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# **Bananas and Treaty-Making Powers: Current Issues in the External Trade Law of the European Union**

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The European Union (EU) is more than an international organization but less than a State. As in a federal State, there is a constant tug-of-war between the center, the Community, and its constituent parts, the Member States. This tug-of-war includes the area of the Community's foreign relations.

A large part of the Member States' relations with non-EU countries is handled by the Community. Foreign trade is one field in which the Community is particularly prominent at the expense of individual Member States. Even in foreign trade, however, some questions concerning the division of powers between the Community and the Member States arise. The constant evolution of the Community's powers complicates these issues. Over the years, the Community has gradually taken over national competences in the area of foreign trade, often in the face of the Member States' reluctance to relinquish their powers.

The Community and its Member States have turned to the constitutional court of the EU—the European Court of Justice (ECJ)—to solve disputes involving the division of powers in the area of foreign relations. Historically, the ECJ has sided with the Community, enlarging the Community's powers through interpretation of the founding treaties. At critical junctures in the development of the Community's foreign economic relations, the ECJ has led the way towards greater European integration.

Recently this trend has begun to change. Today there are signs that the ECJ is becoming more inclined to promote the interests of the Member States rather than those of the Community. The Member States' visibility and their identities as individual actors in international relations are in question; thus, very sensitive aspects of sovereignty are at stake. In the field of foreign relations, the Member States seem more reluctant than

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ever to relinquish power to the Community. At the same time, the Community still strives for ever-growing powers. The ever-increasing importance of international interaction on a global scale compounds this tension. As a result, the EU's relations with the surrounding world have become very complex, often leaving the ECJ with the dubious task of trying to disentangle them.

The ECJ has dealt with three recent cases involving the division of powers within the EU. These cases also concern the EU's international relations, primarily those involving the framework of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO). These cases raise questions of principle concerning the external trade law of the Community, illustrating how the ECJ has decided these issues before and how it decides them now.

This article begins with a brief overview of the constitutional structure of the EU. Parts II through IV will discuss the separate cases in detail. The main issue in part II is division of power among different Community institutions as to international treaty-making. The treaty involved concerns cooperation in the anti-trust field between the EU and the United States. The case in Part III involves new rules on banana imports to the EU and the relationship between EU law and the GATT. Part IV discusses a case addressing the division of power as to treaty-making between the Community and the Member States in view of the agreement on the WTO and annexed agreements. The article concludes that, except for a temporary integrationist relapse when the agricultural interests of the EC were at stake, the ECJ's handling of the cases discussed here confirms that the ECJ currently favors the Member States' interests over those of the Community.

## I. THE CONSTITUTIONAL STRUCTURE OF THE EUROPEAN UNION

The term "European Union" was launched in 1992, in connection with the adoption of the Treaty on European Union (TEU), better known as the Maastricht Treaty, after the Dutch town where it was concluded.<sup>1</sup> The EU as such, however, does not have an international legal personality. For instance, the EU cannot conclude international treaties. Although the name

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1. TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M. 247 (1992) [hereinafter TEU].

“European Union” may evoke the image of a more closely knit organization than the “Community,” from a formal or legal point of view the TEU did little, if anything, to push forward European integration. For the time being, “European Union” is just a name. It could perhaps be seen as the political guiding star of the States that concluded the TEU and of the states that subsequently have acceded to the TEU. If nothing else, Europeans will become accustomed to thinking in terms of a “Union” and not only of a “Community.”

There are three European Communities under the umbrella of the EU, each based on a separate founding treaty. Each of these communities has a separate international legal personality. The most important European Community is the former *European Economic Community* (EEC) of 1958, which is now simply called the *European Community* (EC). The Treaty on the European Economic Community (EEC Treaty) founded the EEC in 1957.<sup>2</sup> The EEC Treaty was amended at the same time the TEU was adopted in 1992, changing the name of the European Economic Community to the European Community (EC). Thus, the founding treaty of the EC is the Treaty on the European Community (EC Treaty).<sup>3</sup> Except for an increase in the breadth and depth of cooperation between the Member States under the EEC Treaty, the two treaties are still largely identical. The other two European Communities are the European Coal and Steel Community (ECSC Treaty) of 1952<sup>4</sup> and the European Atomic Energy Community (Euratom Treaty) of 1958.<sup>5</sup>

International treaties may be concluded by all three European Communities—the EC, the ECSC and the Euratom—in accordance with the treaties by which these communities themselves were established. This article will examine only treaties concluded by the EC.

All three European Communities *and* the European Union are served by the same institutional framework. The cooperation in the areas covered by the TEU is essentially intergovernmental without any supranational traits. This includes a common foreign and security policy and cooperation in the fields

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2. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY].

3. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY].

4. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY].

5. TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM TREATY].

of justice and home affairs. The Community institutions serve the governments, however, and are involved in various ways in the strictly intergovernmental work. The cooperation within the three European Communities is closer and basically supranational.

The most important European institutions are the Council of Ministers, the Commission, the directly elected European Parliament, and the European Court of Justice. Comparing the EU to a State, the Council of Ministers (the Council) is the legislative branch of government, the Commission is the executive, the Parliament is a co-legislator of considerably less importance than the Council, and the ECJ, of course, is the judicial branch. Sometimes decisions are taken by a majority of the members of the Council, and sometimes have to be taken unanimously. The supranational character of the cooperation is, of course, strongest when decisions are taken by a majority.

The Commission is an independent institution made up of public officials who are supposed to work for the best interests of the Community.<sup>6</sup> The Council of Ministers, although also being a Community institution, consists of representatives of the governments of the Member States. Consequently, the Council of Ministers is more open to national influences than the Commission.<sup>7</sup> Therefore, what may seem to be a dispute in the treaty-making field between the Council and the Commission may be, in reality, a dispute between the Member States and the Community. The Member States can retain much of their sovereign control via the Council of Ministers. However, if powers pass from the Council to the Commission, the control of the Member States diminishes correspondingly, or at least it should do so in theory.

Since the Commission and the Council serve all three European Communities and the European Union, one should use the precise name—the Commission, or the Council, “of the European Community”, “of the European Coal and Steel Community”, “of the European Atomic Energy Community,” or “of the European Union”—depending on what issue is under discussion. Since the entry into force of the TEU, however, the most common practice is to refer to all institutions as being “of the European Union,” irrespective of the precise context of discussion and even if this is sometimes technically incorrect.

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6. EC TREATY art. 157.

7. *Id.* art. 146.

Unfortunately, two of the cases discussed in this article concern measures taken under the EEC Treaty rather than under the EC Treaty. As a result, these cases address measures taken by the Commission and the Council "of the European *Economic Community*." Since there is not much difference between the tasks of the institutions under the EEC Treaty and the EC Treaty, respectively, I use the simpler terms "the Commission" and "the Council." References to particular treaty articles, however, need to be more precise, and therefore discussion will concern the EEC Treaty when measures have been taken under this treaty and will refer to the EC Treaty when measures have been taken under this later treaty.

