.

The Parliament also considers that the provisions of GATS relating to public procurement fall outside the ambit of Article 113. It refers in that regard to pending Case C-360/93, in which it has applied for the annulment of decisions of the Council relating to an agreement between the Community and the United States on public procurement on the grounds that those decisions were based solely on Article 113. In its view, such acts should have been adopted on the basis of Articles 59 to 66 and 100a.

Lastly, in so far as GATS concerns investments by foreign undertakings, the Parliament asserts that Articles 52 and 57(2) of the Treaty should constitute the legal basis. It refers in that regard to its observations in respect of the request for Opinion 2/92, currently pending before the Court.

Furthermore, the European Parliament seeks to dispute the arguments advanced by the Commission in support of its view that services fall within the common commercial policy, based on the fact that Community decisions on economic sanctions have been adopted solely on the basis of Article 113. For one thing, those measures were intended to suspend the flow of trade, that is, to affect trade in goods and not to regulate transport. Taking the case of the embargo on trade with Iraq⁶ in respect of imported or exported products, therefore, it is difficult to see how that measure could have been effective if it had not applied to air and sea transport. For another, those decisions were adopted in situations of urgency. They are atypical acts in which the legal basis appears after the recitals referring to concerted political action by the Member States. This is best demonstrated by the fact that the Treaty on European Union makes entirely separate provision for them. Under Article 228a, introduced at Maastricht: 'Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures'.

B. *TRIPs*

The *Commission's* arguments are founded on a twofold notion. First, the common commercial policy encompasses all measures

which are chiefly designed to influence the volume or structure of trade in goods or services by regulating or harmonizing intellectual property rights. Second, the rules relating to intellectual property rights are closely linked to trade in the products and services to which they apply. It infers from this, in its main claim, that the Community has exclusive competence under Article 113 of the EC Treaty.

In so far as the object and purpose of the envisaged agreement is to regulate directly trade in intellectual property rights, it must be regarded as falling within the ambit of the common commercial policy.

To show the very close link between intellectual property rights on the one hand and goods and services on the other, the Commission refers to Article 36 of the EC Treaty and to the corresponding rule evolved by the Court in relation to services.

According to the Commission, the trade-related aspects of intellectual property rights fall within the scope of the common commercial policy.

⁶ — Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1).

The Commission further relies on the practice followed by the institutions.

rights protection, compared with the treatment accorded to United States industry.⁸

The Commission cites three cases in which Council Regulation (EEC) No 2641/84,⁷ which set up a new commercial policy instrument to enable the Community to react to illicit commercial practices of non-member countries and to eliminate the harm caused by them to Community industry, has been used by it and by the Council. Although that regulation does not specifically mention infringement of intellectual property rights, it has hitherto been used three times by the Council and the Commission to defend the Community's interests in that field. From that the Commission concludes that, in order to safeguard the Community's intellectual property rights affecting the volume of its trade in goods and services abroad, the Community has exclusive competence to take enforcement measures in response to illicit commercial practices through the use of the existing commercial policy instruments.

Moreover, several bilateral agreements concluded by the Community with non-member countries contain provisions relating to the protection of intellectual property rights. For example, almost all bilateral agreements on textiles concluded on the basis of Article 113 of the Treaty in the 1980s contain a provision on the protection of marks, designs or models of textile products.⁹ The Community has also concluded on the basis of Article 113 of the Treaty a number of reciprocal agreements with non-member countries for the protection of certain denominations for wine originating in those countries and entitled to a designation of origin.¹⁰ More recently, in the Europe agreements concluded with the countries of central and eastern Europe, the Community has inserted clauses designed to raise the level of intellectual property protection. The commercial provisions of those agreements, together with the provisions on intellectual property rights, have been implemented by interim agreements. The Council decisions

Similarly, the Community suspended the Republic of Korea with effect from 1 January 1989 from the list of countries which may benefit from its generalized system of tariff preferences, as a retaliation against the discriminatory treatment of Community industry in the field of intellectual property

⁷ — Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices (OJ 1984 L 252, p. 1).

⁸ — See Council Regulation (EEC) No 4257/88 of 19 December 1988 applying generalized tariff preferences for 1989 in respect of certain industrial products originating in developing countries (OJ 1988 L 375, p. 1).

⁹ — See, for example, Article 18 of the Agreement between the European Economic Community and the People's Republic of China on trade in textile products, initialled on 9 December 1988 (OJ 1988 L 380, p. 1), and Article 20 of the Agreement between the European Economic Community and the Union of Soviet Socialist Republics on trade in textile products, initialled on 11 December 1989 (OJ 1989 L 397, p. 1).

¹⁰ — See, for example, the Agreement with the Kingdom of Morocco: Council Regulation (EEC) No 482/77 of 8 March 1977 (OJ 1977 L 65, p. 1); the Agreement with the Tunisian Republic: Council Regulation (EEC) No 3618/87 of 30 November 1987 (OJ 1987 L 340, p. 27); the Agreement with Austria: Council Decision 89/146/EEC of 12 December 1988 (OJ 1989 L 56, p. 1).

applying those interim agreements in the Community were based on Article 113 of the EC Treaty.¹¹

Lastly, in 1986, the Council adopted, on the basis of Articles 113 and 235 of the Treaty, Council Regulation (EEC) No 3842/86 of 1 December 1986 laying down measures to prohibit the release for free circulation of counterfeit goods.¹² According to the Commission, that regulation, the purpose of which is to prevent counterfeit goods from being placed on the market, is a classic commercial policy measure intended to protect Community intellectual property rights internationally.

Finally, the Commission relies, in support of its arguments, on the external action taken by the Community, with particular reference, first, to its participation in the international conferences to establish a protocol concerning the Madrid Agreement on the International Registration of Trade Marks and the Washington Treaty on Intellectual Property in respect of Integrated Circuits (IPIC) and, second, the Council's decision authorizing the Commission to negotiate on behalf of the Community a new agreement

on the protection of the rights of performers and producers of phonograms.¹³

As was observed in the account of the respective positions of the parties in relation to GATS, the *Council* strongly disputes the Commission's wide interpretation of the concept of the common commercial policy. According to the Council, the fact that TRIPs has an effect on trade is not enough to bring it within the scope of the common commercial policy. For the purposes of determining the legal basis of an act, it is its principal objective which counts. The Council refers, in relation to Article 100a of the EC Treaty, to the 'Waste directive judgment' (Case C-155/91 *Commission v Council* [1993] ECR I-939, paragraphs 19 and 20).

As in its arguments in respect of GATS, the Council notes that the Commission's proposals that exclusive competence be conferred on the Community to conclude international agreements on intellectual property were rejected by the Intergovernmental Conference on Political Union.

In reply to the Commission's observation regarding its proposal for a Council decision requiring Member States to accede to the Berne Convention (Paris Act) and the Rome Convention, the Council states that that

11 — See, for example, Council Decision 92/230/EEC of 25 February 1992 (OJ 1992 L 116, p. 1) concerning the interim agreement with the Republic of Hungary (Article 35); Council Decision 93/690/EEC of 10 December 1993 (OJ 1993 L 323, p. 1) concerning the interim agreement with the Republic of Bulgaria (Article 37); Council Decision 92/229/EEC of 25 February 1992 (OJ 1992 L 115, p. 1) concerning the interim agreement with the Czech and Slovak Federal Republic (Article 36).

12 — OJ 1986 L 357, p. 1.

13 — OJ 1991 C 24, p. 5.

proposal was rejected by it precisely because of the extraordinary transfer of competence which such a decision would have entailed.

As regards the Community's presence in the field of intellectual property at international level, the Council observes that, on each occasion when it authorized the Commission to negotiate on behalf of the Community, it did so in relation to matters in which there existed secondary legislation.

The *German Government* considers in relation to TRIPs that Article 113 of the EC Treaty can constitute a legal basis only in respect of the assignment and enjoyment of intellectual property rights having a direct connection with the supply of goods and the accompanying services.

The *United Kingdom* asserts that the function of the common commercial policy, envisaged by the Treaty in relation to goods, is to permit the free movement in the internal market of all goods, whether originating in a Member State or in a non-member country and being in free circulation in a Member State. That rationale does not lend any support to the argument that the common commercial policy extends to the negotiation of international agreements intended to secure respect for intellectual property rights in the Community and in non-member countries. The fact that one Member State recognizes the intellectual property right of a holder in respect of goods imported from a non-member country does

not affect the right of a holder in another Member State to rely upon the intellectual property laws of that latter Member State to restrict the import of the product in question — the latter holder may rely upon Article 36 of the EC Treaty to protect his rights under national law in that Member State. Consequently, there is no question of trade diversion resulting from the fact that intellectual property rights are not subject to the common commercial policy.

The United Kingdom describes as extravagant the Commission's claims for the scope of the common commercial policy; it points out the impossibility of seeking to accommodate within an area of exclusive Community competence a subject-matter which in large part remains subject to unharmonized national rules. However, it concedes that Section 4 of Part III of the TRIPs Agreement (Articles 51 to 60), relating to the suspension of the release of goods into free circulation by customs authorities, the counterpart of which is to be found in the provisions of the aforementioned Council Regulation No 3842/86 on counterfeit goods, is covered by Article 113 of the Treaty.

The *French Government* observes that the very title of the agreement shows that the TRIPs Agreement is not principally concerned with international trade, apart from certain provisions relating to trade in counterfeit goods (that is to say, various articles in

Part III dealing with the means of enforcement of intellectual property rights and Article 69, which establishes a system of cooperation with a view to eliminating international trade in counterfeit goods). The TRIPs Agreement relates, in essence, to the rights and powers of the holders of intellectual property rights, the worldwide protection of which needed to be strengthened and harmonized.

In reply to the Commission's argument concerning the insertion of clauses relating to intellectual property in agreements with non-member countries, the French Government observes that those clauses are generally contained within a single article and that they merely constitute 'best endeavours' clauses which in fact relate only to the non-member countries concerned.

The French Government submits that, since the principal subject-matter of the TRIPs Agreement is not international trade but the protection of intellectual property, it cannot have its legal basis solely in Article 113.

According to the *Danish Government*, the Community cannot have exclusive competence in intellectual property matters on the basis of Article 113 since, as is apparent from the judgment in *Phil Collins and Others* (Joined Cases C-92/92 and C-326/92, [1993] ECR I-5145), that is an area which falls, in the absence of Community harmonization, within the competence of national laws.

The *Greek, Netherlands and Portuguese Governments* also maintain that the TRIPs Agreement concerns areas which, in so far as there exists no harmonization at Community level, fall within the competence of the Member States.

The *Spanish Government* observes that there exists no Community legislation covering all aspects of intellectual property law; consequently, competence continues to lie with the Member States and the Community cannot claim exclusive competence in that field.

In reply to the Commission's reliance in support of its arguments on examples of common commercial policy measures taken by the Community to protect intellectual property, the Spanish Government states in particular that those measures regulated arrangements in respect of imports, did not in any way affect the system in respect of intellectual property and did not entail any Community commitments in the matter either.

The *European Parliament* also contests the Commission's arguments regarding TRIPs, on the same grounds as it set out in relation to GATS (see above, paragraph XI. A).

XII. GATS, TRIPs and implied powers

A. General considerations regarding implied powers

the Commission, the internal powers do not need to have been exercised already.

In case the Court should find that GATS and TRIPs do not fall within the common commercial policy, the *Commission* argues in the alternative that the Community has exclusive competence by virtue of the doctrine of implied powers derived either from specific provisions of the Treaty (such as Article 54 of the EC Treaty) or from provisions of a general nature (Articles 100a and 235 of the EC Treaty). The *States which have submitted observations* and the *Council*, on the other hand, acknowledge that the Community has some competence but maintain that some competence also vests in the Member States.

- In the second situation, secondary legislation has been adopted, even in areas falling outside common policies, and the international commitments envisaged contain rules which, if adopted by Member States outside the framework of the Community institutions, would be capable of affecting or altering the scope of the existing Community rules (this is referred to by the Commission as the 'AETR doctrine').

The *Commission* identifies two situations in which the Community has implied competence of an exclusive nature at international level.

The *Council* maintains that the Commission's arguments regarding implied powers ignore the difference between the existence of powers and their exercise. Only where the internal powers are exercised by the Community can the resulting external powers be exclusive. Furthermore, if Member States retain their competence internally, they must also do so at international level.

- In the first situation, the Treaty provisions have conferred upon the Community institutions internal powers for the attainment of a specific objective and the participation of the Community in the international commitment is necessary for the attainment of that objective (this is referred to by the Commission as the 'Opinion 1/76 doctrine'). According to

The *United Kingdom* maintains that, where the subject-matter of a proposed international agreement falls within the scope of a provision of the EC Treaty authorizing internal measures and internal measures have

been adopted pursuant to that provision, the Community may derive implied external competence from that provision for the purposes of the agreement in question. But the fact that the Community has the implied power to make an international agreement does not necessarily exclude the competence of the Member States to participate in the conclusion of that agreement, particularly where the internal rules covering the subject-matter of the proposed agreement do not constitute measures of exclusive harmonization. In those circumstances, the Member States may participate in the conclusion of the international agreement in question. According to those principles, which have been established by the case-law of the Court, the Community is competent to participate in the conclusion of the GATS Agreement pursuant to Articles 54, 57, 66, 75, 84, 99 and 100a of the EC Treaty and in the conclusion of the TRIPs Agreement pursuant to Articles 100a, 113 and 235. The Member States are also competent to participate in the conclusion of the two agreements.

According to the United Kingdom, the exclusive or non-exclusive nature of the Community's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions.

The *French Government* observes that where the Community has internal competence but has not yet exercised it and where the provisions of agreements with non-member countries do not affect the rules adopted by the

Community, the Member States remain competent to enter into international commitments.

According to the *German Government*, the implied external powers of the Community are exclusive only if and in so far as the Community organs have actually exercised their powers internally. Internal legislative powers which have not been exercised cannot confer exclusive external competence.

The *Portuguese Government* notes that, in matters which have not been regulated by Community acts or the regulation of which complies with minimum harmonization criteria, the Member States retain concurrent competence, but it is only temporary.

The *European Parliament* observes that, even if the competence of the Community to conclude the WTO Agreement and its annexes is recognized by the Court by virtue of the doctrine of implied powers, the legal basis of the decision to conclude the agreement on behalf of the Community should be precisely indicated in that decision.

B. GATS

(i) Powers inferred from specific provisions of the EC Treaty

1. *The Commission's position*

The arguments advanced by the *Commission* may be divided into two parts. First, the Commission sets out to identify the internal powers of the institutions from which the Community's international competence may be inferred. Second, it endeavours to show the need for Community action or the risks involved in uncoordinated action by the Member States in relation to non-member countries.

The Commission considers that the internal powers of the Community encompass the four modes of supply referred to in GATS. In its view, freedom to provide services within the meaning of the Treaty includes 'cross-frontier supplies' (see, for example, the judgment in Case 33/74 *van Binsbergen v Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299), and also 'consumption abroad' within the meaning of GATS (see the 'Tourist guides judgment', Case C-154/89 *Commission v France* [1991] ECR I-659, paragraphs 9 and 10). Services rendered by reason of a commercial presence (the third mode of supply of services provided for in GATS) or the movement of persons (the fourth and final mode of supply referred to in GATS) are also covered by the provisions of the Treaty on freedom to provide services (Article 52 and the third paragraph of Article 60) and by those on the right of establishment (Articles 52 and 58 in conjunction with Article 66).

(a) The existence of internal powers

The Commission seeks, first, to show that the internal competence of the Community derives from the chapters of the Treaty on the right of establishment and on services; it makes little reference to secondary legislation (i). Next, in the event that the Community is held not to have adequate powers on the basis of specific provisions of the Treaty, it maintains that the Community was able to conclude GATS pursuant to general provisions of the Treaty such as Articles 100a and 235 (ii).

The Commission therefore cites, in support of its position, only provisions relating solely to nationals of Member States of the Community. In its view, there is, however, nothing in any of the provisions of the chapters of the Treaty on the right of establishment and on services which requires the Community legislature to apply the powers conferred on it on an exclusively intra-Community basis. It notes that it is a characteristic of the rule laid down in the *AETR* judgment that it falls to be applied in cases where the Treaty has provided expressly only for the establishment of internal rules.

The Commission observes that, as in the chapter of the Treaty on freedom to provide services, the term 'services' in GATS covers services in any sector except services supplied 'in the exercise of a governmental authority' (Article 1(3)(b) of GATS). According to the Commission, that exception was introduced in order to avoid conflict with the provisions of the EC Treaty which exclude from the sphere of services activities falling within the exercise of official authority.