The European Court of Justice functions as the constitutional court of the European Communities.<sup>8</sup> There are currently fifteen Judges on the Court, which corresponds to the number of Member States of the EU. One particularity about the Court deserves mention. In addition to the Judges, the ECJ, on the pattern of French courts, consists of a number of so-called Advocates-General. Currently there are nine Advocates-General. An Advocate-General is assigned to each case before the ECJ. The Advocate-General, who possesses the same professional qualifications as a Judge, is supposed to be an independent servant of fairness and justice who makes sure that all relevant factual and legal aspects of the case are thoroughly examined. After his or her investigation of the case, the Advocate-General proposes a solution in the form of an "opinion," which is always attached to the final judgment of the Court. The Advocate-General does not participate in the actual decision of the case. By comparing the opinion of the Advocate-General to the considerably more laconic decisions subsequently issued by the Judges, it is possible to see alternative ways of reasoning. Since the judgments do not contain separate opinions, it is also possible to see the opinion of the Advocate-General as a form of separate opinion in the event the Advocate-General reaches a conclusion different from that of the Judges.

A final note on the constitutional structure of the EU is appropriate. There are currently three European Communities and one European Union. The three European Communities will probably merge into one when the treaty establishing the

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8. The ECJ does not have jurisdiction over matters dealt with under the TEU unless the Council, prompted by any Member State or the Commission, draws up conventions stipulating that the ECJ shall have jurisdiction. See TEU, *supra* note 1, art. k.3(2)(c).

European Coal and Steel Community expires in the year 2002. The development towards a single Community is indicated by the name change at Maastricht, from the Treaty on the European *Economic* Community to the Treaty on the European Community. This makes room for all three Communities under one name. The EC Treaty is concluded "for an unlimited period" as is the TEU.<sup>9</sup> The next logical step from the point of view of European integration would be to subsume the intergovernmental European Union under the supranational decision-making procedures of the European Community, while keeping the name "European Union" for the resulting supranational organization. Whether this will happen remains to be seen. Even more uncertain is the next logical step, the creation of a federal European State, the United States of Europe.

## II. *FRANCE V. COMMISSION: THE COMMISSION'S TREATY MAKING POWERS*

### A. INTRODUCTION TO THE CASE

The case of *French Republic v. Commission of the European Communities (France v. Commission)*<sup>10</sup> concerned an agreement concluded on 23 September 1991 between the Commission of the EC and the Government of the United States regarding the application of their competition laws.<sup>11</sup> Normally, treaties concluded by the EC with non-EC countries or international organizations are concluded by the Council of Ministers, the principal treaty-making institution within the EC. In this case, however, the Commission concluded the treaty. The Commission does have certain treaty-making powers under the EC Treaty, but these powers are very restricted. To support its action, the Commission invoked, *inter alia*, the argument that the treaty in question should be regarded not as a regular international treaty, but as an "administrative arrangement" which the executive branch of government may conclude on its own. France, among other Member States, opposed the Commission's action and brought a complaint before the ECJ seeking annulment of the decision by which the Commission concluded the

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9. See TEU, *supra* note 1, art. Q; EURATOM TREATY art. 208.

10. Case C-327/91, *French Republic v. Commission*, 1994 E.C.R. I-3641 [hereinafter *French Republic*].

11. See generally Allard D. Ham, *International Cooperation in the Anti-Trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities*, 30 COMMON MKT. L. REV. 571 (1993) (analyzing the contents of the agreement).

agreement. On its face, the case concerned the division of treaty-making competence between the Commission and the Council.

A general issue underlying the case is the division of powers between the Community and the Member States. The Member States want as much power as possible to stay in the hands of the Council, over which they retain much control. Consequently, Member States object when the Commission tries to acquire additional power at the Council's expense through imaginative and expansive interpretations of the EC Treaty. In particular, when the Commission pretends it is equivalent to the executive of a State, the Member States object because the EU is not a State and the Member States, at least for the time being, abhor the thought of the EU ever becoming one.

*France v. Commission* revolves around Article 228 of the EEC Treaty, which concerns procedures to be followed by the EC when concluding international treaties.<sup>12</sup> The ECJ sided with the Member States and found that the Commission lacked the necessary competence to conclude the anti-trust treaty. The Council subsequently reconcluded the EEC Treaty.<sup>13</sup>

## B. INHERENT OR CONFERRED POWERS?

The most important question addressed in the case is whether the Commission's powers to conclude treaties are inherent or whether they are restricted to the very limited powers explicitly conferred on the Commission by the EC Treaty. Ultimately, the case turned on the crucial and persistent issue of distribution of power between the Commission and the Council, and behind the Council in the Member States.

Article 228 of the EC Treaty regulates treaty-making between the EC and non-EC countries and international organizations.<sup>14</sup> Under Article 228(2), the main rule is that treaties

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12. The EC and the United States concluded their agreement under Article 228 of the EEC Treaty. Soon thereafter, the EEC Treaty was amended and renamed the EC Treaty. In the process, Article 228 was amended, but not with regard to the rules on the division of power between the Council and the Commission. See EC TREATY art. 228(4).

13. 1995 O.J. (L 95) 47. Cf. Eric Stein, *External Relations of the European Community: Structure and Process*, 1 COLLECTIVE COURSE ACAD. EUR. L. 127, 164 (1990); Pieter J. Kuijper, *The Conclusion and Implementation of the Uruguay Round Results by the European Community*, 6 EUR. J. INT'L L. 222, 234 (1995) (discussing whether the Council's legal bases for its decision to conclude the WTO Agreement conformed with the Court's decision).

14. EC TREATY art. 228.

between the Community and third parties are negotiated by the Commission but *are concluded* by the Council. The power of the Council is subject to "the powers *vested* in the Commission in this field" (emphasis added).<sup>15</sup> The explicit treaty-making power of the Commission is limited to the powers flowing from three sources. The first is the Commission's charge to maintain appropriate relations with international organizations other than the EC itself. The second is the power of the Commission, according to the Protocol on the Privileges and Immunities of the European Communities,<sup>16</sup> to conclude agreements with non-EC countries concerning recognition of laissez-passer for Community nationals. Finally, the Commission has the power to conclude treaties in specified cases where the Council delegates authority to the Commission in accordance with the EC Treaty as amended at Maastricht. This amendment was made after *France v. Commission* was brought before the ECJ. Before the changes at Maastricht, the EEC Treaty did not mention the possibility that the Council might delegate treaty-making power to the Commission.