The Commission infers from the obligation imposed by the Court's case-law requiring the Member States, under Community law, 'to take all measures, whether of [a] procedural or substantive nature, which are necessary to guarantee its effective application' that the Community is competent to assume the same type of obligation in the framework of an international agreement. For that reason, it considers that Article VI(2)(a) of GATS, which requires members of the WTO to maintain or institute tribunals or procedures providing for the review of administrative decisions affecting trade in services, falls within the exclusive competence of the Community.

Turning to Article XVI of GATS, relating to specific market-access commitments, the Commission maintains that the Community internally has the necessary powers to remove the quantitative restrictions on market access listed in that provision (quotas, limitations on the total number of persons who may be employed by a service supplier,

measures restricting or requiring a specific type of company structure for a service supplier, etc.).

Since the conclusion of the Maastricht Treaty, the Community has also had internal legislative powers which cover the whole of Article XI of GATS. That article provides that members of the WTO must not apply restrictions on international transfers and payments for current transactions relating to specific commitments other than those allowed by Article XII (restrictions to safeguard the balance of payments). In Community law, all restrictions on the movement of capital between Member States and between Member States and non-member countries are prohibited (Article 73b(1) and (2) of the EC Treaty). Furthermore, Article 73c(2) confers on the Council the necessary powers to adopt measures on the movement of capital to or from non-member countries involving direct investment.

As regards the recognition of diplomas, licences and certifications (Article VII of GATS), the Commission maintains that the Community has internal powers on the basis of Articles 49, 57 and 66 of the Treaty and, moreover, that it has made use of those powers.

The Commission refers in that regard to Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJ 1989 L 19, p. 16) and Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training (OJ 1992 L 209, p. 25).

Member States and non-member countries. Moreover, the Community has already made wide use of such powers externally.

(ii) Powers derived from general provisions (Articles 100a and 235 of the EC Treaty)

The Commission is prepared to concede that the general system of mutual recognition established by those two directives does not concern qualifications or professional experience gained in non-member countries. In its view, however, the *ratio decidendi* of the judgment in Case C-154/93 *Tawil-Albertini* [1994] ECR I-451 clearly implies that the recognition of qualifications obtained in non-member countries may be established at Community level (paragraphs 11 to 15 of the judgment).

The Commission maintains that, if the powers of the Community based on specific provisions of the EC Treaty do not cover the entire scope of GATS, then Article 100a may be used to conclude it. According to the Commission, that article imposes on the Council a 'clear' legal obligation to act in order to achieve the completion of the internal market.

Lastly, as regards all modes of transport, the Community has wide internal powers to take the necessary measures to achieve the specific objectives of its common policy (Article 74 et seq. of the EC Treaty). All modes of transport constitute pre-eminently provision of services, for which international action is particularly necessary to achieve the Treaty's objectives. Thus Regulation No 4055/86, cited above, lays down rules applying the principle of freedom to provide services to maritime transport between

The Commission submits that, if that basis were in turn found to be inadequate, it would be necessary to have recourse to Article 235 of the Treaty in order to confer the requisite external powers on the Community institutions. The Member States are not free to take joint action through an agreement concluded outside the Community framework if the conditions for the application of Article 235 are fulfilled. According to the Commission, those conditions are indeed fulfilled. The necessity of concluding the agreement is not in dispute: it will contribute to the attainment of the objectives of the Treaty and relates directly to the operation

of the common market. Unilateral action by the Member States outside the Community framework is not only unlikely to help achieve the Community's specific objectives but will, more probably, impede them by gradually compromising and dismantling the internal market.

(b) The need for external Community action

The Commission observes, first, that, if the Community were to be a party to the agreement alongside its own Member States, the coherence of the internal market would be prejudiced. It relies on three arguments in that regard.

First, taking as an example the financial services sector, it maintains that recognition of the competence of the Member States would place Member States with strong financial services centres in a position of strength in bilateral negotiations with non-member countries. In return for their relatively generous offers, they would be able to obtain the greatest concessions. Thus their service providers would improve their competitive position disproportionately by comparison with service suppliers from other Member States.

According to the Commission, that is precisely the situation which the Second Banking Directive (Directive 89/646, cited above) sought to avoid. That directive, which

harmonized the conditions governing authorization within the Community, also contains provisions on trade in financial services with non-member countries (see Title III on relations with non-member countries, Articles 8 and 9). It further seeks to remove disparities in the conditions governing access by non-member country banks to the internal market and, on a reciprocal basis, to ensure that non-member countries grant Community credit institutions, from whatever Member State, effective access which is comparable to the access afforded by the Community to the credit institutions of those non-member countries. As regards that latter point, Article 9(3) of the Second Directive provides that, whenever it appears to the Commission that a non-member country is not granting such access, it 'may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable competitive opportunities for Community credit institutions. The Council shall decide by a qualified majority'.

Next, the Commission observes that, once established in a Member State, the subsidiaries of non-member country banks, henceforth regarded, in accordance with Article 58 of the Treaty, as Community nationals, could compete with the banks of other Member States without those States having had any say in the matter.

Lastly, the Commission submits that there can be no grounds for holding that, on a

strict application of the *AETR* judgment, Community competence is limited to sectors which have been the subject of internal harmonization, given that not all service sectors have been harmonized. If that criterion for the division of competence were adopted, States whose key service sectors were covered by harmonized rules would be completely subject to Community discipline, whereas States whose main service sectors were regulated only slightly, or not at all, by harmonized rules would retain a virtually unfettered freedom to negotiate. According to the Commission, such a situation would rob the Community of the possibility of using balanced bargaining power in the interests of all the Member States across all service sectors.

Second, the Commission maintains that, if the Member States were to retain some competence in the matter, that could affect or alter the scope of the existing Community rules. It relies in that regard on three arguments.

It states, first, that after three years have elapsed following the entry into force of the WTO Agreement, member countries will be able unilaterally to modify their schedules of specific commitments by means of a compensatory adjustment in favour of any GATS members who are able to show that their rights are 'nullified or impaired' by the modification. Since compensation in the context of GATS can only take the form of the modification of laws or regulations (so as to ease, for example, the conditions of market access

in a service sector), the Commission takes the view that it must affect Community legislation or alter its scope. For that reason, the Member States cannot be recognized as having the power to conclude GATS.

The Commission further maintains that, in order for international commitments to be such as to affect existing Community rules, it is not necessary for them to conflict with those rules. It is enough that they should concern a field which is 'to a large extent' already covered by Community rules (see Opinion 2/91 [1993] ECR I-1061, paragraphs 25 and 26). Community rules cover the entire scope of GATS.

Lastly, the Commission observes that no modification of the specific commitments is possible, in principle, during the first three years following the entry into force of the WTO Agreement and its annexes. Consequently, if the Member States were to conclude the WTO Agreement on their own behalf, they could throughout that period use the possible incompatibility of Community legislation with their commitments under GATS as a pretext for not applying Community law.

2. *The positions of the parties which have submitted observations*

The Commission's position is disputed by the Council and the Governments which have submitted observations.

Neither those Governments nor the Council make any observations on the point regarding the need for external action on the part of the Community. Their submissions disputing the Community competence which the Commission would infer from specific provisions of the Treaty or from secondary legislation, or alternatively from the provisions of a general nature contained in Articles 100a and 235 of the EC Treaty, are summarized below.

(i) Competence deriving from specific provisions of the EC Treaty

The Council, the Spanish Government and the Portuguese Government maintain that the concept of services is wider in GATS than in Community law. Unlike GATS, the Treaty is not concerned with services which are not provided for remuneration (Article 60 of the Treaty).

According to the Council, the Commission fails to draw any distinction between the

system applying to nationals and companies of Member States and that applying to nationals and companies of non-member countries. The Council observes that no mention is made in the articles of the Treaty relating to the right of establishment and to freedom to provide services of the way in which nationals and companies of non-member countries are to be treated. The sole exception is in the second paragraph of Article 59 of the Treaty. That provision establishes a specific legal basis for the enactment of legislation in relation to nationals of a non-member country who provide services and who are *already established within the Community*. It would be completely redundant if, as the Commission maintains, the Community already enjoyed internal competence in relation to nationals of non-member countries as regards freedom to provide services and the right of establishment.

According to the Council, Community law is confined, as regards nationals of non-member countries, to regulating questions of second establishment and of the supply of services from a first establishment within the Community. As regards 'commercial presence', the Council draws a distinction between the subsidiaries of non-member country companies and the mere branches of such companies. It concedes that Community law is capable of applying to a Community subsidiary of a non-member country company. On the other hand, the mere branches of such companies, established within the Community, fall within the competence of the Member States, since Article 58 of the Treaty relates only to the companies themselves.

The Council disputes the competence which, according to the Commission, the Community has in respect of the specific commitments relating to access to markets in services. Following numerous discussions, schedules of specific commitments have been lodged on behalf of the Community and the Member States, and both the limitations and the conditions attaching to those commitments vary from one Member State to another. The Council points out that it is clear from a superficial reading of the document containing the specific commitments in relation to services, a document which it considers to be of prime importance, that it is indeed national laws which are directly concerned. Consequently, the specific commitments offered by the Community and the Member States fall for the most part within the competence of the Member States. In the Council's view, the very fact that that list exists provides an answer to the questions submitted to the Court.

- the provision of services for no remuneration;
- commitments in relation to movements of capital by nationals of non-member countries who are not established within the Community (Article XI of GATS), given that Article 67 of the Treaty only requires the abolition of restrictions on movements of capital in relation to capital belonging to persons residing in a Member State;
- commitments relating to the recognition of diplomas or titles acquired in non-member countries.

According to the *Spanish Government*, there are whole sections of GATS which cover fields in which the Community has no internal powers. Thus, provisions of GATS falling within the competence of the Member States are those concerning:

- the provision of services by companies from non-member countries wishing to establish themselves within the Community (commercial presence);
- the provision of services by means of the movement of natural persons who are nationals of non-member countries;

The *Portuguese Government* notes that the modes of supply of services contemplated by GATS, other than 'cross-frontier supplies', fall within the competence of the Member States.

It stresses the fact that 'the most important and significant aspects of the international liberalization of services concern the conditions of establishment of companies from non-member countries and the rules applying to self-employed persons and company employees from non-member countries'. In its view, those matters fall within the competence of the Member States.

According to the *Danish Government*, there can be no doubt that Community legal acts adopted in the services sector concern only certain fields. Within those fields, the legal acts adopted relate in turn only to certain aspects of the provision of services. Consequently, the Member States are competent to conclude international agreements, both in fields in which there are no Community rules and in those in which Community rules do exist, but are only of a fragmentary nature.

The *Netherlands Government* concurs with the Council and cites specifically, as an instance of a case in which the Member States have exclusive competence, the movement of natural persons from a non-member country to the Community (mobility of workers).

In summary, the *United Kingdom* considers that the Community is competent to participate in the conclusion of GATS pursuant to Articles 54, 57, 66, 75, 84, 99 and 100a of the EC Treaty. Certain aspects of the agreement fall within areas of Community competence which are covered by those provisions and in respect of which the Community has adopted internal rules. However, not all economic activities covered by GATS have been the subject of Community rules. And where Community rules have been adopted, they are often measures of minimal harmonization providing for minimum standards which may be exceeded by the Member States. It follows that the Member States too are competent to participate in the conclusion of GATS.

The *United Kingdom* points out, first, that neither the chapter on establishment nor that on services makes provision for:

- the supply of a service from the territory of a non-member country into the territory of a Member State (Article I(2)(a) of GATS);
- the supply of a service by a service supplier of a non-member country, through a commercial presence (other than a company falling within Article 58 of the EC Treaty) in the territory of a Member State (Article I(2)(c) of GATS);
- the supply of a service by a service supplier of a non-member country, through the presence of nationals of a non-member country in the territory of a Member State (Article I(2)(d) of GATS).

In particular, the *United Kingdom* notes that there is no provision in the Treaty which deals with the first establishment of natural and legal persons who are nationals of non-member countries seeking to provide services within the Member States. It observes that the second paragraph of Article 59 of the Treaty refers only to nationals of non-member countries who are already established within the Community. In the absence

of internal Community rules, these matters remain within the competence of the Member States.

non-member countries enjoy advantages equivalent to those enjoyed by non-member country parent companies of companies in the Community which constitute companies within the meaning of Article 58 of the Treaty.

With regard to subsidiaries and branches, the United Kingdom acknowledges, however, that the Community institutions have adopted measures which lay down 'rules for ... the exercise by the Community of external competence as regards the establishment of nationals of third countries in the Community' on the basis of Article 57(2) of the EC Treaty.

Thus, Article 9(3) of the First Banking Directive (Council Directive 77/780/EEC of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ 1977 L 322, p. 30) provides that '... the Community may, through agreements concluded in accordance with the Treaty with one or more third countries, agree to apply provisions which, on the basis of the principle of reciprocity, accord to branches of a credit institution having its head office outside the Community identical treatment throughout the territory of the Community'. Again, Articles 8 and 9 of Directive 89/646/EEC, cited above, seek to ensure that Community credit institutions doing business in

Similar provisions are to be found in the insurance sector. Article 32 of Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life insurance (OJ 1979 L 63, p. 1) provides that 'The Community may, by means of agreements concluded pursuant to the Treaty with one or more third countries, agree to the application of provisions different from those provided for in this Title, for the purpose [of] ensuring, under conditions of reciprocity, adequate protection for policyholders in the Member States'. And paragraph (3) of Article 32b, introduced by Council Directive 90/619/EEC of 8 November 1990 (OJ 1990 L 330, p. 50), provides that 'Whenever it appears to the Commission ... that a third country is not granting Community insurance undertakings effective market access comparable to that granted by the Community to insurance undertakings from that third country, the Commission may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable competitive opportunities for Community insurance undertakings. The Council shall decide by a qualified majority'.

As regards the first establishment of natural persons who are nationals of non-member countries, the United Kingdom also notes the existence of a rule of secondary legislation.

Article 1(c) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14), adopted on the basis of Articles 54(2) and 63(2), effectively grants a right of residence to spouses and children who are nationals of non-member countries.

The United Kingdom further states that those exceptional provisions in relation to the first establishment of legal or natural persons who are nationals of non-member countries are often limited in their scope.

Title III of the First Banking Directive (Directive 77/780, cited above) does not prevent Member States from applying to branches of non-member country credit institutions, when they commence or carry on their business within the Community, requirements which are more stringent than those applied to branches of Community credit institutions (see, similarly, the recitals in the preamble to the Second Banking Directive (Directive 89/646, cited above) and the ninth recital in the preamble to Council

Directive 92/96/EEC of 10 November 1992, OJ 1992 L 360, p. 1, on insurance).

The United Kingdom concludes that, subject to those exceptional provisions, the first establishment of legal and natural persons who are nationals of non-member countries is a matter in which the Member States retain transitional competence.

Next, it examines the respective competence of Member States and of the Community as regards the rules to which the activities of subsidiaries and branches of non-member country companies are subject once they are established within the Community.

It notes that, once subsidiaries or branches of companies registered in non-member countries are established in a Member State, the Community is competent, under the chapters on establishment and services, to adopt internal rules regulating their activities. It also points out that the Community has exercised that competence in certain sectors.

Council Directive 89/117/EEC of 13 February 1989 on obligations regarding the

publication of accounting documents (OJ 1989 L 44, p. 40) applies not only to branches of Community companies but also to branches of non-member country companies (Articles 1 and 3). Similarly, the Eleventh Directive on Company Law (Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State, OJ 1989 L 395, p. 36) applies to branches of non-member country companies (Articles 7 to 10). Title III of the First Banking Directive, cited above, and Title III of Directive 79/267/EEC on insurance, cited above, also contain provisions relating to branches of undertakings having their head office outside the Community.

For the rest, however, in the absence of internal Community legislation, the rules to which the activities of a subsidiary or branch of a non-member country company are subject remain within the competence of the Member States.

As regards Article VI(2)(a) of GATS (maintenance or establishment of tribunals or procedures for the review of administrative decisions affecting trade in services), the United Kingdom asserts that matters relating to jurisdiction, procedure and remedies remain within the competence of the Member States, subject to certain provisions of secondary legislation which harmonize internal procedures and remedies.

The United Kingdom cites in that regard Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33). It states, however, that that directive is a measure of partial harmonization, which leaves to Member States a wide choice of means in achieving its objectives.

It concludes from this that the Member States are competent to participate in the conclusion of the GATS Agreement as regards the subject-matter covered by Article VI(2)(a) of that agreement.

Lastly, with regard to Article VII of GATS (recognition of diplomas and qualifications), the United Kingdom states that, even though Community rules provide for the harmonization and mutual recognition of qualifications obtained in Member States, competence is nevertheless reserved to the Member States as regards qualifications awarded in non-member countries. It refers in that regard to the judgment in *Tawil-Albertini*, cited above. (ii) Competence which may derive from the Treaty provisions of a general nature (Articles 100a and 235 of the EC Treaty)

The *Council* disputes the proposition that Articles 100a and 235 of the Treaty impose upon the Community legislature a legal obligation to act. To accept such a view would be to remove any distinction between the existence of competence and the exercise thereof, and would constitute flagrant disregard of Article 3b of the Treaty, which sets forth the principle of subsidiarity.

The *German Government* states that Article 235 cannot confer powers on the Community in sectors falling within the exclusive competence of the Member States and that, in any event, the liberalization of world trade in services is not one of the Community's objectives.

The *United Kingdom* maintains that the Court has rejected the proposition that minimum standards directives can provide the basis for exclusive Community competence (see Opinion 2/91, cited above, paragraph 21). Exclusive external competence can only be founded on internal measures of exclusive harmonization. *A fortiori*, exclusive external competence cannot be founded, in the absence of internal rules, on Article 100 alone.

The *Portuguese Government* denies the apparent claim by the Commission that mandatory and exclusive competence can be inferred in a specific matter, whether at internal or external level, from Article 235 of the Treaty. It puts forward the following reasons.

The *French Government* does not interpret Article 235 of the Treaty in the same way as the Commission. Unlike the Commission, it considers that the Council has wide powers to decide whether Community action is necessary for the achievement of one of the objectives of the Community. In the present instance, it submits, that necessity is not evident.

First, the Council remains free to decide on the most appropriate method for achieving Community objectives. It might prefer, for example, for international or internal reasons, to have recourse to the machinery of cooperation between the Community and the Member States, which would lead, as regards external relations, to the conclusion of mixed agreements. That was the view taken by the Court when it held that 'although Article 235 empowers the Council to take any "appropriate measures" equally in the sphere of external relations, it does not create an obligation, but confers on the Council an option, failure to exercise which cannot affect the validity of proceedings' (AETR judgment, paragraph 95). Second, Article 235 does not allow the transfer to the Community of the Member States' own residual competence. In order for that to

happen, there would necessarily have to be a revision of the Treaties.

second, its aim is to establish the need for Community action or, alternatively, the risks involved in uncoordinated action on the part of Member States in their dealings with non-member countries.

The *Spanish Government* considers that Articles 100a and 235 of the Treaty provide, along with a great many other provisions, a legal basis for the competence of the Community.

(a) The existence of internal powers

The *European Parliament* maintains that any recourse to Article 235 of the EC Treaty could not in any way be interpreted as prejudicing its freedom to refuse to give its assent if it deems the agreement to be unacceptable, having regard to the objectives of the Treaty and the interests of Community citizens.

The Commission seeks, first, to show that the internal competence of the Community stems from the existing secondary legislation in respect of intellectual property (i). Next, in the event that the Community is held not to have adequate powers founded on secondary legislation, it maintains that the Community could conclude TRIPs pursuant to general Treaty provisions such as Articles 100a and 235 (ii).

C. TRIPs

1. The Commission's position

(i) Competence inferred from secondary legislation

As with GATS, the arguments advanced by the *Commission* may be split into two parts. In the first, the Commission seeks to identify the internal competence of the institutions from which it is possible to infer Community competence at international level. In the

As regards TRIPs, the Commission states, first, that the purpose of Article 36 of the EC Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States

(Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraphs 19 to 21).

It notes that the Council has adopted a number of directives in relation to copyright and related rights, and considers that these cover, internally, the areas forming the subject-matter of Articles 10 to 14 of TRIPs.

It proceeds to make a very detailed comparison, point by point, between the TRIPs Agreement and the relevant provisions of Community law, concluding in general terms that the Community has the necessary external competence to conclude the TRIPs Agreement in its entirety.

1. As regards copyright (Section 1 of Part II of TRIPs, Articles 9 to 14), first of all, the Commission acknowledges that the Community is not a party either to the Berne Convention (Convention for the Protection of Literary and Artistic Works, Paris Act of 24 July 1971) or to the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961).

It points out that Section 1 of Part II of the TRIPs Agreement, relating to copyright and related rights, obliges the WTO Members to provide a minimum level of protection.

Article 1(1) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) corresponds to Article 10(1) of the TRIPs Agreement, which provides that computer programmes are to be protected as literary works under the Berne Convention. Article 2(1) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61) corresponds, according to the Commission, to Article 11 of the TRIPs Agreement, which concerns rental rights. Articles 6(1), 7 and 8(1) of that directive regulate the same matters as those covered by Article 14 of the TRIPs Agreement (related rights). Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9) covers the subject-matter of Article 12 of the TRIPs Agreement, which relates to the term of protection of copyright. Lastly, the Commission states that it has submitted to the Council a proposal for a directive on the legal protection of databases (OJ 1993 C 308, p. 1), the aim of which is to clarify the protection of databases under copyright and to grant the right to prevent unfair extraction from a database. It states that that proposal has not yet been adopted, but points out that the power of the Com-

munity to enact such a directive has not been disputed.

2. As regards trade marks (Articles 15 to 21 of TRIPs, Section 2 of Part II of the agreement), the Commission observes that, at internal level, the Council has adopted Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) and the First Directive to approximate the laws of the Member States relating to trade marks (Directive 89/104/EEC of 21 December 1988, OJ 1989 L 40, p. 1).

It acknowledges that the First Directive is limited to those national provisions which most directly affect the functioning of the internal market, but points out that the Council has announced its readiness to adopt later further directives approximating national trade mark law.

3. As regards geographical indications and designations of origin (Articles 22 to 24 of TRIPs, Section 3), the Commission maintains that the Community legislation adopted in that area is far more precise and extensive than the provisions laid down by the corresponding section of TRIPs.

of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1) prohibited any labelling of foodstuffs which could mislead the purchaser as to the origin or provenance of a foodstuff. Next, the Council adopted Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1). Finally, in the context of the common organization of the market in wine, or on the basis of Articles 43 and 100a of the Treaty, the Council has adopted a series of regulations with respect to the presentation and designation of wines and spirits.

4. As regards industrial designs (covered by Section 4 of Part II of TRIPs, Articles 25 and 26), the Commission points out that it has submitted to the Council a proposal for a directive, on the basis of Article 100a of the Treaty, on the legal protection of designs, intended to harmonize national legislations, and a proposal for a regulation on a Community design. According to the Commission, the level of protection provided for in those proposals is far more extensive than the general obligations contained in Articles 25 and 26 of the TRIPs Agreement.

First of all, Council Directive 79/112/EEC of 18 December 1978 on the approximation

5. As regards patents (covered by Section 5 of Part II of TRIPs, Articles 27 to 34), the

Commission states that both the Munich Convention of 5 October 1973 on the Grant of European Patents and the Luxembourg Agreement of 15 December 1989 relating to Community Patents (OJ 1989 L 401, p. 1), signed by the Member States but not yet in force, form part of the Community legal order. It maintains that the Community is empowered to adopt legislation in the field of patent law whenever such legislation is necessary for the proper functioning of the internal market. Furthermore, the Council has adopted Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ 1992 L 182, p. 1) and has adopted a common position on the proposal for a directive on the legal protection of biotechnological inventions, harmonizing the laws of the Member States with regard to the patentability of biotechnological material.

6. As regards the topographies of integrated circuits, the Commission notes that Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products (OJ 1987 L 24, p. 36) is the internal counterpart of Section 6 of Part II of TRIPs (Articles 35 to 38 concerning layout designs of integrated circuits).

7. As to Part III of the TRIPs Agreement, which establishes rules for the enforcement of intellectual property rights, the Commission points out that the powers which the Community enjoys internally in that area are as wide as the provisions of Articles 41 to 61 of the TRIPs Agreement. It further states

that the powers of the Community have already been exercised by the adoption of Regulation No 3842/86, cited above, laying down measures to prohibit the release for free circulation of counterfeit goods (OJ 1986 L 357, p. 1).

To sum up, the Commission considers that *all* of the provisions of the TRIPs Agreement have their counterparts, at internal level, in secondary Community legislation.

(ii) Powers which may be inferred from provisions of the Treaty of a general nature (Articles 100a and 235 of the EC Treaty)

The Commission puts forward, in general terms, the same arguments in favour of recourse to Article 100a or Article 235 as the legal basis for the conclusion of the TRIPs Agreement as it advances in relation to GATS. The only argument specific to TRIPs is as follows. As TRIPs lays down rules in areas where there are no Community harmonization measures, its conclusion would make it possible, from the outset, to achieve harmonization within the Community and thereby to contribute to the establishment and functioning of the internal market.

(b) The need for external Community action

The Commission maintains that, if the Community were simply one party amongst others to TRIPs, alongside its own Member States, the cohesion of the internal market would be prejudiced, for two reasons. First, competitive distortion in that market would occur and, second, competitive opportunities in the markets of non-member countries would be artificially distorted.

According to the Commission, the risk of distortion of trade is as follows: if the Member States were free to negotiate and conclude their own agreements in the field covered by TRIPs, they could place their undertakings in a better competitive position than the undertakings of other Member States, thereby favouring their own economies in a way which is not compatible with undistorted competition in the internal market.

The Commission cites an example of secondary legislation which precludes the Member States from freely negotiating bilateral agreements with non-member countries.

Under Directive 87/54/EEC on the protection of topographies of semiconductor products, cited above, Member States may extend

that protection to nationals of non-member countries only on certain conditions. That directive has already been used several times to extend the protection of topographies of semiconductor products on the basis of reciprocity to a selective list of countries which satisfy the criteria of the directive and which offer the same level of protection to Community nationals. The Member States are not allowed to derogate from the provisions of the Council's decisions offering such protection. The reason for this is given in the preamble to the directive, which states that the differences in the legal protection provided by the laws of the Member States have direct and negative effects on the functioning of the common market.

As regards the risk of prejudice to the general cohesion of the Community rules in the event of shared competence, the Commission maintains that the adoption of the TRIPs Agreement both by the Member States on their own behalf and by the Community is likely to 'affect' Community law or to 'alter its scope' within the meaning of the *AETR* judgment for the following reasons.

First, even though it lays down only minimum requirements, TRIPs will nevertheless 'affect' Community rules in areas where the level of protection which they provide is lower than that provided for by TRIPs.

Second, even if TRIPs lays down only minimum standards of protection, they will have to be extended to all TRIPs Members. If the Member States were able to negotiate with non-member countries, outside the Community framework, with a view to extending intellectual property protection to nationals of non-member countries, there would be disparities and potential conflicts between their external regimes in that field and the Community regime.

Third, even if TRIPs lays down only minimum requirements, the Community rules in the field of intellectual property do not themselves lay down a minimum level of protection. Referring to Opinion 2/91, cited above, in which the Court held that the mere co-existence of international and Community rules covering the same subject-matter was liable to affect Community law, even if there were no contradiction between them, the Commission infers that the conclusion of TRIPs by the Member States would 'affect' the existing Community rules.

Fourth, TRIPs leaves its members free to raise the level of protection afforded by them, provided that the new level of protection continues to comply with the minimum TRIPs provisions. Since Community law applies the principle of national or 'Community' exhaustion, the adoption by one Member State of the principle of 'international exhaustion' provided for in the TRIPs Agreement would be enough to affect

Community rules and the functioning of the internal market.

Lastly, the conclusion of TRIPs both by the Community and by the Member States on the basis of shared competence would seriously affect Community law, because it would in practice 'freeze' or rule out Community harmonization measures in the field to which TRIPs applies. It would also 'affect' Community law inasmuch as the Member States would continue to use the Article 36 exception to protect the specific subject-matter of intellectual property rights, thereby impeding harmonization at Community level and the establishment or proper functioning of the internal market.

2. The positions of the parties which have submitted observations

The *Council* analyses, first of all, the situation in respect of Community legislation with regard to intellectual property. It identifies four 'bodies' of Community legislation.

- The first body of legislation is made up of Community measures adopted, in particular, on the basis of Article 43 of the EC Treaty and relating to geographical indications.

The Council considers that the scope of that first body of legislation coincides with that of Section 3 of Part II of TRIPs on geographical indications and that the conditions for the existence of implied external competence pursuant to the *AETR* judgment are generally met in this instance.

16 December 1986 on the legal protection of topographies of semiconductor products (OJ 1987 L 24, p. 36) and the First Directive (Council Directive 89/104/EEC of 21 December 1988) to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

- The second body of legislation consists of Community measures for the harmonization of national laws adopted on the basis of Article 100a of the Treaty, and also, in certain cases, on the basis of Articles 57 and 66, and relating to certain aspects of intellectual property.

According to the Council, the scope of the second body of legislation overlaps only very partially with the areas covered by Sections 1 and 2 of Part II of TRIPs (copyright and trade marks). The Council observes that, on the other hand, no harmonization measures have been adopted in the fields of industrial design and patents (covered by Sections 4 and 5 of Part II of TRIPs).

It includes directives on copyright and related rights (Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61); Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15); Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9); Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42); Council Directive 87/54/EEC of

In any event, the adoption of Community rules does not mean that they must be applied to nationals of non-member countries, whereas it is precisely one of the objectives of TRIPs to lay down minimum rules applicable to nationals of those countries.

- The third body of Community legislation is made up of measures which seek to establish, in relation to certain aspects of intellectual property rights, a system of Community protection supplementing

the systems established by the laws of each Member State. Those measures include Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ 1992 L 182, p. 1) and Regulation No 40/94 on the Community trade mark, cited above.

According to the Council, the measures comprised in that third body of legislation are designed solely to establish a system of Community protection to be superimposed on the national systems. Consequently, it considers that, if the doctrine of implied powers set out in the *AETR* judgment is capable of applying in relation to Community regulations, it can only do so in respect of the subject-matter of those supplementary systems and does not extend to matters which continue to form the subject-matter of (partially harmonized) national trade mark systems and (non-harmonized) national patent systems.

- The fourth body of legislation comprises Regulation No 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods, cited above.

According to the Council, that regulation corresponds solely to certain provisions in Part III of the TRIPs Agreement (relating to the enforcement of intellectual property rights), namely, those concerning the prohibition of the release into free circulation of counterfeit goods (Articles 51 to 60 of TRIPs). On the

other hand, the main provisions of Part III (Articles 41 to 50 and 61) continue to fall within the competence of the Member States. That is the position, in particular, as regards the provisions concerning the application of criminal sanctions (Article 61 of TRIPs).

Consequently, the Council considers that rule laid down in the *AETR* judgment can only apply to the (very limited) extent that the regulation prohibiting the release into free circulation of counterfeit goods overlaps with certain provisions of the TRIPs Agreement.

The Council infers from this that the Community and the Member States are jointly competent to conclude the TRIPs Agreement.

The *United Kingdom* points out, first, that each of the Community's legislative initiatives in the field of intellectual property has been careful to acknowledge the continued existence of national intellectual property rights.

Consequently, each Member State retains its own legal system for protecting patents, trade marks, copyright and designs. The United Kingdom emphasizes one point: even

the Community trade mark and even the Community patent (as and when introduced) will run in parallel with national rights, leaving them essentially untouched.

decision to conclude an agreement committing the Member States to the principles of the Berne Convention in their dealings with non-member countries is one which only the Member States can take.

The United Kingdom further notes that Community rules have only rarely been adopted in relation to the content of intellectual property rights. There are few examples of harmonization of national rules defining the specific subject-matter of intellectual property rights. The United Kingdom cites two: Directive 89/104 on trade marks, cited above, and Directive 87/54 on the topographies of semiconductor products, cited above.

As regards patents, the United Kingdom observes that there has been no harmonization at Community level. The United Kingdom counters the Commission's reliance on the Community Patent Convention by stating that that convention, which has not entered into force, was negotiated at inter-governmental level rather than at Community level, and that it leaves national patent systems untouched.

As regards, in particular, copyright and related rights, the United Kingdom observes that, whilst a number of the provisions of the TRIPs Agreement relate to the content or specific subject-matter of copyright and related rights, there has been no attempt to harmonize those aspects at Community level. It infers from this that 'the manner in which Member States define the specific subject-matter of copyright and related rights in their national laws, by reference to the (Berne) Convention or otherwise, is a matter for the Member States'.

The United Kingdom cites, in addition to the fields of patents and copyright, three areas of intellectual property law covered by the TRIPs Agreement in respect of which there are no Community harmonization measures: industrial designs, the protection of undisclosed information and the enforcement of intellectual property rights.

The United Kingdom also points out, with regard to copyright, that Article 9 of the TRIPs Agreement requires its members to comply with Articles 1 to 21 of the Berne Convention. Since the Community itself is not a party to the Berne Convention, the

The United Kingdom points out that, even where there has been Community harmonization of national rules, the extent of such harmonization is limited by explicit reference to the laws of the Member States or by

implicit recognition that the Member States continue to operate their own systems of intellectual property protection in fields which are not covered by Community legislation.

sions concerning patent rights, trade marks, unfair competition, trade secrets, protection of semiconductor products or the law of contract (Article 9(1)).