Even after Maastricht, the treaty-making powers which may be delegated to the Commission are very circumscribed. According to Article 228(4), the Commission may only conclude treaties amending former treaties concluded by the Council, and only if the original treaties provide for this possibility. In addition, the Council may attach further specific conditions to its authorization of the Commission.<sup>17</sup> In *France v. Commission*, however, the Commission argued that the new wording of Article 228 did not limit the Commission's already-vested powers to conclude international agreements. According to the Commission, these powers reach considerably farther than the text of the EC Treaty seems to suggest.

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15. *Id.* art. 228(2).

16. *Id.* Protocol No. 7.

17. *Id.* art. 228(4). This circumscribed structure is reminiscent of the so-called comitology surrounding the powers delegated by the Council to the Commission to enact further legislation implementing more general legislation previously adopted by the Council. The possibility on the part of the Council to delegate legislative powers to the Commission was inserted in Article 145 of the EEC Treaty by the Single European Act of 1987 and it was retained in the EC Treaty. See Council Decision 87/373, 1987 O.J. (L 197) 33 (laying down the procedures for the exercise of implementing powers conferred on the Commission). Comitology concerns the elaborate system of committees with different formal capacities—advisory or more—by which the implementing legislation is prepared. The Council decides what kind of committee is going to be used for the preparation of each piece of implementing legislation.

The EC Treaty exists in as many linguistic versions as there are official languages in the EC/EU. The text is equally authoritative in each language.<sup>18</sup> In order to strengthen its argument, the Commission invoked the French language version of Article 228(2) of the EC Treaty and argued that had the drafters of the treaty really sought to limit the Commission's power to conclude treaties, the French version of Article 228(2) would have conferred power on the Council of Ministers to conclude treaties "[s]ous réserve des compétences *attribuées* à la Commission" and not "[s]ous réserve des compétences *reconnues* à la Commission."<sup>19</sup> *Attribuées*, according to the Commission, would have a meaning closer to "conferred" in English, whereas *reconnues*, according to the Commission, would be closer to "inherent" in English. According to the English language version of Article 228(2), the Council exercises its power to conclude treaties "[s]ubject to the powers *vested* in the Commission."<sup>20</sup> Thus, in the Commission's view, the formulation "vested in" should be interpreted expansively and not restrictively, as the French Government argued. Interpreted expansively, "vested in," according to the Commission, means that the Commission may derive its power to conclude international agreements from sources other than the actual text of the EC Treaty.<sup>21</sup>

Interpreting "vested in" expansively, as the Commission desired, however, could be seen as conflicting with a principle of fundamental importance to the entire organizational edifice of the EC. This is the principle of enumerated powers of the institutions of the EC, as stated in the EC Treaty: "Each institution shall act within the limits of the powers conferred upon it by this Treaty."<sup>22</sup> This statement suggests that the institutions of the EC have only the powers that they explicitly have been given by the Member States. Seen from the Member States' perspective, this means that they do not lose more power than they explicitly agree to give up. In other words, there are no *a priori* powers of the institutions of the EC. One could also say that there are no residual powers of the EC institutions. The Commission argued

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18. Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, art. 33(1), 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (when a treaty is authenticated in two or more languages, the text is equally authoritative unless otherwise provided).

19. French Republic, *supra* note 10, ¶ 30 (judgment) (emphasis in original) (explaining that Article 228(2) remained intact after the Maastricht revisions of the EEC Treaty).

20. EC TREATY art. 228(2) (emphasis added).

21. French Republic, *supra* note 10, ¶ 31 (judgment).

22. EC TREATY art. 4(1).

that there are such powers, however, and it preferred an interpretation of the expression "the powers *vested in* the Commission" which comes closer to "inherent in" than "conferred upon" the Commission.

Both the Advocate-General and the Court used Article 4(1) of the EC Treaty to support the rejection of the Commission's claim that its power to conclude treaties is "inherent" and not "attributed."<sup>23</sup> Prima facie, this seems to be a strong argument. Article 4(1) clearly states that the Commission merely has the powers that the Member States have conferred upon it. The problem, however, is that even this article is open to different interpretations, and it is unclear whether a restrictive one should be chosen. "Conferred on it by this Treaty"<sup>24</sup> is not an absolute formula, since it is seldom evident exactly what "this Treaty" says. The extent of the powers conferred upon the institutions depends upon how one construes the other articles in the treaty. Article 4(1) becomes a function of interpretation of the other articles, not the other way round.

Fighting for its alleged inherent powers under Article 228(2), the Commission supported in a number of ways its argument that the expression "the powers vested in the Commission" should be extensively interpreted. The Commission referred to Article 101 of the Euratom Treaty and claimed that, by analogy, it should have the same power to conclude treaties under the EC Treaty as it has under the Euratom Treaty.<sup>25</sup> According to Article 101 of the latter, the Commission negotiates *and* concludes international agreements and contracts, subject to the Council's approval. In case of agreements or contracts whose implementation does not require action by the Council and which do not impose financial burdens on the Community, the Commission alone shall negotiate and conclude them.<sup>26</sup> The only obligation of the Commission *vis-à-vis* the Council in such circumstances is that the Commission shall keep the Council informed of its actions.

In *France v. Commission*, the Advocate-General flatly dismissed the Commission's argument based on analogy by pointing out that the procedure for concluding international agreements is different under the Euratom Treaty than under

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23. French Republic, *supra* note 10, ¶ 34 (opinion of the Advocate-General); *id.* ¶ 34 (judgment).

24. EC TREATY art. 4(1).

25. French Republic, *supra* note 10, ¶ 25 (opinion of the Advocate-General).

26. EURATOM TREATY art. 101.

the EEC Treaty; this makes reasoning by analogy between the treaties all the more difficult.<sup>27</sup> Also, the Advocate-General emphasized that the Euratom Treaty and the EEC Treaty were signed on the same day (25 March 1957) and that it is no coincidence that the powers of the Commission were laid down differently in the two agreements.<sup>28</sup> Because the corresponding provisions are formulated differently, according to the Advocate-General and subsequently the Court, this shows that the drafters of the two treaties did not want the Commission to have the same powers under the EEC Treaty as under the Euratom Treaty.<sup>29</sup> The Advocate-General and the Court reasoned *a contrario* rather than by analogy, which, considering the circumstances, seems more reasonable than the Commission's approach.

The Court has applied interpretation by analogy, however, to another difference between the wording of Article 101 of the Euratom Treaty and Article 228 of the EC Treaty. I will return to this point later on. For the moment, suffice it to note that apparently the Court sometimes applies reasoning by analogy and sometimes applies reasoning *a contrario* to the same Articles in the EC Treaty and the Euratom Treaty. When the Court applies *a contrario* interpretation, it supports its distinction between the EC Treaty and the Euratom Treaty by arguing that, since the treaties were signed simultaneously, any difference between them must be intended. Presumably this should hold true for all differences and not just some differences. Nevertheless, the Court changes between reasoning *a contrario* and reasoning by analogy, depending on the case.

It is important to note that, in *France v. Commission*, the Commission drew a line between "ordinary international agreements," on the one hand and "administrative arrangements" on the other. The Commission considered itself vested with the power to conclude "administrative agreements."<sup>30</sup> Both the Advocate-General and the Court concluded that the agreement in question is an international agreement *tout court* as defined under international law. Despite its formal designation, this "administrative agreement" is an international agreement

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27. French Republic, *supra* note 10, ¶ 26 (opinion of the Advocate-General).

28. *Id.*

29. *Id.*; *id.* ¶¶ 38-39 (judgment); cf. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 168 (1994) (comparing the application procedures under Article 103 of the Euratom Treaty and Article 228 of the EC Treaty).

30. French Republic, *supra* note 10, ¶ 17 (opinion of the Advocate-General).

under international law.<sup>31</sup> So far as international law is concerned, international agreements are either legally binding or they are not. International law does not recognize multiple categories of binding international agreements. The Commission probably does not dispute this particular point. However, the Commission was of the opinion that it was vested with a power to conclude legally binding international agreements, a power which went further than the powers explicitly granted the Commission under the EC Treaty. This was especially the case for agreements of an administrative nature.

The Commission's most important argument that its treaty-making powers are "inherent" rather than "conferred upon" it was reference to past practice. The Commission referred to a large number of international agreements, either administrative or technical in nature, which it had concluded without protest either from the Council or Member States.<sup>32</sup> The Commission inferred from this silence that its powers to conclude international agreements had been extended in relation to the text of Article 228 of the EEC Treaty.<sup>33</sup> This is not an unreasonable argument. Treaties are often amended by practice. The Charter of the United Nations, for instance, a treaty which is at the same time the constituent document of an international organization, has been amended on several points through practice.<sup>34</sup>

The Vienna Convention of 1969 on the Law of Treaties allows "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."<sup>35</sup> Treaty interpretation should take this into ac-

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31. *Id.* ¶ 22 (opinion of the Advocate-General); *id.* ¶ 25 (judgment); see also Vienna Convention of 1986 on the Law of Treaties between States and International Organizations or between International Organizations, Mar. 21, 1986, 25 I.L.M. 543, 545-56 (defining an international treaty as "an international agreement governed by international law and concluded in written form: between one or more States and one or more international organizations; or between international organizations . . . whatever its particular designation"). The ECJ referred to this Article even though the Convention has not yet entered into force because of an insufficient number of ratifications. Cf. Vienna Convention, *supra* note 18, art. 2(1)(a) (defining a treaty as "an international agreement concluded between States in written form and governed by international law . . . whatever its particular designation").

32. French Republic, *supra* note 10, ¶ 28 (opinion of the Advocate-General).

33. *Id.*

34. Interpretation of the EC Treaty has generally been more progressive than the interpretation of the Charter of the United Nations because the EC Treaty contains broader goals. It is also probably true that greater homogeneity among the countries comprising the EU makes it easier to go beyond the actual text of the founding treaty.

35. Vienna Convention, *supra* note 18, art. 31(3)(b).

count. At first glance, this rule would seem to support the Commission's argument concerning extension of its treaty-making powers beyond the text of the EC Treaty. The Commission has in fact concluded international agreements, albeit of a technical or administrative nature, in a number of cases. This practice has met with no protests which could detract from the legal significance of the agreements.

Probably with Article 31 of the Vienna Convention on the Law of Treaties in mind, the Advocate-General began his counter-argument by stating that it was uncertain whether the Council of Ministers and the Member States of the EU had actually been aware of the practice of the Commission. As a consequence, it was not clear whether the Council and the Member States had consciously tolerated the Commission's exercise of treaty-making powers.<sup>36</sup> In any event, both the Council and the Member States failed to react to the agreements. At this crucial stage of the argument, the Advocate-General could have inferred the consent of the Council of Ministers and the Member States from their silence. He chose not to, however, and one can only speculate as to the reasons behind this choice.

As the Advocate-General himself pointed out further on in his opinion, an important issue involved is the balance of power between the Commission and the Council of Ministers.<sup>37</sup> An issue at least as important, but not mentioned by the Advocate-General, is the balance of power between the Member States and the Community. The Advocate-General referred to a previous judgment of the ECJ in which the Court stated that "a mere practice [on the part of the Council as it were] cannot derogate from the rules laid down in the Treaty."<sup>38</sup> In a way this settled the question, but in a surprisingly rigid manner. The ECJ in *France v. Commission* repeated this position and thereby confirmed the opinion of the Advocate-General.<sup>39</sup>

The Advocate-General's comment is surprising in its rigidity: "[A]ny other solution would be tantamount to acknowledging that an infringement of the rules of the Treaty acquires legitimacy only because it is repeated!"<sup>40</sup> Why would it be wrong to acknowledge that an infringement of the Treaty acquires legiti-

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36. French Republic, *supra* note 10, ¶ 29 (opinion of the Advocate-General).

37. *Id.*

38. *Id.* (citing Case 68/86, *United Kingdom v. Council*, 1988 E.C.R. 855, ¶ 24).

39. French Republic, *supra* note 10, ¶ 36 (judgment).

40. *Id.* ¶ 29 (opinion of the Advocate-General).

macy when it is repeated? This is a normal way of amending, or at least interpreting through practice, the EC Treaty or any other treaty. It is also a means by which new international customary rules are created; old rules are overridden by new practices. The crucial missing link, according to the reasoning of the Advocate-General, was the *opinio juris* of the Member States. *Opinio juris* means the conviction by the member States that the practice is binding as of law. Rules of customary international law are made up of State practice plus a recognition by States that they are conforming to a legal obligation—"a general practice accepted as law."<sup>41</sup> The assumption that the action lacks *opinio juris* makes the reasoning of the Advocate-General logical from a traditional point of view, but his argument remains rigid and formalistic.

The ECJ did not comment on the statement by the Advocate-General relating to whether an infringement of the EC Treaty would acquire legitimacy through repetition. The ECJ did not have to comment on this because it had already stated that a practice cannot override the provisions of the EC Treaty. The ECJ generally does not say more than is absolutely necessary to solve the case before it.

The Commission and the Council, however, have obviously played a central role in filling gaps in the EC Treaty's rather general formulation. Whether a practice is labelled "derogation from" or "interpretation of" a treaty text seems to be a question of degree rather than a difference in kind. In the particular case of the division of treaty-making powers between the Council and the Commission, the rule is relatively clear. In contrast to other parts of the EC Treaty, one can say with relative certainty that one interpretation is right and one is wrong, strictly according to the wording of Article 228. This also holds true after the amendments of the EEC Treaty after Maastricht, even though these somewhat extended the Commission's powers. This is not to say, however, as did the Advocate-General, that "it is *not possible* to interpret Article 228" in the way the Commission did in *France v. Commission*—empowering the Commission to conclude international agreements independently.<sup>42</sup> In treaty in-

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41. 1945 I.C.J. art. 38(1)(b); *see also* North Sea Continental Shelf (F.R.G. v. Den., Neth.), 1969 I.C.J. 3, 44 (discussing the requirements for establishing a new rule of customary international law).