It gives a number of examples.

- (a) The provisions of Directive 87/54 on the topographies of semiconductors, cited above, are without prejudice to rights conferred by the Member States in fulfilment of their obligations under international agreements.
 - (b) Directive 89/104 on trade marks, cited above, is not intended as a full-scale approximation of the trade mark laws of the Member States, but limits its approximation to those provisions which most directly affect the functioning of the internal market (third recital in the preamble). Member States remain entitled, in particular, to protect trade marks acquired through use.
 - (c) Directive 91/250 on the legal protection of computer programs, cited above, operates without prejudice to national provisions concerning patent rights, trade marks, unfair competition, trade secrets, protection of semiconductor products or the law of contract (Article 9(1)).
 - (d) Directive 92/100 on rental right and lending right, cited above, leaves Member States with an unfettered discretion to decide whether, and to what extent, to impose administration by collecting societies of the right to equitable remuneration, and to determine from whom it may be claimed or collected (Article 4).
 - (e) Directive 93/83 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, cited above, allows Member States to provide for more extensive protection for holders of the rights in question than the right to prohibit broadcasting or communication required by Article 8 of Directive 92/100/EEC (Article 6).
- The United Kingdom further states in general terms that, subject to certain exceptions mentioned by it, none of the Community measures relating to intellectual property deals with the questions of reciprocity, mutual recognition or the rights to be granted to non-member country nationals in the Community.

In conclusion, it considers that the Community and the Member States have joint competence to participate in the conclusion of the TRIPs Agreement. The Community is, certainly, competent to participate in the conclusion of TRIPs by virtue of the doctrine of implied powers and of the fact that some limited aspects of that agreement are covered by internal rules adopted pursuant to Articles 100a and 235 of the EC Treaty, but the Member States are also competent, because they retain substantial internal competence as regards the subject-matter of the TRIPs Agreement.

As regards TRIPs and the question of implied powers, the Member States other than the United Kingdom generally concur with the observations of the Council. Only the German, Spanish, French, Portuguese and Netherlands Governments go into the point at any length.

The *German Government* maintains that TRIPs must be concluded in the form of a mixed agreement. On the one hand, the Community is competent inasmuch as it has enacted legislation in the field of intellectual property. On the other, the Member States are also competent, for three reasons. Copyright remains largely unharmonized; it is the Member States which have become parties to the international conventions in the matter; and most of the obligations arising under the TRIPs Agreement can only be fulfilled by the Member States (in particular, the obligation to organize administrative, civil and

even criminal procedures for the application of the different intellectual property rights).

The *Spanish Government* also considers that TRIPs must be concluded in the form of a mixed agreement. First, only certain aspects of intellectual and industrial property rights are covered by Community rules. Second, those rules are not in every case intended to harmonize national laws. Regulation No 40/94 on the Community trade mark, cited above, leaves untouched national laws relating to trade marks; it merely establishes a specific protection system for the Community mark which coexists with national marks. Lastly, certain Community legislation in the matter is limited to establishing a minimum level of protection. In those circumstances, the Member States retain the right to enact more restrictive measures (see, for example, Article 18 of Council Regulation (EEC) No 823/87 of 16 March 1987 laying down special provisions relating to quality wines produced in specified regions (OJ 1987 L 84, p. 59)).

The *Spanish Government* also considers that the provisions of TRIPs relating to measures to be taken to ensure the effective protection of intellectual property rights, such as the guarantee of a fair and equitable procedure, the submission of evidence, the right to be heard, the giving of reasons for decisions, the right of appeal, interim and injunctive measures, steps taken by customs authorities on their own initiative, damages and criminal sanctions, fall within the competence of the Member States. The Community legal order contains no provisions in respect of those points.

Furthermore, the Spanish Government criticizes the Commission's reference to Article 36 of the Treaty. In its view, that reference is irrelevant. Article 36 is applicable solely to trade 'between Member States' and does not apply, therefore, to restrictions imposed on imports from non-member countries for reasons connected with the protection of intellectual property (see the judgment in Case 96/75 *EMI Records v CBS Schallplatten* [1976] ECR 913).

The *French Government* relies on the observations submitted by the Council.

However, it points out that, as regards patents, which are at the heart of the TRIPs Agreement, the Commission's view is open to criticism. It notes that the entire matter is governed, at European level, by international conventions, of which the main one in practice (the Munich Convention on the Grant of European Patents, cited above) goes beyond the framework of the Community, since seventeen European countries are parties to it.

The French Government further states that one of the specific features of TRIPs is that it operates in an area which has for many years been governed by very extensive multilateral conventions which continue to apply and are still administered by the specialized United Nations body, the World Intellectual Property Organization (WIPO). The Community has never sought to take the place of the Member States in those conventions, it is not a member of WIPO and it has not applied to

become one. If the Commission's view were accepted, the Member States would lose all parallel external competence and would henceforth no longer be able to conclude or administer bilateral or multilateral treaties in the areas covered by TRIPs.

As regards TRIPs, the *Portuguese Government* also refers to the Council's observations.

It merely stresses the point that, as is apparent from the Court's judgments in *EMI* and *Phil Collins*, cited above, it is for the Member States, as Community law stands at present and in the absence of Community measures for the harmonization of laws, to lay down the conditions and modalities for the protection of literary and artistic property. In its view, the Community harmonization measures adopted concern only a very limited part of the matters covered by the TRIPs Agreement (Section 3 of Part II, relating to the topographies of integrated circuits).

Lastly, the Portuguese Government emphasizes that the participation of the Member States is also necessary by reason of the presence, in Part III of TRIPs, of provisions relating to judicial procedures (Section 2 of Part III of TRIPs) and criminal procedures

(Section 5 of Part III of TRIPs), which are matters falling within the Member States' own competence.

The *Netherlands Government* considers that, to a great extent, TRIPs covers areas in which the Member States are competent, inasmuch as there has been no harmonization at Community level. It points out that the regulation on the Community trade mark leaves intact the national laws on trade marks and that, moreover, the rules laid down by the conventions on patents are of an intergovernmental nature.

Furthermore, it emphasizes that TRIPs covers matters in which the Member States have exclusive competence, in particular, Article

61 of the TRIPs Agreement, relating to criminal procedures. Unlike all the other Member States, the Netherlands Government refers to the provisions of Title VI of the Treaty on European Union, relating to cooperation in the fields of justice and home affairs. In its view, the intergovernmental conference, by dealing with the provisions relating to criminal law separately from those of the EC Treaty, clearly indicated that that field falls within the competence of the Member States.

According to the Netherlands Government, those reasons alone make it necessary for the Member States to participate in the conclusion of the TRIPs Agreement. Such participation is all the more important since it is only the Member States which can be held responsible for complying with the obligations arising in this regard under the agreement.

XIII. Problems in relation to the representation of certain dependent territories of the Member States which do not belong to the Community

With regard to the position of dependent territories whose external relations are the responsibility of certain Member States, there can be no doubt, according to the *Commission*, that the Member States concerned have the power to conclude the WTO Agreement on behalf of such territories, provided that those territories can themselves become parties to the WTO Agreement.

petent to conclude and perform the agreements on behalf of territories to which the treaties establishing the European Communities do not apply, that is to say, overseas territories.

The *Council* states that, in so far as concerns GATT, certain Member States remain com-

The *United Kingdom* points out that it alone has the power to conclude the WTO

Agreement on behalf of such of its dependent territories as are not independent members of the WTO. It refers to Opinion 2/91, cited above (paragraph 35).

The *French Government* observes, also with reference to that Opinion, that, where the provisions of an international agreement fall outside the arrangements concerning the association of the overseas countries and territories, the Member States responsible for the international relations of those territories are competent to conclude that agreement.

There are numerous respects in which the WTO Agreement and the agreements annexed to it fall outside the arrangements concerning the association of the overseas countries and territories. First of all, by virtue of the substantive scope of the WTO agreements, specific sectors, such as the supply of transport services, but also intellectual property, fall at present outside the arrangements concerning association with the overseas countries and territories. Similarly, by virtue of the 'personal' scope of the WTO agreements, trade in products between the overseas countries and territories and non-member countries, and the establishment of, and provision of services by, nationals or undertakings of non-member countries, where they are not established within a Member State of the Community, do not fall within the scope of the provisions of the arrangements concerning association with the overseas countries and territories.

The *Netherlands Government* considers that, irrespective of the way in which competence is ultimately allocated between the Commu-

nity and the Member States, Member States having links with overseas countries and territories are at the very least empowered, with a view to defending the interests of those countries and territories, to conclude the WTO Agreement autonomously and, wherever that agreement is applied, to act in the best interests of those countries and territories.

It draws attention in that regard to the Court's decisions in Opinion 1/78, cited above, on the International Agreement on Natural Rubber and Opinion 2/91, cited above, on ILO Convention No 170.

It also refers to the declaration regarding the representation of the overseas countries and territories referred to in Article 227(3) and Article (5)(a) and (b) of the EC Treaty, which was adopted at the time of the conclusion of the Treaty on European Union. It interprets that declaration as applying to all the chapters of the Treaty on European Union.¹⁴ In its view, by virtue of that declaration, a

14 — 'This Conference, noting that in exceptional circumstances divergences may arise between the interests of the Union and those of the overseas countries and territories referred to in Article 227(3) and (5)(a) and (b), agrees that the Council will seek to reach a solution which accords with the position of the Union. However, in the event that this proves impossible, the Conference agrees that the Member State concerned may act separately in the interests of the said overseas countries and territories, without this affecting the Community's interests. The Member State concerned will give notice to the Council and the Commission where such a divergence of interests is likely to occur and, when separate action proves unavoidable, make it clear that it is acting in the interests of an overseas territory mentioned above.
This declaration also applies to Macao and East Timor.'

Member State which represents dependent territories internationally must ensure, as far as possible, that it does not act in a manner which runs counter to the general position

adopted by the Community in the matter. According to the Netherlands Government, those principles also apply in the context of the administration of the WTO Agreement.

XIV. Effect of the question of competence on how views are expressed within the WTO

The *Commission* states that it accepted that the Member States should become members of the WTO, since it was felt to be acceptable for political reasons to continue the situation as it existed in GATT, namely combined membership of the European Communities and the Member States, cemented by Community discipline as to the positions to be taken within GATT.

are specifically authorized so to do, or if they speak on behalf of one of their 'dependent territories'. That is, moreover, the position as it stands at present under GATT.

It considers that if the agreement is concluded by the Community alone, the Member States, which will become full members of the WTO in accordance with Articles XI and XIV of the WTO Agreement (see Part II above on the status of the European Communities in the WTO), will no longer be able to exercise fully their sovereign rights within the WTO and will instead be subject as WTO members to Community procedures under Article 113 or the other applicable provisions of the EC Treaty. The Commission will act as their spokesman and official positions in the WTO will be taken only on the basis of the procedures of Article 113 (or any other relevant article of the Treaty). Member States will be able to speak and take positions only to the extent to which they

The Commission maintains that if the Member States were to retain certain powers in relation to GATS or TRIPs, they might find themselves, like the Community, legally unable to exercise the right to take cross-retaliation measures. Thus, if a Member State, within its sphere of competence, had been duly authorized to take cross-retaliation measures but considered that they would be ineffective if taken in the fields covered by GATS or TRIPs, it would lack the power under Community law to retaliate in the area of trade in goods, since that area falls in any event within the exclusive competence of the Community by virtue of Article 113 of the Treaty. Conversely, if the Community were granted the right to retaliate in the goods sector but found itself incapable of exercising that right, it would be legally unable to retaliate in the services or

TRIPs sectors because the necessary powers would be reserved to the Member States.

third sentences of Article J.1(4)¹⁶ of the Treaty on European Union, Article 5 of the EC Treaty and the conditions laid down by the Court in its Opinion 2/91, cited above.

According to the Commission, to concede Member State competence under GATS and TRIPs could lead to situations which were unfair both to Member States and to the Community. For example, if a non-member country won the right to retaliate against the Community for an infringement of GATT or one of the goods agreements, but was ultimately authorized, in accordance with the procedure under Article 22 of the Dispute Settlement Understanding, to retaliate in the area of Member State competence under GATS or TRIPs, one or more Member States would be 'punished' for an infringement attributable solely to the Community. Similarly, the Community could be struck by retaliation in the goods sector for an infringement committed by one of its Member States under GATS or TRIPs.

The Council states that it is conscious of the legal obligation incumbent on the Community institutions and the Member States to find ways of ensuring common, coordinated and consistent action by the Community and the Member States. It concedes that it is not at present in a position to submit a text defining the forms of such participation. It claims that the responsibility for this lies with the Commission which, in view of its 'uncompromising' position on the Community's exclusive competence to conclude the WTO Agreement and its annexes, has refused to take part in any discussion of the problem.

The *Council* strongly disputes the claim that the determination of the means by which the Community and the Member States participate in the WTO is a political matter. In its view, joint participation by the Community and the Member States is legally justified and may take place in conformity with the principle of the consistency of the external activities of the Union, as enshrined in the second paragraph of Article C¹⁵ and the second and

In the Council's view, the problem is not an insuperable one. The Uruguay Round negotiations were conducted on behalf of the Community and the Member States in such a way as to ensure unity of action. The administration of the agreements within the WTO will probably be less complicated than the negotiations.

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

16 — By virtue of that article, the Member States 'shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council shall ensure that these principles are complied with.'

There is nothing to support the Commission's supposition that the requirements set out in the Treaty on European Union, the Treaties and the Court's case-law may be infringed in the future. Moreover, the Commission can use the legal means at its disposal (Articles 169 and 173 of the Treaty) to ensure that the acts of the Council and of the Member States are in conformity with Community law.

The Member States which have submitted observations fully endorse the Council's view.

The *United Kingdom* refers, first, to Opinion 2/91 and to the second paragraph of Article C of the Treaty on European Union, as the Council has done. It goes on to point out that the close association envisaged by those texts characterized the Uruguay Round negotiations. Those negotiations showed that a means of negotiating with non-member countries which recognizes the competence of the Community and the Member States can be found and can work effectively.

The *French Government*, noting that the number of votes held by the Community is directly and solely dependent on the Member States' membership of the WTO, considers, like the Council, that the Member States' membership is justified not by alleged political considerations but by the existence of the competence vested in them, in other

words, by the non-exclusive nature of the Community's competence to conclude the agreement.

The *Netherlands Government* refers to Opinion 2/91, to the duty to act in good faith in Community matters set out in Article 5 of the EC Treaty and to the need to ensure the consistency of the external activities of the Union, referred to in the second paragraph of Article C of the Treaty on European Union. It considers that the Council, the Community and the Member States could between them cover all aspects of the activities to be undertaken within the WTO, such as the mutual reconciliation of points of view, the exercise of the function of spokesman in the course of negotiations and intervention in the context of the resolution of disputes.

It points out that the formulation of such an arrangement, in compliance with the existing competence of the Community and of the Member States respectively, is an internal matter to be settled between the Community and the Member States, and does not in any way alter the fact that the Community does not have exclusive competence in the matters covered by the WTO Agreement.

The *Spanish Government* recognizes that it will be necessary, in the event of joint participation by the Member States of the Community in the conclusion of the WTO

Agreement and its annexes, to coordinate the present and future activities of the Community and the Member States within the new organization. It cites in that regard the same decisions (Opinions 1/78 and 2/91) and the same Treaty provisions as the other Governments which have submitted observations (duty to act in good faith in Community matters imposed by Article 5 of the EC Treaty).

The *Greek Government* merely points out that joint participation by the Community and the Member States in the decision-making procedures of the WTO can only work if there is compliance with the principle of the consistency of the external activities of the European Union, as enshrined in the second paragraph of Article C of the Treaty on European Union.

XV. Budgetary and financial matters

As regards the financial provisions of the WTO Agreement, the *Commission* observes that although the WTO's operating expenses are vital to the functioning of the organization, they do not occupy the crucial place in the agreement which the financial provisions had in the scheme of the Agreement on Natural Rubber considered in Opinion 1/78, cited above (paragraph 55). The WTO's budget is a mere consequence of the pursuit of the organization's general objectives.

Consequently, even if the payment of the assessed contributions had to be made by the Member States, that could not call in question the exclusive competence of the Community to conclude the WTO Agreement: the Member States would simply be performing on behalf of the Community international obligations which the latter alone was empowered to enter into.

Even if the Court were nevertheless to find that Member States may contribute in their

own right to the budget of the WTO, the Commission states that the mixed competence that would result from such a finding would remain restricted to the budgetary and financial aspects of the new organization.

The *Portuguese Government* considers that one of the decisive reasons why an international agreement may be concluded jointly but autonomously by the Community and the Member States lies in the national financing of the expenses arising from the application of the Treaty. That interpretation is confirmed in the Community case-law by Opinion 1/78.