42. French Republic, *supra* note 10, ¶ 30 (opinion of the Advocate-General) (emphasis added).

terpretation generally, nothing is *impossible*, and in particular not as concerns the EC Treaty.

The Court's own practice illustrates the suppleness of the EC Treaty. The Member States have been surprised many times by the way the ECJ has creatively interpreted the treaty.<sup>43</sup> At times the Court has found things in the treaty which are by no means obvious from the text. Implicitly, through the Court's interpretation over the years, the Member States acquired many more obligations through the membership in the E(E)C than they realized when they signed the treaty. No one would argue that the Court, through its case-law, has not gone beyond the reach of the immediate text of the treaty. The Court heretofore has not been cautious, has not been formalistic, and has not held back the development of the Community for the benefit of the Member States. This approach seems, however, to have changed in recent years.

Would anyone conclude that the Court has *infringed* the rules of the EC Treaty and EEC Treaty through its expansive manner of interpretation? In defence of the Court's and the Advocate-General's reasoning in *France v. Commission*, it can be said that, in this particular case, there was a clearly formulated rule which it was possible to violate. In other cases, the Court has interpreted vaguely worded parts of the EC Treaty or has invented rules which cannot be found in the text, but it has not acted contrary to the text. In this case, if the Court accorded treaty-making power to the Commission, it would have gone against the text of the treaty. Such a decision is more serious than inflating the text when there are no fixed contours of the Member States' or the institutions' obligations. Here, this fur-

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43. For cases concerning the nature of EC law, see Case 26/62, *N.V. Algemene Transport—en Expeditie Onderneming Van Gend & Loos and Nederlandse administratie der belastingen*, 1963 E.C.R. 1 [hereinafter *Van Gend & Loos*]; Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585; and Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629.

For cases concerning human rights in EC law, see Case 26/69, *Erich Stauder v. City of Ulm, Sozialamt*, 1969 E.C.R. 419; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr*, 1970 E.C.R. 1125; and Case 4/73, *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission*, 1974 E.C.R. 491.

For cases concerning the liability of a Member State for damage caused to individuals by infringements of EC law for which it is responsible, see *Joined Cases 6 & 9/90, Andrea Francovich and Others v. Italy*, 1991 E.C.R. I-5357; and *Joined Cases 46 & 48/93, Brasserie du pLcheur SA v. Bundesrepublik Deutschland and Queen v. Secretary of State for Transport*, 1996 E.C.R. I-1029. In addition, the cases that are subsequently cited in this section and in section IV illustrate the creative interpretation of the EC Treaty by the ECJ.

ther interpretative step is *impossible*. The ECJ could have taken this extra interpretative step in favor of the Commission, thereby sanctioning a de facto amendment of the treaty which would effect the Commission's practice.

In defense of the Court but not of the Advocate-General, who seems unusually conservative in relation to the Community, it can also be argued that the Court cannot act on its own without a complaining party of some kind. Even if the Court has not, in principle, accepted agreements which the Commission has concluded over the years and which it invoked as law-making practice in *France v. Commission*, the Court has not been able to stop this practice earlier since neither the Council nor the Member States have launched complaints. The Court voiced its opinion when it was given the opportunity to do so. But the fact that no one has complained about the agreements concluded by the Commission can also be invoked in favor of the existence of law-making practice which has amended the text of Article 228.

### C. IS THE COMMISSION AN EXECUTIVE?

Although the agreement concluded by the Commission was deemed a legally binding agreement for the Community, the Advocate-General nevertheless discussed whether the agreement could be classified as an "administrative arrangement" which the Commission had the right to conclude. Here the Advocate-General made a significant statement, albeit obiter dictum. The Court did not enter into this discussion at all but presumably was of the same opinion as the Advocate-General; otherwise the Court probably would have concluded that the Commission was competent to conclude the EC-US agreement on cooperation in the anti-trust field.

For the sake of completeness, the Advocate-General is expected to investigate all aspects of the case, even if he or she does not agree with all the arguments raised. Therefore, in *France v. Commission*, the Advocate-General addressed the question whether the Commission after all does not have the power to conclude "administrative arrangements." The Advocate-General did this even though he was unlikely to agree with the conclusion.

The Advocate-General compared the Commission to the executive of a State. When the Commission argued that it has the power to conclude "administrative arrangements," it referred to the practice followed by States whereby the Government gener-

ally, according to national law, is allowed to conclude technical and administrative agreements without having to seek the assent of Parliament.<sup>44</sup> This line of argument presupposed that the Commission of the EU may indeed be equivalent to the executive within a State, a view which the Advocate-General vehemently opposed. In his most significant statement, the Advocate-General stated that it was impossible to apply the theory on the normal functions of the executive to the Commission because the Commission does not carry out "an independent and general executive function" within the Community legal system.<sup>45</sup>

This was an important statement of principle and a significant choice of sides by the Advocate-General. The Advocate-General's tendency toward rigidity can once again be noted in the choice of words—that it is plainly *impossible* to apply the theory. It would have been possible to take a more flexible stand, one more favourable to the Commission and thereby to the Community. Instead, the Advocate-General chose a restrictive interpretation of the E(E)C Treaty, upholding the status quo or even rolling back some of the Commission's acquisition of power. *France v. Commission* obviously actualized sensitive political issues, but until it was decided, neither Advocates-General nor, more significantly, the Court had been afraid to challenge the Member States in the name of European Community.<sup>46</sup>

#### D. PARALLEL INTERNAL AND EXTERNAL POWERS OF THE COMMUNITY

Another important point taken up by the Advocate-General and the Court was the issue of parallel internal and external powers of the Community. The Commission argued that since it had internal powers directly conferred on it by the EEC Treaty and the EEC Council in the field of competition,<sup>47</sup> it also had

44. French Republic, *supra* note 10, ¶ 32 (opinion of the Advocate-General).

45. *Id.* ¶ 33 (opinion of the Advocate-General); see also Philip Raworth, *Too Little, Too Late? Maastricht and the Goal of a European Federation*, 32 ARCHIV DES VOLKERRECHTS 24 (1994) (analysis of the TEU from a federalist point of view). Because the Advocate-General did not think that the Commission may be regarded as the equivalent of an executive he did not enter into the further question whether the power to conclude administrative arrangements is inherent in the function of the executive.

46. HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICY-MAKING* (1986).

47. Under the EC Treaty and Council Regulation 17, the Commission alone is empowered to ensure the application of the rules laid down in Article 85

corresponding external powers.<sup>48</sup> In that case, as the Advocate-General noted, Article 228 of the EEC Treaty—which regulates who concludes treaties (the Council) and how—could no longer be treated as an autonomous general provision governing the conclusion of treaties.<sup>49</sup> Against this and in a less absolutist manner, it could be argued that Article 228 could very well be regarded as autonomously distributing the treaty-making power between the Council and the Commission, but that certain exceptions to this fundamental rule have developed in practice.

The Court's case law on parallel internal and external powers of the Community is fairly clear. By means of a pro-Community construction of the EC Treaty, the Court has found that in areas where the Community is competent to legislate internally, it is also implicitly competent to conclude treaties with third countries or organizations. But as the Advocate-General rightly pointed out, the ECJ's case law on parallel powers deals with the issue of the power of the Community *vis-à-vis* the Member States and not the allocation of power between the institutions of the Community.<sup>50</sup> The power of the Community is one thing,

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(prohibiting agreements between undertakings limiting competition) and Article 86 (prohibiting the abuse of a dominant position on the European market). EC TREATY art. 89; 1959-1962 O.J. SPEC. ED. 87, 89. Furthermore, the Commission alone is responsible for the application of Council Regulation 4064/89, concerning the control of concentrations between undertakings. 1990 O.J. (L 257) 14, 15.

48. French Republic, *supra* note 10, ¶ 36 (opinion of the Advocate-General).

49. *Id.* ¶ 37 (opinion of the Advocate-General); *see also id.* ¶ 28 (judgment).

50. *Id.* ¶ 35 (opinion of the Advocate-General); *see also* Case 22/70, Commission v. Council 1971 E.C.R. 263 [hereinafter ERTA]; Joined Cases 3, 4 & 6/76, Cornelis Kramer and Others 1976 E.C.R. 1279; and Opinion 1/76, 1977 E.C.R. 741 (Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels). On the ERTA case in particular *see* John Temple Lang, *The ERTA Judgment and the Court's Case-law on Competence and Conflict*, 1986 Y.B. EUR. L. 183.

The Member States and the Council have constantly tried to limit the treaty-making powers of the Community. *See* HARTLEY, *supra* note 29, at 167-68. The Court, in a highly controversial move, found that the Community had implied powers to conclude international agreements in all areas where it had internal legislative powers. But, as Hartley points out, the Court soon managed, by a "step-by-step" approach, to settle its doctrine of parallel powers in the minds of the Member States. *Id.*, at 164 ("What seemed bold in 1971 had been discarded as insufficient by 1977").

The Community has even concluded treaties under Article 235 of the EC Treaty—which gives the Council the power to pass internal legislation or to take appropriate measures, if "action by the Community should prove necessary to attain . . . one of the objectives of the Community and this Treaty has not provided the necessary powers"—and, according to Hartley, the doctrine of parallel powers applies in this situation. *Id.*, at 165. No one has brought any treaty concluded under Article 235 before the ECJ, but in its Opinion 1/94 of 15

and the division of power between the Council and the Commission is quite another.

The Court in *France v. Commission* restricted itself to saying precisely this, but the Advocate-General also argued that the Commission's powers even in the field of competition are very limited when compared with those of the Council. Therefore, even if the fundamental rule in Article 228 about division of powers is not regarded as autonomous, the Commission's exclusive powers in the field of competition are virtually non-existent, and since the Commission has no exclusive *internal* powers, it has no *external* powers.<sup>51</sup> Again, the Advocate-General's opinion, which received the subsequent blessing of the Court, gave the impression of wanting to minimize the significance of the Commission, and thereby indirectly the Community, in the tug-of-war between the Community and the Member States. As noted above, the more power the Council retains, the more influence the Member States retain over the Community and vice versa.

Considering the ECJ's elastic construction of the EC Treaty concerning the implied treaty-making powers of the Community, it is interesting to compare the restrictive attitude the ECJ takes when interpreting Article 228 of the EC Treaty with Article 101 of the Euratom Treaty regarding the treaty-making power of the Commission under the respective treaties. According to Article 101 of the Euratom Treaty, the Commission alone negotiates and concludes international agreements of lesser importance. In *France v. Commission*, however, the ECJ refused to extend the same powers to the Commission under Article 228(2) of the EC Treaty. This can be compared with another section of Article 228 concerning the treaty-making powers of the EC, which the ECJ through its practice has extended to become equivalent to the considerably wider ones conferred by the Euratom Treaty. Thus, at least in practice, some parts of Article 228 have been applied by analogy with Article 101 of the Euratom Treaty.

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November 1994, (1994) ECR I-5267, ¶ 89, the Court seems to confirm Hartley's assumption that the doctrine of parallel powers applies also in relation to Article 235. The doctrine on parallel powers can be compared with the absolutist reasoning of the Court in *France v. Commission* on the subject of Article 4(1) of the EC Treaty: "Each institution shall act within the limits of the powers conferred on it by this Treaty." Obviously the doctrine of parallel powers has considerably extended the scope of the Treaty.

51. French Republic, *supra* note 10, ¶¶ 38-39 (opinion of the Advocate-General).

Judging exclusively from the opening of Article 228 of the EC Treaty, "[w]here this Treaty provides for the conclusion of agreements. . .," the Community would only have treaty-making powers where this is explicitly provided. Article 101 of the Euratom Treaty, on the contrary, provides in general terms that "[t]he Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State. . . ."<sup>52</sup> The way the Court has interpreted Article 228 with respect to the treaty-making powers of the EC, however, results in the powers of the Community under the EC Treaty being as extensive as those under the Euratom Treaty.<sup>53</sup>

Hartley comments on the difference between the EC Treaty and the Euratom Treaty with respect to treaty-making and draws the same conclusion as the Advocate-General and the Court in *France v. Commission*, that since the two treaties were drafted at the same time and in many instances contain identical provisions, any differences that may occur between the treaties must be intended as such.<sup>54</sup> It is interesting that, concerning the treaty-making powers of the Community generally,<sup>55</sup> the Court has departed significantly from the wording of the EC Treaty in the direction of the Euratom Treaty. At the same time, in *France v. Commission*, the Court bluntly refused to apply reasoning by analogy between the two treaties concerning the allocation of treaty-making powers between the Commission and the Council under Article 228(2). In *France v. Commission*, both the Advocate-General and the Court argued that the Euratom Treaty *must* be interpreted *a contrario*; the differences between the treaties were intended and the will of the drafters should be followed.

This is not a consistent approach, considering the Court's previous elastic case law relating to Article 228. Why did the Advocate-General, and even more importantly the ECJ, apply different methods of interpretation to different parts of Article 228? Even though the Court has significantly expanded the Community's power to conclude treaties, the Community's treaty-making power remains in the hands of the Council, where the Member States retain a large measure of control. In *France v. Commission*, the question was whether the Court should go

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52. EURATOM TREATY art. 101.