The Portuguese Government points out that the Member States will finance the expenses arising from the establishment and functioning of the WTO, given that they are original

members of it (see Article XI of the Agreement establishing the WTO). In its view, that fact is enough to justify the participation of the Member States in the conclusion of the agreement, for two reasons.

The first is based on Community law: under Community practice one of the decisive reasons why an international agreement should be concluded by the Community and by the Member States is that the financing of the expenses arising from the application of the Treaty is a matter for the Member States.

Contrary to the Commission's assertions, the question whether or not financing occupies a crucial place in the scheme of the agreement (as it did in the Agreement on Natural Rubber which gave rise to Opinion 1/78) is not significant. A number of international agreements on commodities were concluded after delivery of Opinion 1/78 in the form of mixed agreements, because it was the national budgets which bore the financial responsibility, even though the contributions

were intended only to cover the expenses inherent in the functioning of the organizations set up to administer the agreements in question. Conversely, analogous agreements took the form of purely Community agreements, for the sole reason that they were to be financed from the Community budget.

The Portuguese Government advances a second reason, based on its own constitutional law, in favour of the participation of the Member States in the conclusion of the WTO Agreement. Under Article 164(j) of the Constitution of the Portuguese Republic, it is for the Assembly of the Republic to approve international treaties providing for the participation of Portugal in international organizations and, after that, for the President of the Republic to ratify them (see Article 137(b)). According to the Portuguese Government, the accession of Portugal to the European Communities cannot preclude the application of those constitutional provisions, at least where the participation of Portugal in international organizations involves financial contributions to be paid out of the national budget.

XVI. Replies proposed by the Commission, the Council and the Member States which have submitted observations to the questions asked in the request for an opinion

In the light of the foregoing considerations, the Commissions and the parties which have submitted observations propose that the questions put to the Court be answered as follows.

The *Commission* concludes that:

— The parts of the Agreement establishing the World Trade Organization (WTO)

concerning trade in goods, that is the GATT 1994 Agreement and related Annexes, fall within the Community's exclusive competence under Article 113 of the EC Treaty, with a possible exception probably for certain aspects of ECSC products;

circumstances of this matter, involving as they do an agreement which is not "envisaged" but already signed "subject to conclusion", the request for a (prior) Opinion is admissible. It considers in any event that the questions put to the Court by the Commission should be reformulated.

- The part of the WTO Agreement concerning trade in services (GATS) also falls within the Community's exclusive competence under Article 113 EC, or Articles 235 and/or 100a EC, and, if necessary, the principle of implied powers under the Opinion 1/76 doctrine and the *AETR* doctrine;

Substance

- The part of the WTO Agreement concerning trade in intellectual property rights (TRIPs) also falls within the Community's exclusive competence under Article 113 EC, or Articles 100a and/or 235, and, if necessary, the principle of implied powers under the Opinion 1/76 doctrine and the *AETR* doctrine.'

The Community has exclusive competence as regards almost the whole of GATT, apart from certain exceptions, particularly concerning the regime applicable to products covered by the ECSC Treaty and concerning overseas territories not covered by the Community Treaties. Moreover, the Community has exclusive competence, pursuant to the *AETR* judgment, with regard to certain specific aspects of GATS and TRIPs.

The *Council's* conclusions are as follows:

'Procedure

The Council leaves it to the Court of Justice to decide whether, in the particular

Furthermore, and above all, inasmuch as the Council has already decided not to exercise

the potential competence of the Community with regard to GATS and TRIPs, the competence of the Member States prevails in relation to a great many of the matters covered by those two agreements. Lastly, certain matters covered by GATS and TRIPs can in any event only fall within the sole competence of the Member States, as the Treaty stands at present'.

The Council proposes that:

'in so far as the request for an Opinion is admissible, the Court should reply to it as follows:

The joint conclusion by the Community and by the Member States of the agreements resulting from the Uruguay Round is compatible with the division of powers laid down by the Treaties establishing the European Communities'.

The *United Kingdom's* conclusions are as follows:

- '1. The Community is competent to participate in the conclusion of the GATS agreement pursuant to Articles 54, 57, 66, 75, 84, 99 and 100a of the EC Treaty.

2. The Member States are also competent to participate in the conclusion of the GATS agreement.

3. The Member States are competent to participate in the conclusion of the TRIPs agreement.

4. The Community is also competent to participate in the conclusion of the TRIPs agreement pursuant to Articles 100a, 113 and 235 of the EC Treaty.

5. The Member States are competent to participate in the conclusion of the Agreement establishing the World Trade Organization'.

The *French Government* 'requests the Court to state in reply to the request by the Commission that the conclusion of the WTO Agreement (together with the agreements annexed to it) falls both within the competence of the Community and within the

competence of the Member States and that, as regards the Community, the decision cannot be founded on a legal basis consisting solely of Article 113 or solely of Articles 100a, 113 and 235'.

The *Spanish Government* requests the Court to deliver an Opinion confirming the existence of shared competence between the Community and the Member States in the context of the Agreement establishing the World Trade Organization and finding, consequently, that that agreement is a mixed agreement.

The *Portuguese Government's* conclusions are as follows:

— The WTO Agreement, in so far as concerns the part relating to services, intellectual property rights and the regulation of trade in products covered by the ECSC Treaty, governs matters which fall in part within the concurrent or sole competence of the Member States.

— The financing of the operating expenditure of the WTO out of national budgets is a matter reserved to the Member States' own competence.

— In so far as the matters referred to in the WTO Agreement fall in part within the

competence of the Community and in part within that of the Member States, the form of a mixed agreement is not only compatible with the Community system of division of powers, as provided for by the basic Treaties, but is also the only form which can ensure unity and consistency in the international representation of the interests of the European Union and of the Member States within the World Trade Organization'.

The *German Government's* conclusions are that:

'the GATS and the TRIPs Agreement, the ECSC customs duties and the WTO Agreement must be concluded in the form of *mixed agreements*. They must be ratified by the Federal Republic of Germany'.

The *Danish Government* concludes that:

'the European Communities do not have ... exclusive competence to conclude the Agree-

ment establishing the World Trade Agreement'. The Greek Government

According to the Danish Government,

'expects the Court to uphold the views advanced by the Council'.

'the Member States may decide whether the Community should conclude the agreement. The Member States may also opt for the mixed form, so that the agreement is concluded both by the Community and by the Member States. In the Danish Government's view, the question of the implementation of the agreement should be a factor to be taken into account in that assessment. In the areas in which the Member States intend, at present or in the future, to implement the agreement on a national basis, it is not appropriate for the Community alone to conclude the agreement. That is the position with regard to certain parts of GATS and the TRIPs Agreement. As regards specifically the two areas covered by those two agreements, the Danish Government considers it necessary for mixed competence to be maintained and for there to be added to the agreement an indication of the requisite legal basis'.

In the event that the Court regards the Commission's request for an Opinion as admissible, the *Netherlands Government* considers that the conclusion of the WTO Agreement and its annexes falls within the joint competence of the Member States and of the Community.

The *European Parliament* proposes that the Court should:

- declare that the Agreement establishing the World Trade Organization must be concluded on the basis of the second subparagraph of Article 228(3) of the EC Treaty;
- declare, independently of the foregoing, that Article 113 of the EC Treaty does not constitute an adequate legal basis;
- declare that, if recourse is had to Article 235 of the EC Treaty or to the case-law of the Court of Justice, such recourse can under no circumstances be interpreted as giving rise to any legal obligation on the part of the Parliament to give its assent, even where the conclusion of the agreement, having regard to its content, would be unacceptable to the European Parliament'.

XVII. Questions put by the Court to the Commission, the Council and the Member States, and the answers given to those questions

The Court decided to put the following questions to the Commission and to the parties who have submitted observations.

acceptance that the Member States were competent to conclude GATS.

A. Question 1

The *Commission* is requested to reply to the argument based by the Council on the way in which the list of specific commitments submitted on behalf of the Community and the States was drawn up. It is clear from examination of that document that the conditions laid down for the removal of restrictions on the access to the market for services and the limitations on removal vary from one Member State to another.

The variations between the different Member States in the conditions laid down for the removal of restrictions on access to the market in services from one Member State to another are attributable to the methodology adopted by GATS and to the incomplete nature of Community harmonization.

The Commission states in reply that in its view the way in which the list of commitments submitted by the Community was drawn up, its contents and its title have no bearing on the determination of Community competence.

The fundamental objective of GATS is the liberalization of international trade in services. However, with a view to providing flexibility, the Members of the WTO are authorized by Articles XVI and XVII of GATS to lay down limitations and conditions in their lists of specific commitments. For reasons of transparency, it was considered preferable to list the types of existing restrictions rather than to set out a general 'standstill' clause.

It agreed that the list should be submitted on behalf of the Community and its Member States solely in order to allay the latter's fear that they would not qualify as members of the WTO unless an offer of commitments in respect of services was submitted on their behalf. That concession, which was purely a matter of policy, did not constitute any

The lists of existing restrictions vary from Member State to Member State because

complete Community harmonization has not been achieved and because the Member States still have concurrent competence in the domestic sphere. However, it does not follow that external competence is also shared.

The field of goods offers a striking example of exclusive external Community competence superimposed on partly concurrent domestic competence. For example, the rules on technical barriers to trade continue to fall partly within the competence of the Member States at domestic level, whilst the Community has exclusive competence in the international sphere on the basis of Article 113 of the Treaty. That is the provision pursuant to which the Community concluded the GATT Code on Technical Barriers to Trade. If a schedule of the position in respect of technical standards and norms applicable to goods, comparable to the list of commitments in the field of services, were to be drawn up today, the variations would be considerable. That does not call in question, however, the Community's exclusive competence to conclude an international agreement aimed at liberalizing that sphere. The Community concludes from this that it is not possible to found any argument on the way in which the lists of specific commitments have been drawn up, or on the contents of those lists, in determining the respective competence of the Community and of the Member States to conclude GATS.

B. Question 2

According to the Commission's summary of Opinion 1/76, the authority of the Commu-

nity to enter into international commitments is not limited to the eventuality where the internal powers have already been used but may also exist where the internal Community measures are adopted only after the international commitments are concluded and made enforceable. The *Commission* is requested to indicate the internal measures whose adoption is envisaged following the conclusion and implementation of the GATS and the TRIPs.

The Commission points out that it submitted, in its proposal for acts implementing the results of the Uruguay Round, recently transmitted to the Council, that there should be:

- an amendment of Articles 5 and 29 of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1);
- modifications to the Council regulations relating to the protection of the geographical indications in respect of wines, aromatized wines and spirits (Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organization of the market in wine (OJ 1987 L 84,

p. 1); Council Regulation (EEC) No 1567/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks (OJ 1989 L 160, p. 1); and Council Regulation (EEC) No 1601/91 of 10 June 1991 laying down general rules as to the definition, description and presentation of aromatized wines, aromatized wine-based drinks and aromatized wine-product cocktails (OJ 1991 L 149, p. 1));

— a decision extending to natural and legal persons from the WTO member countries the protection provided by Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products (OJ 1987 L 24, p. 36);

— a modified proposal for a regulation laying down measures to prohibit the release into free circulation, export or transit of counterfeit and pirated goods.

The Commission further states that, at present, it is restricting its proposals solely to measures which are absolutely necessary for the proper implementation of the WTO Agreement and its annexes. For that reason, it does not anticipate introducing Community measures for the implementation of GATS until a later date.

C. Question 3

1. The Commission has stated that no provision in the chapters of the EC Treaty on the right of establishment and the freedom to provide services obliges the Community legislature to make purely internal use (that is, with regard to nationals of the Member States) of the powers conferred on it by those chapters. The Commission is requested to indicate the cases in which, and the considerations on the basis of which, the Community legislature has already made use of those powers with regard to nationals of third countries.

The Commission has supplied a list of thirty three acts of secondary legislation involving an external aspect. Some were adopted in the fields of banking, finance, insurance and telecommunications, on the basis of Articles 54, 57(2) or 66 of the Treaty. Others were adopted in the field of transport, on the basis of Article 84(2) of the Treaty. The most important acts cited by the Commission may be grouped in the following categories:

(a) Certain acts of secondary legislation provide that they are also to apply to Community branches of non-member country companies or even lay down specific provisions in relation to them.

See:

— Article 3 of Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State having their head offices outside that Member State regarding the publication of annual accounting documents (OJ 1989 L 44, p. 40), which is based on Article 54 of the Treaty;

— Article 7 of the Eleventh Council Directive (89/666/EEC) of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36), which is based on Article 54 of the Treaty;

— Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, which is based on Articles 57(2) and 100a (OJ 1991 L 166, p. 77);

— Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ 1994 L 135, p. 5), which is based on Article 57(2) of the Treaty. Article 6 of that directive provides that Member States are to check that branches established by a credit institution which has its head office

outside the Community have cover equivalent to that prescribed in that directive. Failing that, Member States may require that such branches join deposit-guarantee schemes in operation within their territories.

(b) In financial matters, the Community rules apply to all securities which are admitted or are the subject of an application for admission to official listing on a stock exchange situated or operating within a Member State, even where their issuer is established in a non-member country.

See:

Article 1 of Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing (OJ 1979 L 66, p. 21) and Article 1 of Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing (OJ 1980 L 100, p. 1), both of which are based on Articles 54(3)(g) and 100 of the Treaty.

(c) In a very similar manner, one directive applies to non-member country companies

the shares of which are admitted to official listing on a Community stock exchange.

See:

Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing (OJ 1982 L 48, p. 26), which is based on Articles 54(3)(g) and 100 of the Treaty.

Another directive applies to non-member country companies which acquire or dispose of a major holding in a company incorporated under the laws of one of the Member States and the shares of which are admitted to official listing on a Community stock exchange.

See:

Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of (OJ 1988 L 348, p. 62), which is based on Article 54 of the Treaty.

(d) The 'television without frontiers' directive requires each Member State to ensure

that all television broadcasts transmitted either by broadcasters under its jurisdiction or by broadcasters who, while not being under the jurisdiction of any Member State, make use of a frequency or a satellite capacity granted by, or a satellite up-link situated in, that Member State, comply with the law applicable to broadcasts intended for the public in that Member State.

See:

Article 2 of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), based on Articles 57(2) and 66 of the Treaty.

(e) Certain acts of secondary legislation empower the Community to cooperate with the authorities of non-member countries with a view to strengthening the effectiveness of Community law.

See:

— Council Directive 92/30/EEC of 6 April 1992 on the supervision of credit institutions on a consolidated basis (OJ 1992 L 110, p. 52), which is based on Article 57(2) of the Treaty. Article 8 empowers the Council to conclude

agreements with non-member countries with a view to agreeing the means of exercising supervision on a consolidated basis over credit institutions the parent undertakings of which have their head offices situated in a non-member country and over credit institutions situated in non-member countries the parent undertakings of which, whether credit institutions or financial holding companies, have their head offices in the Community;

- Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing (OJ 1989 L 334, p. 30), which is based on Article 100a of the Treaty. Article 11 empowers the Community to conclude agreements with non-member countries on the matters governed by the directive.

(f) Certain acts of secondary legislation empower the Community to conclude agreements with one or more non-member countries with a view to agreeing rules which are more favourable to the Community branches of companies from those non-member countries than those normally prescribed by those acts of secondary legislation, provided that comparable treatment is afforded to branches of Community companies in those non-member countries (principle of reciprocity). The Commission refers in that regard to:

- Article 9(3) of the First Council Directive (77/780/EEC) of 12 December 1977 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of

credit institutions (OJ 1977 L 322, p. 30), which is based on Article 57 of the Treaty;

- Article 32 of the First Council Directive (79/267/EEC) of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (OJ 1979 L 63, p. 1), which is also based on Article 57 of the Treaty;

- Article 29 of the First Council Directive (73/239/EEC) of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3), which is based on Article 57(2) of the Treaty. Pursuant to Article 29 of that directive, an agreement has been concluded with the Swiss Confederation on the basis of Articles 57(2) and 235 of the Treaty (OJ 1991 L 205, p. 2).

(g) Other acts of secondary legislation provide for the organization of a permanent procedure for assessing the access to the markets of non-member countries which is

granted to Community economic operators. Whenever it appears that Community undertakings are not being granted market access comparable to that granted by the Community to non-member country undertakings, the Commission may enter into negotiations with the non-member country in question with a view to remedying the situation, or even propose to the Council that access to the Community market be closed to the Community subsidiaries of companies from that non-member country.

The Commission refers in that regard to:

— Articles 8 and 9 of the Second Council Directive (89/646/EEC) of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC (OJ 1989 L 386, p. 1), which is based on Article 57(2) of the Treaty;

— Article 4 of Council Directive 90/618/EEC of 8 November 1990 amending, particularly as regards motor vehicle liability insurance, Directive 73/239/EEC and Directive 88/357/EEC which concern the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (OJ 1990 L 330, p. 44);

— Article 8 of the Second Council Directive (90/619/EEC) of 8 November 1990 on

the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (OJ 1990 L 330, p. 50);

— Article 7 of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27), which is based on Article 57(2) of the Treaty.