53. See *supra* note 50 and accompanying text.

54. HARTLEY, *supra* note 29, at 168.

55. EC TREATY art. 228(1).

one step further and transfer power to the Community in the form of the Commission, which is outside the reach of the Member States. But this probably was regarded politically as too sensitive a step to be taken by the judiciary.<sup>56</sup>

### III. GERMANY V. COUNCIL: BANANA IMPORTS TO THE EUROPEAN COMMON MARKET

#### A. INTRODUCTION TO THE CASE

The case of *Federal Republic of Germany v. Council of the European Union* (the *Banana Case*)<sup>57</sup> concerns the decision of the Council in 1993 to establish a common organization of the European market in bananas (the *Banana Regulation*).<sup>58</sup> The common organization of different agricultural markets within the EC forms part of the Common Agricultural Policy (CAP) of the EC. The CAP in its turn is one of the most important and certainly the most costly of the common policies of the EC.<sup>59</sup> The common organization of the internal EC market in bananas presupposes among other things a common import regime from third countries. Before the *Banana Regulation*, different EC countries had different import regimes, depending on whether they produced bananas themselves and on whether they had former colonies which produced bananas (the so-called ACP countries—African, Caribbean and Pacific). In France, Greece, Italy, Portugal, Spain, and the United Kingdom, the consumption was covered either by bananas produced within the Community,

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56. In a more recent case that concerned the Commission's, or the EC's right to vote in the Food and Agricultural Organization, where the EC and the EC Member States individually are members, the ECJ decided in favor of the Commission's right to vote with respect to questions falling within the exclusive competence of the EC. Case C-25/94 *Commission v. Council*, 1994 E.C.R. I-1469 (Fisheries Convention).

57. Case C-280/93, *Germany v. Council*, 1994 E.C.R. I-4973 [hereinafter *Banana Case*].

58. Council Regulation 404/93, 1993 O.J. (L 47) 1 [hereinafter *Banana Regulation*].

59. The CAP makes up approximately 50 percent of the total EC budget. Other common policies are the Common Commercial Policy (CCP) concerning the external trade of the EC, the transport policy, the economic and monetary policy, the regional policy, the social and educational policy, the consumer protection policy, the industrial policy, the policy on research and technological development and the environmental policy. The common policies have become more and more numerous as the EC Member States become more and more integrated.

including overseas regions,<sup>60</sup> or by imports from the ACP countries.

Germany traditionally had the most liberal import regime of all the EC Member States. In practice, an unlimited amount of bananas could be imported into Germany duty free, regardless of source.<sup>61</sup> Germany imported its bananas mostly from Latin America. When the common organization of the market in bananas was established, the quantity of Latin American bananas that could be imported to the EC was circumscribed and, especially in relation to Germany where traders had been able to import bananas duty-free, the duty on imports was raised. A system for the licensing of importers of "third country" bananas into the EC, i.e. Latin American bananas, was also created through the *Banana Regulation*. As a consequence of the licensing system, thirty per cent of the market share of the traders who had traditionally imported Latin American bananas was transferred to those traders who had traditionally imported bananas from the ACP countries.

The new licensing system was particularly detrimental to German importers, who traditionally had been the largest importers of bananas from Latin America. Therefore it is no coincidence that Germany challenged the *Banana Regulation* before the ECJ. Belgium and the Netherlands, which also imported bananas mostly from Latin America, intervened in support of Germany. It was also no coincidence that the UK, France, Greece, Italy, Portugal, and Spain intervened in support of the Council. Individual German import enterprises have also launched complaints against the *Banana Regulation* before the ECJ.<sup>62</sup>

The *Banana Case* raises a number of legal issues. Critics attacked the *Banana Regulation* both under EC law and under the GATT. The ECJ held that the *Banana Regulation* did not violate EC law. The most important issue was whether the new licensing system for banana importers violated fundamental

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60. For instance the Spanish Canary Islands; the Portuguese Madeira, west of Africa; and the French departments, Guadeloupe and Martinique in the Caribbean.

61. This was due to a special "Banana Protocol" for the benefit of Germany. The Protocol was annexed to the early Implementing Convention on the Association of the Overseas Countries and Territories with the Community, as provided for in Article 136 of the EEC Treaty. The Implementing Convention itself expired in 1962, but the Protocol continued to be applied. The overseas countries and territories were the colonies of the Member States when the EEC Treaty was concluded in 1957. Now these countries are referred to as the ACP countries.

62. See *infra* note 123.

economic rights, as defined under EC law, of the traditional importers of "third country" bananas. The ECJ held that, although the GATT is superior in principle to secondary legislation in the form, for instance, of a Regulation, the legality of the Banana Regulation nevertheless cannot be tested against the GATT because the text of the latter is not sufficiently precise and unconditional to allow such a test. This is in line with the ECJ's previous case law relating to the GATT. The result in the *Banana Case* was that the ECJ never tried the issue of whether the *Banana Regulation* infringed the GATT in substance. Thus, according to the ECJ, there were no grounds for annulling the *Banana Regulation*, and the Court dismissed the German application for annulment of the Regulation.

## B. THE BANANA REGULATION

The Council adopted the *Banana Regulation*<sup>63</sup> in February 1993. In May of 1993 Germany launched a complaint against the Regulation, seeking a declaration that certain parts of it were void. The Regulation instituted a quota system for the importation to the EC of bananas from third countries and from "non-traditional" ACP countries.<sup>64</sup> The quota was set at 2 million tons. It was later to be augmented to 2.2 million tons through the Framework Agreement on Banana Imports signed in March 1994 between the EC on the one hand and Colombia, Costa Rica, Nicaragua, and Venezuela on the other.<sup>65</sup> Within this quota, "non-traditional" ACP bananas would be imported duty free while the third-country bananas would be subject to a levy of 100 ECUs per ton.<sup>66</sup> The levy for third-country bananas was lowered to seventy-five ECUs per ton through the Framework Agreement.<sup>67</sup> The Agreement, however, did not affect the principal legal issues in the *Banana Case*, then pending before the ECJ.

The Regulation was also the subject of panel proceedings under the GATT agreement after having been challenged by the same countries (plus Guatemala) who later concluded the Framework Agreement with the EC. The GATT panel found in

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63. *Banana Regulation*, *supra* note 58.

64. *Id.* Title IV (trade with third countries).

65. Costa Rica-Colombia-Dominican Republic-European Community-Nicaragua-Venezuela: Framework Agreement on Banana Imports, Mar. 29, 1994, 34 I.L.M. 1 (1995) [hereinafter Framework Agreement].

66. *Banana Regulation*, *supra* note 58, art. 18(1). One ECU (European Currency Unit) equals approximately \$1.30 (US).