(h) In the financial sphere, Council directives authorize the Community to conclude agreements with non-member countries with a view to recognizing, subject to reciprocity, prospectuses drawn up and scrutinized in accordance with the rules of those non-member countries for the purposes of admission to stock exchange listing of a public offer.

See:

Council Directive 87/345/EEC of 22 June 1987 amending the abovementioned Directive 80/390 (OJ 1987 L 185, p. 81), which is based on Article 54(2) of the Treaty, and Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public (OJ 1989 L 124, p. 8), which is based on Article 54 of the Treaty.

(i) In the field of public procurement, one directive provides that any tender made for the award of a supply contract may be rejected where the proportion of the products originating in non-member countries exceeds 50% of the total value of the products constituting the tender, unless the Community has concluded with that non-member country an agreement ensuring comparable and effective access to its markets for Community undertakings.

See:

Article 29 of Council Directive 90/531/EEC of 17 September 1990 on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, which is based on Articles 57(2), 66, 100a and 113 of the Treaty (OJ 1990 L 297, p. 1).

Pursuant to Article 29 of that directive, the European Community has concluded an agreement in the form of a memorandum of understanding with the United States of America on government procurement. That agreement ensures comparable and effective access for Community undertakings to the markets of the United States of America as regards the award of contracts for supplies and works by its contracting entities in the electrical power sector (see Council Decision 93/323/EEC of 10 May 1993 approving the agreement (OJ 1993 L 125, p. 1) which is based on Article 113 of the Treaty, and Council Decision 93/324/EEC of 10 May 1993 concerning the extension of the benefit of the provisions of Directive 90/531/EEC in respect of the United States of America (OJ

1993 L 125, p. 54), which is also based on Article 113 of the Treaty).

Another directive provides that, whenever the Commission establishes that, with regard to the award of contracts for services, a non-member country does not grant Community undertakings effective access comparable to that granted by the Community to undertakings from that non-member country, it may propose that the Council decide to suspend or restrict the award of contracts for services to:

- undertakings governed by the law of the non-member country in question;
- undertakings affiliated to the undertakings specified in (a) and having their registered office in the Community but having no direct and effective link with the economy of a Member State;
- undertakings submitting tenders which have as their object services originating in the non-member country in question.

See:

Article 37(3) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), which is based on Articles 57(2), 66, 100a and 113 of the EEC Treaty.

(j) In the field of maritime transport, one regulation lays down the procedure which is to be followed in order to respond to unfair pricing practices by certain non-member country shipowners engaged in international cargo liner shipping.

See:

Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport (OJ 1986 L 378, p. 14), which is based on Article 84(2) of the Treaty.

Another regulation lays down the procedure which is to apply when action by a non-member country or by its agents restricts or threatens to restrict free access by shipping companies of Member States or by ships registered in a Member State (Article 1). It applies to shipping companies of a non-member country which operate a service between their own country or another non-member country and one or more Member States (Article 2). Article 4(1)(b) authorizes the coordinated adoption of counter-measures against such companies.

See:

Council Regulation (EEC) No 4058/86 of 22 December 1986 concerning coordinated action to safeguard free access to cargoes in ocean trades (OJ 1986 L 378, p. 21), which is based on Article 84(2) of the Treaty.

2. More generally, the Commission is requested to expand, for the eventuality that competence is limited to nationals of the Member States, as the Council and certain of the States taking part in the procedure have contended, the arguments enabling external competence covering the treatment to be given to nationals of third countries to be deduced from internal competence as so limited.

As a preliminary point, the Commission observes that GATS and the EC Treaty are both founded on the principle of non-discrimination and have recourse to the same legal means in order to achieve their aim of liberalizing the supply of services. Thus, Articles 52 and 59 of the Treaty prevent the Member States from taking measures which would prejudice the principle of non-discrimination based on nationality, whilst GATS prohibits its members from discriminating between the nationals of different members (most-favoured-nation clause) and from treating national and foreign suppliers of services differently as regards market access and the conditions governing the exercise of their activities (market access and national treatment clauses).

For that reason, if it were acknowledged that the Community has external competence to conclude GATS on the basis of the idea of parallelism of competence, that would not mean that the Community's external powers are wider in scope than its internal powers, but rather that their scope is comparable, and possibly narrower.

Next, the Commission relies on two arguments in favour of external Community competence encompassing the treatment of nationals of non-member countries: first, the need for external action and, second, the risk that Community rules would be affected.

As regards the need for external action, the Commission observes that the economic advantages afforded by the Treaty to Community service suppliers have, with the completion of the internal market, almost reached their full extent. It is the liberalization of trade in services with non-member countries which now offers the best prospects for maintaining the economic development of the Member States. According to the Commission, the Community cannot seek to win commercial advantages for its economic operators in the markets of non-member countries unless it is able in return to offer service suppliers in non-member countries comparable advantages in the common market, which means that it must be competent to regulate their access to the common market.

To illustrate the close interdependence between those two aspects of Community action, the Commission gives two examples: the agreement between the European Economic Community and the Swiss Confederation of 10 October 1989 on direct insurance other than life assurance and the Second Banking Directive. Article 1 of the agreement concluded with the Swiss Confederation states that its object is 'to lay down, on a reciprocal basis, the conditions which are necessary and sufficient to enable agencies and branches of undertakings whose head

office is situated in the territory of one of the Contracting Parties and which wish to become established in the territory of the other Contracting Party, or which are established there, to take up or pursue the self-employed activity of direct insurance other than life assurance'. The Second Banking Directive provides that applications for the authorization of Community subsidiaries of non-member country credit establishments may be suspended, with a view to giving the Community a means of negotiating effective access to the market in the non-member countries concerned for subsidiaries of Community credit institutions incorporated in those countries.

The second argument advanced by the Commission is that if the Community's internal competence were confined to nationals of the Member States, the principles of freedom of establishment and freedom to provide services could be affected.

First, the provision of services and competition could be distorted if a Member State were able to determine, in respect of nationals of non-member countries, the rules governing access to its market and the pursuit of self-employed activities. For example, the Member State which was most liberal in the banking and insurance fields would draw in the majority of the suppliers of those services from non-member countries by laying down conditions which were less strict than Community law (with regard to minimum share capital, technical reserves, solvency margins and so forth); and insured persons

residing in the less liberal Member States would turn away from the insurance companies established in those States in favour of insurance companies operating in the most liberal Member State.

Next, there would be a risk that fundamental principles of Community law would be affected, whether or not there was any Community harmonization. For example, as regards the recognition of professional qualifications, if a Member State established a system which was more favourable to nationals of non-member countries than that applying to Community nationals, it would hinder the right of establishment and freedom to provide services enjoyed on its territory by the nationals of other Member States. Furthermore, such rules would be contrary to the principle of Community preference or consistency, and even to Article 5 of the Treaty.

D. Question 4

The *Council* considers that the chapters of the EC Treaty on the right of establishment and on services are essentially silent as to the treatment of nationals (companies and natural persons) of third countries. Subsequently, with regard to the form of supply by 'commercial presence', according to the GATS terminology, the Council draws a distinction between the subsidiaries of a company of a third State and mere branches of a company of a third State. The Council is requested to clarify its position.

As a preliminary point, the *Council* informs the Court that it approved, at the Council Meeting (General Matters) in Luxembourg on 4 October 1994, a draft decision regarding the conclusion of the Uruguay Round agreements, which was sent to the European Parliament so that the latter could decide on the position which it wished to adopt in the context of the assent procedure. That draft decision may possibly be revised in the light of the opinion to be delivered by the Court on 15 November 1994. For the time being, the Council holds the view that the legal basis of Community competence lies in Articles 43, 54, 57, 66, 75, 84(2), 99, 100, 100a, 113 and 235, in conjunction with the second subparagraph of Article 228(3), of the EC Treaty.

Following the hearing on 11 October 1994, the Council communicated to the Court the 'code of conduct' agreed between the Council, the Member States and the Commission on the 'post-Uruguay Round' negotiations on services. The text of that code is as follows:

'1. With regard to the negotiations on trade in services provided for in the Ministerial Decisions made at Marrakech on 15 April 1994 and in any other discussions on trade in services conducted under the authority of either the Preparatory Committee or of the Council for Trade in Services of the World Trade Organization, it was agreed that, while

reserving positions concerning a new mandate and the question of distribution of competences and without prejudice to the results of the Commission's request to the Court for its opinion on competence, the Commission should continue:¹⁷

(a) to negotiate on behalf of the Community and the Member States in the abovementioned negotiations and discussions;

(b) to inform the Member States as far in advance as possible of the time and place of all discussions and negotiations to be held with other parties either in the context of formal negotiating groups or otherwise, when Member States have not been informed directly;

(c) to express positions reached on all issues according to the relevant decision making procedures;¹⁸

(d) to ensure that representatives of all Member States are in a position to attend all substantive meetings and negotiations,

noting that the Member States may ask the Presidency to attend on their behalf;

(e) to circulate promptly to the Member States any notes, formal or informal, produced by the GATT Secretariat and other participants, including the Commission itself, which have not been sent to the Member States directly.

2. The Council resolves to review regularly the progress of the negotiations on the basis of reports by the Commission submitted in good time, so that the Council may hold its deliberations after due preparation. The Council will further consider the formulation of negotiating objectives for each sector of services, and reserves its right to give the Commission the appropriate directives in due time.'

The Council considers that the chapters of the EC Treaty on the right of establishment and on services are essentially silent as to the treatment of nationals (natural and legal persons) of non-member countries because it is clear, in its view, from the very wording of Articles 52 et seq., 59 et seq. and 221 that the EC Treaty does not impose any obligation on the Member States in relation to the way in which they are to treat nationals of non-member countries.

17 — The following declaration will be entered in the minutes of the Council: 'The Council, the Member States and the Commission agree that paragraph 1 of this Code of Conduct does not prevent the Commission from exploring, on its own responsibility, solutions on all issues under negotiation'.

18 — The following declarations will be entered in the minutes of the Council:
(a) 'The Council declares that the phrase in paragraph 1(c) "The relevant decision making procedures" means, in the case of national competence, consensus';
(b) 'The Commission declares that, in implementing the relevant decision making procedures, every effort should be made to reach consensus.'

The Council uses an example to illustrate its reasoning: the privatization of a public undertaking providing services.

In the absence of any Community harmonization measures in that sphere, Member States remain competent to lay down the conditions governing privatization. In exercising that competence, however, Member States must comply with the conditions and limitations imposed on them by the relevant provisions of the Treaty (for example, the principle of non-discrimination on grounds of nationality applying to companies by virtue of Article 58). A distinction must be drawn in that regard between companies incorporated in Member States and 'foreign' companies, that is to say, those incorporated in non-member countries. Where national laws prescribe the conditions governing participation by private companies in the capital of the undertaking to be privatized, therefore, they must not discriminate between companies incorporated in the Member States on the grounds of their 'nationality'. With regard to foreign companies, on the other hand, the competence of the Member States is unfettered and may be exercised without any rule of Community law being applicable.

The Council uses the same example to explain the distinction drawn by it between subsidiaries and branches or agencies of companies of non-member countries with regard to the supply of services through a 'commercial presence'.

According to the Council, where a non-member country company has two subsid-

aries established in different Member States, the Member State which undertakes the privatization will be unable, by virtue of Article 58 of the EC Treaty, in conjunction with Article 52, to discriminate between those two subsidiaries when determining the conditions governing participation by private companies in the share capital.

If, on the other hand, a non-member country company has only branches or agencies (not having, therefore, their own legal personality) in the Member States, Article 58, which applies only to companies, will not apply and the Member State carrying out the privatization will be able to treat those various branches or agencies in a different way.

E. Question 5

The *United Kingdom* states that no provision of the Treaty relates to the first establishment of natural or legal persons who are nationals of third countries and seek to provide services within the Member States. However, it states that the Community institutions have adopted measures to lay down 'rules in respect of ... the exercise by the Community of external competence as regards the establishment of nationals of third countries in the Community'. The *United Kingdom* cites in this regard the directives adopted on banking and on insurance. The *United Kingdom* is requested to state how it reconciles that practice (which it

does not dispute) with the position of principle it adopts elsewhere regarding the scope of the chapters on establishment and the freedom to provide services.

The *United Kingdom* states that the chapters of the EC Treaty on establishment and services make no specific provision for internal competence of the Community as regards the first establishment of nationals of non-member countries in the Member States.

The sole objective of the chapter on establishment is to secure the rights of establishment of nationals of a Member State in the territory of another. The objective of the chapter on freedom to provide services is to secure that freedom for nationals of a Member State who are established in another Member State of the Community. Those chapters do not seek, therefore, the attainment of any specific objective, within the meaning of the Court's case-law on international competence, which is capable of founding any implied international competence to conclude agreements with non-member countries.

There is in that regard a contrast between, on the one hand, the chapters on establishment and freedom to provide services and, on the other, the chapters relating to transport.

In Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279, the Court held that certain provisions of the EEC Treaty and of the Act of Accession, together with Council Regulation No (EEC) 2142/79 of 20 October 1970 on the common organization of the market in fishery products (OJ, English Special Edition, 1970 (III), p. 707), vested internal competence in the Community to regulate fishing on the high seas with a view to conserving their biological resources. The Court considered that it followed from the very duties and powers which Community law had established and assigned to the institutions of the Community at internal level that the Community had authority to enter into international commitments for the conservation of the biological resources of the high seas. The *United Kingdom* observes that the jurisdiction of each State over the high seas is confined to ships which fly its flag, and that fish stocks are migratory. Consequently, conservation measures adopted by one State (or by the Community in respect of all waters under the sovereignty or jurisdiction of its Member States) are liable to be rendered nugatory if corresponding measures are not taken by neighbouring States. It follows that, of its nature, conservation of the resources of the seas may only be achieved by the conclusion of international agreements between the parties having jurisdiction over those waters.

The *United Kingdom* notes that the Court was able, in the *AETR* judgment, to infer internal competence from Articles 74 and 75 of the EEC Treaty by basing its findings on Article 75(a), which is 'equally concerned with transport from or to third countries, as regards that part of the journey which takes

place on Community territory'. The Court concluded that 'the powers of the Community extend to relationships arising from international law, and hence involve the need in the sphere in question for agreements with the third countries concerned'.

On the other hand, the basis of Community external competence to conclude GATS is to be sought not in the provisions of the Treaty on establishment and services but in the secondary legislation adopted under the chapters on establishment and services.

The fact that the chapters on establishment and services define no specific objective as regards the first establishment of nationals of non-member countries or their freedom to provide services does not preclude the Community from adopting, in certain circumstances, acts concerning nationals of non-member countries. The United Kingdom indicates two situations in which it may do so.

First, where the Council adopts internal rules with a view to facilitating the exercise by nationals of the Member States of their rights to freedom of establishment and freedom to provide services, those internal rules may also regulate the situation of nationals of non-member countries, in so far as may be necessary to secure the effective exercise of the aforementioned rights by nationals of the Member States in the conditions laid down by the Treaty for the operation of the internal market. The United Kingdom gives

two examples in that regard. With a view to facilitating the exercise of the right of establishment by nationals of Member States, a directive has allowed members of their families who are nationals of non-member countries a right of entry and residence. The other example concerns the extension of the rules applicable to branches of companies with head offices in Member States to branches of companies with head offices in non-member countries. The United Kingdom refers in that regard to the Eleventh Council Directive on company law, Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

Second, internal rules may expressly provide for the Community to have external competence in respect of matters covered by those internal rules. Thus, the internal rules may make provision for the conclusion of agreements with non-member countries providing that branches of non-member country companies are to be treated in the same way in different Member States, or for the conclusion of agreements with non-member countries providing that branches of companies which are nationals of Member States are to enjoy treatment no less favourable than that accorded to branches of non-member country companies in the Community. The United Kingdom refers in that regard to the provisions of the First and Second Banking Directives, cited above, and to the provisions of the First Council Directive (79/267/EEC)

of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life insurance (OJ 1979 L 63, p. 1), with which it deals in greater detail in its written observations (Part XII. B.2.(i)).

Finally, the United Kingdom points out that where the Community has laid down internal rules under the chapters on establishment and services which themselves constitute exclusive harmonization measures, but has not made specific provision for the exercise of international competence, it follows from the case-law of the Court that the Community may derive implied international competence on the basis of those rules themselves (see the *AETR* judgment, cited above). Where, however, the relevant internal rules do not amount to measures of exclusive harmonization, the external competence derived from the the exercise of internal competence is not exclusive either.

F. Question 6

Neither the *Council* nor the *States which have submitted observations* have replied to the arguments put forward by the Commission to show the need for external action by the Community and by the Community alone. They are requested either to reply to those arguments or to state why they consider a reply is unnecessary.

The *Council* points out the problems which it has encountered in understanding the arguments expounded by the Commission to show the need for external action by the Community and by the Community alone. For the rest, it has not considered it necessary to reply expressly to those arguments, for the following reasons.

First, the Council observes that the precedent relied on by the Commission in support of its argument as to the necessity of the Community alone participating in the GATS Agreement is that of the 'Europe agreements' with the countries of central and eastern Europe, which were, in actual fact, concluded jointly by the Community and the Member States.

Next, the Council considers, as does the European Parliament, that the Commission is confusing two separate issues, namely that of the legal framework to be respected by the Community legislature and that of the criteria of political expediency pursuant to which the Community legislature might (or might not) decide to act and the scope of its action.

Lastly, according to the Council, the Commission's argument as to the risk of disparity in the international actions of Member States which would arise if the latter concluded GATS and TRIPs on the basis of their own competence is founded on an erroneous presentation of the facts.

The Council maintains that, until now, the competence of the Member States in very many of the areas covered by the two agreements has not been disputed and has been consistently exercised at international level (for example, conventions concluded under the aegis of WIPO). This has not prevented the progressive development of internal Community law and of international action by the Community.

The *Danish and Greek Governments* have not made any detailed comments to the Court on this question.

According to the *German Government*, if the Commission's submission in the alternative that the Community is under an obligation to act, using the powers conferred on it by Articles 100a and 235 of the EC Treaty, were accepted, the situation would be contrary to Article 4 of the EC Treaty and would lead to an amendment of that Treaty. The Federal Government invokes the institutional problems to which that situation would give rise, having regard to the considerations expounded by the Bundesverfassungsgericht in its judgment of 12 October 1993 on the ratification of the Treaty on European Union, particularly part C II 3b, which states:

'The Union Treaty draws a distinction of principle between, on the one hand, the exercise by the public authorities of competence defined restrictively and, on the other, the revision of the Treaty; the interpretation of the Treaty cannot, therefore, lead to a result amounting to its extension; such an interpre-

tation of rules of competence would not be binding on Germany.'

According to the *Spanish Government*, the arguments expounded by the Commission to show the need for external action by the Community and by the Community alone run counter to the principle of the specific conferral of powers which is set out in Articles 3b and 4(1) of the EC Treaty. A finding that there is a need for common external action cannot in itself constitute the basis of exclusive Community competence if such competence has not been conferred on the Community by the Member States. To accept the contrary argument would be tantamount to amending the Treaty, in breach of the procedure laid down for that purpose by Article N of the Treaty on European Union. The Spanish Government further states that the doctrine of parallelism of internal and external competence, as developed in the case-law of the Court, does not mean that, in areas in which the Community has no internal competence, it can acquire such competence by virtue of an external agreement and thus adopt legislation at internal level in areas in which it was previously unable to do so.

The *French Government* considers that Articles 100a and 235 of the Treaty, upon which the Commission relies in the alternative in support of its argument that the Community has exclusive competence, leave the Council a wide discretion to assess whether the conditions for their application are satisfied.

The French Government observes in that regard that, in most of the sectors covered by TRIPs and GATS, the pre-existing Community rules remain unaltered. Nor is there any need for action by the Community alone in order to achieve the objectives of the Community. Save for very few isolated exceptions, those agreements will not be implemented by the Community; the Member States will retain their competence in relation to a great many of the matters covered. The French Government therefore contends that the conclusion of the WTO Agreement by the Community alone is neither necessary nor possible.

According to the *Netherlands Government*, the reasoning expounded by the Commission to show the need for external action by the Community and by the Community alone fall within the scope of a policy envisaged, *de lege ferenda*, by the Commission. As Community integration stands at present, however, it cannot result from the application of the principles of the *AETR* judgment.

The *Portuguese Government* considers that the external competence of the Community must be based on criteria of a legal nature and cannot depend on an assessment of the nature of, or degree of need for, common action. External competence may flow from provisions of the Treaty establishing internal competence in so far as the exercise of that external competence is regarded as necessary for the achievement of one of the Community's objectives and does not result in the Community arrogating to itself the power to take measures within the ambit of the Member States' own competence. The Portuguese Government also draws attention to the principle of the specific attribution of com-

petence, which it states is undermined by the Commission's position.

In those circumstances, the Portuguese Government considers that the need for external action by the Community is not enough to show that the Community has exclusive competence. It is common ground that the WTO Agreement, in its annexes relating to the GATS and TRIPs Agreements, covers matters falling in part within the competence of the Member States; consequently, the Commission's arguments seeking to demonstrate that the Community's competence in that sphere is exclusive merely reflect an assessment of a policy nature.

In reply to the Commission's argument that, if the Community and the Member States were held to be jointly competent to conclude an agreement, the cohesion of the internal market would suffer, competitive distortions would occur and competitive opportunities on markets of non-member countries would be artificially distorted, the *United Kingdom* emphasizes that a situation which the Commission chooses to present as a hypothesis was in fact the situation which prevailed in practice during the Uruguay Round negotiations. It was made clear at the outset and throughout the negotiations that they were being carried on without prejudice to the competence of the Community and the Member States in respect of particular issues. The negotiations were conducted by the Commission, which was to represent the

Community and the Member States. The interests of the Member States were protected by Community procedures designed to secure consensus. From the point of view of the Member States, the negotiations proceeded on the basis of the joint competence of the Community and the Member States. The outcome of those negotiations took full account of the interests of both the Community and the Member States.

the opportunity for that national to provide services or establish himself in any other Member State, because the chapters on establishment and services apply only to nationals of Member States.

The Commission cites, as an example of a sector in which competitive distortions could arise, the financial services sector. However, that hypothesis was put to the test in the course of the multilateral negotiations (the United Kingdom recalls that GATS has annexes on financial services). The United Kingdom states that there was manifested the very *balanced bargaining power* which the Commission claims is unobtainable in the absence of exclusive Community competence. It notes that, in point of fact, such notable difficulties as arose in connection with the negotiation of the GATS annexes on financial services also arose in reaching agreement within the Council on matters accepted as being within the exclusive competence of the Community (reciprocity for credit institutions pursuant to Article 9 of the Second Banking Directive).

The United Kingdom notes that the Commission nevertheless presses two points. The first is that the conclusion by the Member States of agreements with non-member countries would give rise to advantages in some States which would not accrue in others, which would be an unacceptable distortion of competition. The second point is that nationals of some Member States would secure advantages on the markets of non-member countries which would not be open to nationals of other Member States.

According to the United Kingdom, the Commission itself rightly acknowledges that services are not in free circulation in Member States. This means that access by a national of a non-member country to the market of one Member State does not of itself provide

The United Kingdom notes, however, that the possibility of Member States concluding agreements with non-member countries concerning the conditions for the pursuit of professional activities in their territory cannot be regarded as incompatible with the internal market. In Case C-154/93 *Tawil-Albertini* [1994] ECR I-451, the Court held that Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of

the formal qualifications of parctitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services (OJ 1987 L 233, p. 1) leaves intact the competence of the Member States to make international agreements with non-member countries in the matter. The exercise of such competence may affect the conditions of competition as between Member States, since a non-member country qualification may thus be recognized in one Member State but not in another. Equally, such a competence may lead to nationals of one Member State having their qualifications recognized in a non-member country, while the qualifications of nationals of another Member State are not recognized there, despite the fact that in the Community the qualifications are deemed to be equivalent. Such a situation, which reflects the distribution of competences between the Community and the Member States in the sector in question, cannot be regarded as incompatible *per se* with the internal market. The position must *a fortiori* be the same as regards the possibility of Member States concluding agreements with non-member countries on trade in services in sectors where no internal rules have been adopted.

On the other hand, where internal rules have been adopted in a particular sector, the Council may determine that the Commission should exercise exclusive external competence (see, for example, Article 9 of the Second Banking Directive). It is for the Council to determine, when laying down the internal rules governing a particular sector, whether or not to make provision for exclusive external competence on the part of the Community with respect to that subject-matter.

Where the Council determines that exclusive external competence be vested in the Community, this will tend to equalize conditions of competition both within the Community and, for nationals of the Member States, on the markets of non-member countries. Consequently, decisions on the scope of the external competence left to the Member States after the enactment of internal rules pursuant to the chapters on establishment and services are vested in the Community legislature. This is more appropriate than the Commission's approach, which is to draw the conclusion that the Community automatically derives exclusive external competence from the provisions of the Treaty itself. According to the United Kingdom, since the chapters on establishment and services do not of themselves identify a 'specific objective' apt to vest implied external competence in the Community, it is the internal rules adopted pursuant to those chapters which provide the basis for external Community competence in the sphere of services. However, those rules neither cover the whole field of economic activities covered by GATS nor exclusively harmonize the sectors which they do cover.

The Commission has maintained that joint competence, shared between the Member States and the Community, would undermine the internal market. It has stated, in support of that argument, that suppliers from a non-member country would be in a position to set up a company under the law of a Member State, which allowed them to do so, and then to establish agencies and branches in the other Member States, thus exposing nationals of those States to increased competition from companies from

the non-member country in question. The United Kingdom is not convinced by that argument.

First, a subsidiary established by a national of a non-member country in a Member State is subject to the national law of that Member State, and its agencies and branches are in turn subject to the laws of the Member States in which they are established.

Second, GATS does not result in 'off the shelf' companies set up in one Member State being a springboard into the markets of other Member States. The schedule of specific commitments provides, under the heading 'Limitations of National Treatment' that 'treatment less favourable may be accorded to subsidiaries (of third-country companies) formed in accordance with the law of a Member State which have only their registered office in the territory of the Community, unless it can be shown that they possess an effective and continuous link with the economy of one of the Member States'.

Furthermore, the establishment of a subsidiary is only one method of providing a service pursuant to GATS. Services may also be provided through agencies and branches. The establishment by nationals of non-member countries of agencies and branches in the Member States cannot have the consequences for the internal market which the Commission ascribes to the establishment by such nationals of subsidiaries in the Member States. The establishment of a branch or

agency of a non-member country company in a Member State does not entitle that branch or agency to become established or to provide services in the territory of any other Member State; yet, subject to the qualifications expressed above, GATS applies to establishment by agencies and branches just as it applies to establishment by subsidiaries.

Thus, it is not possible to argue that exclusive external competence exists by relying on the consequences arising from Article 58 of the Treaty in relation to nationals of non-member countries who become established in the territory of a Member State. Consequently, the Commission's argument based on Article 58 cannot in any event undermine the competence of the Member States as regards the application of GATS to establishment through agencies and branches in the Member States.

As regards the Commission's argument as to the possibility of cross-retaliation, the United Kingdom considers that the question of the respective competences of the Community and the Member States to conclude an international agreement cannot be determined by the scope of a single provision of that agreement, taken in isolation, but must be ascertained in the light of all its provisions. The mere existence of a provision as to cross-retaliation cannot have the effect of increasing the competence of the Community as regards the agreement on services, or

of diminishing the competence of the Member States as regards that same agreement.

discrepancies do turn out to exist between GATS and existing Community rules, such discrepancies would not exclude the competence of the Member States outside the scope of the Community rules in question.

In response to the Commission's argument that the conclusion of GATS by the Member States would affect or alter the scope of Community law because Community rules cover the whole of GATS, the United Kingdom states that this is wholly incorrect. Community internal rules do not regulate all economic activities in the field of establishment and services; where such rules do exist, they are often only measures of partial harmonization, or merely lay down minimum standards.

The United Kingdom expresses surprise at the Commission's assertion that, since GATS might in certain respects be inconsistent with primary or secondary Community law, the *AETR* principle ordains exclusive Community competence to conclude GATS. In negotiating GATS, the Commission's objective must have been to ensure that it was consistent with Community law. The Commission states that it took account in the negotiations of the existing corpus of Community law. The United Kingdom has the distinct impression that the Commission is striving assiduously to discover any incompatibility it can between GATS and Community law, so as to furnish itself with the pretext for claiming that the Community and the Community alone is competent to conclude GATS. What the Commission's argument does not do, according to the United Kingdom, is to show that any discrepancies between GATS and existing Community rules actually exist. In any event, even if such

In response to the Commission's argument that, if the TRIPs Agreement were also to be concluded by the Member States on their own behalf, that would be likely to affect or alter the scope of Community law, the United Kingdom, whilst accepting that the Community has competence as regards TRIPs, states that such competence exists to the limited extent that TRIPs is capable of affecting harmonization measures already adopted under Article 100a or the Community trade mark regulation adopted under Article 235. The United Kingdom observes that the point of difference between it and the Commission is not, therefore, whether the Community has external competence in the field of TRIPs, but whether that competence is exclusive.

Referring to the principles explained by the Court in Opinion 2/91, the United Kingdom considers that competence to conclude the TRIPs Agreement must be shared between the Community and the Member States, because most of the areas covered by TRIPs are either entirely untouched by Community

harmonization or subject to partial harmonization which is limited by express or implicit recognition of national intellectual property law.

domestic legislation or by entering into new international agreements which were not in accordance with Community law.

G. Question 7

The Commission has cited only one example of an area in which the minimum conditions laid down by TRIPs appear to be more restrictive than those contained in Community legislation (the conditions for granting compulsory licences of topographies of semiconductor products set out in Directive 87/54, cited above). The fact that TRIPs may affect or alter the scope of that directive is good reason for the Community to participate in the conclusion of the TRIPs Agreement. It cannot, however, justify the handing over to the Community of exclusive competence to conclude an agreement concerning, in large part, matters which the Community legislature has never addressed and over which the continued competence of the Member States is expressly acknowledged by the EC Treaty or by the applicable secondary legislation.

The *Commission* is requested to expand its arguments seeking to show that if there were joint participation of the Community and the Member States in the conclusion of the GATS and TRIPs Agreements, existing Community rules would be affected or altered.

According to the Commission, if it were accepted that joint competence exists in the field of banking, Community rules could be affected or altered, within the meaning of the *AETR* judgment, in three ways.

In reply to the Commission's assertion that for Member States to have power to act in the area covered by the TRIPs Agreement would lead to discrepancies and conflicts in their external regimes which could, in turn, impede existing or future harmonization at Community level, the United Kingdom states that the mere fact that the Member States share competence with the Community to conclude the TRIPs Agreement would not allow them in any circumstances to act inconsistently with existing Community rules, either by adopting inconsistent

First, if the Member States were able to determine their own specific commitments with regard to access to the business of banking on their territory, the provisions of the Second Banking Directive, cited above, in particular those relating to the harmonization of authorization conditions (Title II), would be affected. Furthermore, the negotiation mechanism laid down by Article 9 of the Second Directive with a view to securing for Community credit institutions access to the markets of non-member countries comparable to that granted to non-member

country companies in the Community market would be undermined. The situation would revert to that prevailing at the time when each Member State had its own system of reciprocity.

subject-matter, any commitment given by a Member State would render a Community commitment valueless.

Next, the Member States would be able, within the framework of their competence, to determine the type and level of their specific commitments. Consequently, several different levels of requirements could exist simultaneously: in relation to areas falling within the competence of the Member States, there would be a level A of specific commitments within GATS, and, as regards areas falling within Community competence, there would be, on the one hand, Community rules (level B) and, on the other, specific commitments made by the Community within the framework of GATS (level C). Since those three levels may be different, it is likely that the Community rules would be affected or altered within the meaning of the *AETR* judgment.

The Commission also refers to the question of exhaustion of intellectual property rights. It observes that, under TRIPs, it is for the members to determine their own rules on exhaustion, provided that they apply them in accordance with the most-favoured-nation principle and the principle of national treatment (see Article 6). Community law for its part applies the principle of Community exhaustion. Consequently, in the event of mixed competence, there could be three types of exhaustion existing simultaneously:

- within the framework of their competence, some Member States could apply the principle of international exhaustion as against non-member countries;
- the other Member States would adopt the principle of national exhaustion;
- and, in the areas falling within Community competence, all the Member States would in any event have to apply the principle of Community exhaustion.

Lastly, the Community rules on access to the banking market would be considerably devalued if each Member State were able to determine its commitments, which, like those of the Community, would have to be applied on the basis of the most-favoured-nation principle. That is particularly true in the areas in which mixed competence is claimed on the ground that the Community rules contain minimum provisions. Given that, in those circumstances, the competence of the Community and the competence of the Member States would relate to the same

Given that it will not always be easy to determine under which regime a product or service comprising an intellectual property right is imported into a Member State, actions for infringement of intellectual property rights could be brought in the Member States. There would be the risk of parallel imports being affected. The scope of the principle of freedom of movement would probably be affected or altered.

For example, if a product has been marketed in a non-member country by the holder of an intellectual property right, or with his consent, it will be possible for a parallel importer to import the product into those Member States of the Community which apply the principle of international exhaustion. However, the holder of the right will be in a position to oppose the importation of that product into those Member States which apply the principle of national exhaustion. It follows implicitly from the Court's judgment in *EMI v CBS*, cited above, that the holder of the right will be in a position to prohibit the importation of the product concerned into the other Member States from the Member State which applies the principle of international exhaustion, because the holder of the right would not in fact have consented to the first importation into the Community by the parallel importer. Consequently, it would not be possible to apply the principle of Community exhaustion. Harmonization seems thus to be necessary in this area and has already been undertaken with respect to certain intellectual property rights in such a way as to exclude the possibility of international exhaustion.

The Commission points out that GATS does not allow the unilateral modification of a

member's schedules of specific commitments during the first three years after its entry into force. Thereafter, if such a modification nullifies or impairs the rights of other members of GATS, they must be compensated (Article XXI). The Commission considers, therefore, that, in the event of mixed competence, the Member States could be tempted to oppose any further development of Community law, in order to avoid having to offer compensation to non-member countries. According to the Commission, the risk that Community law may be 'frozen' is such as to affect or alter Community law within the meaning of the *AETR* judgment.

The Commission further notes that Article V of GATS provides for a general derogation for economic integration agreements. However, some uncertainty exists as to the interpretation to be given to some of its provisions. There can be no absolute certainty that the Europe Agreements concluded with central and eastern European countries (see the Agreements concluded by the Community or Communities with the Republic of Poland, of 16 December 1991 (OJ 1992 L 348, p. 2), with the Czech and Slovak Federal Republic, of 16 December 1991 (OJ 1992 L 115, p. 2), with the Republic of Hungary, of 16 December 1991 (OJ 1992 L 347, p. 2), with the Republic of Bulgaria, of 8 March 1993 (OJ 1993 L 323, p. 2) and with Rumania, of 1 February 1993 (OJ 1993 L 81, p. 2)) fulfil the criteria of Article V. If certain agreements prove to be inconsistent with that provision, they may be maintained as preferential agreements only if a derogation from the most-favoured-nation principle were obtained. If the Member

States refused to allow an application for such derogation to be made, the benefits of those agreements would have to be extended, pursuant to the most-favoured-nation principle, to all GATS members.

The Commission also points out that Article 6 of Directive 87/54, cited above, on the topographies of semiconductor products lays down conditions for granting compulsory licences which are less stringent than those required by the minimum conditions of TRIPs. Relying on Opinion 2/91 (paragraphs 25 and 26), the Commission points out that the mere co-existence of international rules and Community rules covering the same subject-matter is liable to affect Community law, even in the absence of disparity between them.

Finally, the Commission observes that, because of the single package of the WTO Agreement and the cross-retaliation rule in the Dispute Settlement Understanding, an infringement by one Member State of one of the agreements annexed to the WTO Agreement could lead, in the event of mixed competence, to retaliation within the framework of another agreement, falling within the ambit of Community competence. The possibility of such cross-retaliation measures alone is such as to affect or alter Community law within the meaning of the *AETR* judgment.

H. Question 8

Section 3 of Part II of the TRIPs Agreement obliges each its members to protect the geographical indications of other members. The Council and the Commission state that in part Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (OJ 1992 L 208, p. 1) meets that requirement. The *Council* and the *Commission* are requested to state how that regulation can serve as a basis for protecting geographical descriptions and designations of origin of third countries.

The *Commission* states that, pursuant to Article 12, that regulation is also applicable to the geographical indications of non-member countries: those which fulfil the conditions laid down by the it (particularly as regards compliance with specifications and submission to inspection) may be granted, following the same procedure, the specific protection provided by Article 13 of that regulation.

The *Council* points out that Section 3 of Part II of TRIPs obliges each contracting party to provide protection to designations protected by other contracting parties. By its very logical basis, the application of the Agreement may compromise the protection provided by the Community rules.

By way of illustration, the Council cites the example of a complaint by the Republic of Hungary, a WTO member, that the protection given by the Community to the designation 'Tokay' is contrary to TRIPs because it should be reserved to wines produced in the Hungarian region of Tokay. Since the designation 'Tokay' is protected by Community law, the Council considers that the Community, and not the Member States, would be competent to contest the Republic of Hungary's claims in the context of such a dispute.

However, the Council acknowledges that the question of protecting the geographical indications of non-member countries may also arise where Community rules are not affected, and that it did not anticipate the possibility of such a situation in its written observations.

The Council cites as an example in that regard the protection to be given in Spain to an alcoholic drink produced in Mexico and called 'Mexican Tequila'. According to the Council, without prejudice to an act of secondary Community legislation on the issue, such a matter would fall within the competence of the Member States. As regards that latter example, the Council wishes to modify its written observations: the scope of Community measures in respect of geographical indications does not wholly coincide with that of Section 3 of Part II of TRIPs. Consequently, Community competence deriving from the *AETR* doctrine does not encompass the whole of Section 3, and the Member States therefore remain partly competent.

I. Question 9

The *Commission* and the Council are requested to state whether, where there is a Community act harmonizing intellectual property rights, the Member States are under an obligation to apply the rules which they are obliged to adopt to nationals of third countries.

The *Commission* considers that, as regards Community acts harmonizing intellectual property rights covered by the Paris Convention on Industrial Property and the Berne Convention on Literary and Artistic Works, the question is resolved by those international conventions themselves.

Articles 2 and 3 of the Paris Convention provide that nationals of the countries of the Paris Union and persons domiciled or having an effective and serious establishment in the territory of one of those countries are to be given national treatment as regards present and future 'advantages' granted by legislation in the field of intellectual property. That principle applies automatically, therefore, to the provisions of the First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1).

Pursuant to Articles 3 and 5 of the Berne Convention, authors who are nationals of one of the Berne Union countries or who habitually reside in one of those countries are to enjoy the present and future rights granted by law to nationals.

That principle must be applied automatically to the copyright provisions contained in:

— Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61);

— Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

As regards other intellectual property rights, the position varies, depending on the Community acts concerned. Pursuant to Article 3(7) of Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products (OJ 1987 L 24, p. 36), the extension of protection to nationals of non-member countries is a matter for the decision of the Council. In Council Directive 92/100/EEC of

19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ 1992 L 346, p. 61), it was implicit that the Member States would continue to grant those rights on a reciprocal basis and would grant national treatment to nationals of countries which are parties to the Rome Convention. That position was expressly confirmed in Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9). The twenty third recital in the preamble refers to protection for nationals of third countries pursuant to an international agreement.

The *Council* maintains, first, that, in principle, where there exists a Community act harmonizing intellectual property rights, the Member States are not obliged to apply to nationals of non-member countries the rules which they are required to adopt.

Generally, harmonization measures are aimed at the establishment and operation of the internal market, and their object is to eliminate obstacles to freedom of movement within the Community. They are not intended to harmonize the treatment to be given to nationals and companies of non-member countries. Moreover, they are often

silent as to the treatment which each Member State may apply to nationals of non-member countries.

those agreements if the Community were recognized as having exclusive competence to conclude agreements on intellectual property with third countries.

However, the Council acknowledges that Community harmonization measures may sometimes contain general rules applicable to all activities carried out within the territory of the Member States, including those pursued by nationals or companies of non-member countries. For example, a harmonization measure could impose a registration requirement on any professional person wishing to pursue his activities within the Community or on any natural or legal person wishing to secure the protection of an intellectual property right held by him. Such a general rule would apply to nationals of non-member countries.

As a preliminary point, the *Commission* states that its argument is merely that the Community has exclusive competence to conclude the WTO Agreement because it is primarily a trade-related agreement; it does not claim that the Community has exclusive competence to conclude all intellectual property conventions with non-member countries.

For that reason, the Council considers that the answer to Question 9 can only be formulated with regard to the present state of Community harmonization; at present, it is only in exceptional cases that Community legislation imposes obligations on Member States concerning the intellectual property rights to be granted to nationals of non-member countries.

According to the Commission, conventions must be examined on a case-by-case basis in order to determine whether they are trade-related and, if not, whether the Community legislature has already adopted measures likely to be affected by the convention in question or is preparing to do so by concluding that convention.

J. Question 10

Since the Community is not a party to a number of agreements administered by WIPO in the field of intellectual property, the *Commission* is invited to state who would take part in the administration of

The Commission observes that the external competence of the Community is of an evolutionary nature, particularly in the field of intellectual property. Thus, at the present time, the Community cannot become a member of WIPO or a party to existing conventions such as the Paris and Berne Conventions, since it is only open to States to do

so. The Commission has only observer status within WIPO, in which it acts in coordination with the Member States. On the other hand, the Community has been more closely associated with the preparation of two WIPO conventions drawn up recently, namely the Washington Treaty of 26 May 1989 on the Protection of Intellectual Property in respect of Integrated Circuits and the Madrid Protocol of 28 June 1989 concerning the Madrid Agreement on the International Registration of Trade Marks. It participated, with the status of a delegation, in the Diplomatic Conference and it may become a contracting party to those conventions.

its Opinion, the existence of joint competence vested in the Community and the Member States remains uncertain.

The Council merely outlines the solution to be adopted in the event of joint participation.

K. Question 11

The *Council* and the *States which have submitted observations* are requested to state precisely how the coherence of the external action of the Community and the States could be ensured if it were held that the conclusion of the GATS and TRIPs required the joint participation of the Community and the Member States.

First, the solution will need to be fully consistent with the Treaties and the *acquis communautaire*. Next, the principle of a single common spokesman will need to be adopted, even in matters not falling wholly or at all within the exclusive competence of the Community. The actual decisions will have to be taken within the Council, even in non-Community matters, in order that it may fully perform the role assigned to it by the Treaty on European Union. Finally, it will be necessary to adopt the principle of a single 'post box', in order to spare the other WTO members the burden of determining whether competence lies with the Community or the Member States. Any requests for consultation and all complaints could be addressed either 'to the European Union' or 'to the Community and the Member States' and should be accepted irrespective of who is competent.

The *Council* states that the question of the detailed arrangements for joint participation in the WTO by the Community and the Member States has not yet been resolved, because, until such time as the Court delivers

The Council further states that the Court does not need to know what arrangements are to be adopted in the event of joint participation by the Community and the Member States in order to answer the question put to it, namely, whether the Member States have

competence in a specific field in which GATS or TRIPs lays down obligations. It emphasizes that it is in any event conscious of the obligations incumbent on it under the articles of the Treaty which require coherence in the external actions of the European Union.

According to the *Danish Government*, it is apparent from Article C of the Treaty on European Union and from Article 5 of the EC Treaty, as well as from the case-law of the Court, that the Community institutions and the Member States are under a duty to cooperate with each other in good faith, and that that duty applies whether the Community has exclusive competence or whether competence is shared between the Community and the Member States. In the latter case, that duty applies regardless of the way in which the Member States exercise their competence.

The *German Government* refers to the 'code of conduct' adopted by the Council in May 1994 to enable the 'post-Uruguay Round' negotiations in the field of services to be pursued (see the text of that agreement, set out above, in the answer to Question 4), and to the draft 'code of conduct' under discussion within the Council, which is envisaged more generally in relation to the WTO as a whole. Those codes are such as to remove the difficulties connected with safeguarding the unity of external action by the Community and the Member States.

The *Greek Government* also states that unity of action by the Member States and the Community within the WTO can be secured by a 'code of conduct' adopted by a decision of the representatives of the Governments of the Member States meeting within the Council. That code would appoint the Commission to act as the common spokesman for the Member States and for the Community within the WTO, both on issues falling within the exclusive competence of the Community and on those falling within the competence of the Member States. For the latter category, the Member States would be requested to define common positions, which the Commission would put forward within the competent organs of the WTO. Finally, if, and only if, the Member States did not manage to arrive at a common position, they could, in the Greek Government's view, put forward their national viewpoints within the WTO.

The *Spanish Government* also emphasizes the need to adopt a code of conduct envisaging recourse to the procedures laid down by the Treaties in relation to matters falling within Community competence and the seeking of consensus between the Member States in relation to matters falling within their competence. If no consensus could be reached, the Member States would be free, in the Spanish Government's view, to put forward their own positions. Finally, the Commission would be requested to express its

own views and to negotiate on behalf of the Community and the Member States in accordance with instructions given, depending on the circumstances, either by the Council or by the Member States.

and, as regards matters within national competence, by consensus. The Member States would only express their views on questions falling within national competence if it proved impossible to adopt a common position.

The *French Government* also observes that unity of action of the Community and of its Member States should be secured for the application of the agreements resulting from the Uruguay Round, in accordance with the second paragraph of Article C of the Treaty on European Union and Article 5 of the EC Treaty. According to the French Government, the draft code of conduct under discussion within the Council should enable such unity of action to be achieved. That code should contain the following: the principle that the Commission is to act as sole spokesman within the WTO; the conduct of negotiations within the WTO by the Commission on behalf of the Community and the Member States, within the framework of a mandate; regular reports on the negotiations to the Council and to the bodies delegated by it to monitor them; involvement of the Member States in each stage of the negotiations or discussions. Furthermore, the Commission should accept requests for consultation from the Member States and temporarily suspend discussions where necessary. There should be close cooperation between the Commission, the Member States and the General Secretariat of the Council in order to ensure the orderly conduct of negotiations. All actions and positions taken should be based on a common position adopted, as regards matters within the competence of the Community, in accordance with the relevant provisions of the Treaty

The *Netherlands Government* refers to Opinion 2/91 in stressing the need for the closest possible collaboration between the Community and its Member States in the event that they are found to have joint competence. That collaboration should take the form of the adoption of a code of conduct. The Netherlands Government draws attention in that regard to the contents of the former Article 116 of the EEC Treaty, to the existing arrangement within the Food and Agriculture Organization and to the procedures existing within the framework of the third pillar of the Treaty on European Union, particularly that laid down by Article K.5.

According to the *Portuguese Government*, any potential difficulties which might arise as regards representation of the Member States' own interests within the WTO or in relation to the formulation of their wishes do not determine the answer to the question of

division of competence or preclude the conclusion that the agreements in question are of a mixed nature. The Portuguese Government draws attention to the cooperation and coherence obligations laid down by Articles C, J.1(4) and J.2(3) of the Treaty on European Union and Article 5 of the EC Treaty. The objective of unity of action between the Community and the Member States was met during the WTO negotiations. According to the Portuguese Government, the experience thus gained should serve as a point of reference in drawing up a code of conduct defining both the specific duties of the Commission as spokesman for the Member States and the way in which common or concerted positions are to be adopted by the Member States on issues falling within their competence. A decision should be reached by consensus where vital or highly important interests of a Member State are involved.

However, it is not inevitable that any single method of cooperation would be right for all agreements and for all times. For that reason, the United Kingdom is only able to outline the likely features of any agreed procedure pursuant to which the coherence of external action could be achieved within the framework of the WTO.

(1) The procedure would cover the conduct of the Community and the Member States within the framework of the WTO, covering matters within Community competence or Member States' competence.

The *United Kingdom* observes that the real significance of the Court's question lies in the future participation by the Community and the Member States in the WTO. It points out that the Community and the Member States collaborated effectively during the multilateral negotiations of the Uruguay Round, in the same way or a similar way to the way they would have done had joint competence been accepted on all sides at the outset. This demonstrates that such collaboration is politically possible and can be formidably effective in securing the interests of the Community and the Member States.

(2) The Commission would normally speak and negotiate on behalf of the Community and the Member States; but in exceptional circumstances the Member States should be able to do so. The applicable procedure would set out the circumstances in which they could exercise that right.

(3) The Commission would inform the Member States of discussions and negotiations, keep them informed and enable them to participate as appropriate.

trative and budgetary matters, but would avoid taking divergent positions.

(4) The Commission would circulate expeditiously to the Member States relevant papers, including texts.

(8) Provisions would need to be adopted dealing with the way the Community operates the dispute settlement procedures in the WTO Agreement, and these would provide for close cooperation between the Commission and the Member States.

(5) The Commission would take into account the views of the Member States. The applicable procedures would be a matter for agreement.

(9) There would need to be provisions dealing with the position where individual Member States were affected by the conduct of other parties to the WTO Agreement which violated its provisions, and these would need to provide for consultation between the Commission and the Member States and for close cooperation between them.

(6) The positions or actions decided upon would be based on Community rules and procedures where these apply (for example, pursuant to the second subparagraph of Article 228(1) of the EC Treaty) and in other cases would be based on a common position reached by consensus.

(7) The Member States would, as now, act and speak on their own behalf on adminis-

The United Kingdom has no doubt that a procedure with the above features would be forthcoming. The Member States have no intention of undermining the enormous bargaining power which they exercise collectively; their overriding interest is to deploy that bargaining power in the most effective way possible.