67. Framework Agreement, *supra* note 65, art. VII.

favor of the complainants on several points.<sup>68</sup> Considering that the EC market for imported bananas is the largest in the world, a great deal was at stake for the banana producers in Latin America (mostly U.S. multinational companies). The EC market accounts for forty per cent of the international trade in bananas.<sup>69</sup>

Therefore, as we have seen, different countries within the EC had applied different rules to the importation of bananas. Germany had the most liberal regime with unrestricted duty-free market access for all bananas irrespective of origin. Other Member States had rules which either favored their own production or favored imports from the ACP countries. Although disfavored by restrictive import regimes, the majority of bananas sold within the EC were still imported from Latin America.<sup>70</sup> The bananas from Latin America were both cheaper and of better quality than Community or ACP bananas, creating what the

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68. The GATT Panel Report was issued on 18 January 1994, but not adopted. GATT Panel Report on the European Economic Community-Import Regime for Bananas, Jan. 19, 1994, GATT Doc. DS 38/R (Feb. 11, 1994), 34 I.L.M. 177 (1995) [hereinafter *Banana Report*]. The GATT panel found that the new specific duties levied on imports of third-country bananas (100 ECU's per ton) were inconsistent with Article II of the GATT on tariff binding because they were higher or potentially higher than the tariff concession granted by the E(E)C to bananas; the preferential tariff rates on bananas accorded by the E(E)C to ACP countries were inconsistent with the principle of the most-favored-nation treatment in Article I of the GATT; and the allocation of import licences granting access to imports under the quota system was inconsistent with Article III of the GATT's prohibition of internal legislation distorting competition between domestic and imported products. The same five Latin American countries also instituted GATT proceedings against France, Italy, Portugal and Spain individually, the latter allowing virtually no banana imports at all before the adoption by the EC Council of the Banana Regulation. See Nancy L. Perkins, *Judgment of the Court in Germany v. Council*, 34 I.L.M. 154, 156 (1995). The GATT panel established to deal with that complaint also found in favor of the complainants. The panel held that the quantitative restrictions maintained by these countries on imports of bananas were inconsistent with Article XI:1 of the GATT's prohibition of quantitative restrictions on imports. Ernst-Ulrich Petersmann, *Proposals for a New Constitution for the European Union: Building-Blocks for a Constitutional Theory and Constitutional Law of the EU*, 32 COMMON MKT. L. REV. 1123, 1164-65 (1995). Yet another panel was established on May 8, 1996, under the agreement on the World Trade Organization (WTO), to deal with the issue of the EC's banana importation regime, subsequent to a complaint by Ecuador, Guatemala, Honduras, Mexico and the United States. WTO Communication by the DSB Chairman, European Communities—Regime for the Importation, Sale and Distribution of Bananas, Constitution of the Panel Established at the Request of Ecuador, Guatemala, Honduras, Mexico and the United States, WT/DS 27/7 (June 7, 1996).

69. Perkins, *supra* note 68 at 156.

70. *Id.*

ECJ termed "structural deficiencies" which affected the latter two groups of producers.<sup>71</sup>

The point of the *Banana Regulation*, in brief, was to establish a common market in bananas while at the same time protecting the importation of bananas from ACP countries.<sup>72</sup> The protection which ACP bananas had already enjoyed under the Lomé IV Convention was retained.<sup>73</sup> The Lomé Convention is a comprehensive agreement primarily on trade between the EC and the ACP countries guaranteeing the ACP countries duty-free imports into the EC, but covering also a wide range of other areas of cooperation.<sup>74</sup> The *Banana Regulation* also established a system for compensating EC banana growers for any income loss attributable to the Regulation.<sup>75</sup> Indeed, the Community institutions foresaw that, if a common market for bananas was

71. *Banana Case*, *supra* note 57, ¶ 5 (judgment).

72. *Banana Regulation*, *supra* note 58, ¶¶ 15-16 (preamble); *id.* art. 1. "The Regulation is intended to ensure the disposal of Community production and traditional ACP production, as stated by the ECJ." *Id.* ¶ 74.

The restriction of the right to import third-country bananas imposed on the economic operators on the German market is inherent in the establishment of a common organization of the market designed to ensure that the objectives of article 39 [concerning the CAP] of the [EC] Treaty are safeguarded and that the Community's international obligations under the Lomé Convention are complied with. A common organization of the market had to be implemented while *Community and ACP bananas were not displaced from the entire common market* following the disappearance of the protective barriers enabling them to be disposed of with protection from competition from third-country bananas.

*Id.* ¶ 82 (emphasis added).

73. Paragraph 15 of the Regulation's preamble states that the purpose of opening a tariff quota is, among other things, "to ensure satisfactory marketing of bananas produced within the Community and of products originating in the ACP States within the framework of the Lomé Convention Agreements." Non-ACP third country imports "not falling within the tariff quota must be subject to sufficiently high rates of duty to ensure that Community production and traditional ACP quantities are disposed of in acceptable conditions." *Id.* ¶ 16 (preamble). The Fourth Lomé Convention was signed in Lomé, Togo on December 15, 1989. Fourth ACP-EEC Convention of Lomé, Dec. 15, 1989, 29 I.L.M. 783 (1990), 1991 O.J. (L 229) 1 (entered into force Sept. 1, 1991) [hereinafter Lomé Convention]. The first Lomé Convention was signed on February 28, 1975. ACP-EEC Convention of Lomé, Feb. 28, 1975, 14 I.L.M. 604 (1976).

74. Environment; agricultural cooperation; food security and rural development; development of fisheries; cooperation on commodities; industrial development; manufacturing and processing; mining development; energy development; enterprise development; development of services; cultural and social cooperation; and regional cooperation. Lomé Convention, *supra* note 73.

75. *Banana Regulation*, *supra* note 58, art. XII.

[S]ince introduction of the market organization should not place producers in a worse situation than at present, and since it is likely to alter the levels of prices on those markets, provision should be made for

created without keeping some protection for Community and ACP bananas, these bananas would disappear completely from the market because they are not competitive.<sup>76</sup>

### C. AGRICULTURAL POLICY VS. COMPETITION AND FREE TRADE

Through its complaint against the *Banana Regulation*, Germany raised several fundamental legal issues. Germany argued, first of all, that the objectives of the *Banana Regulation*, insofar as they concern safeguarding Community production and maintaining income of Community producers, do not come under Article 39 of the EEC Treaty, which deals specifically with the objectives of the CAP.<sup>77</sup> The Court pointed out that, in pursuing the different objectives of the CAP, the Community institutions may temporarily give any one of the objectives priority.<sup>78</sup> The Court added that in matters concerning the CAP, the Community legislature, i.e. the Council, enjoys broad discretion.<sup>79</sup> Furthermore, the aims of increasing productivity and ensuring a fair standard of living for the agricultural community are expressly mentioned in Article 39 of the EEC Treaty. Therefore, the Council's adoption of the Regulation did not infringe Article 39. The Court pointed out that neither does the Regulation conflict with two other pertinent objectives of the CAP set out in Article 39, namely to stabilize the market and to assure the availability of supplies.

Banana prices had risen dramatically in the German market after the adoption of the Regulation. Germany argued that, in allowing this to happen, the *Banana Regulation* conflicted with yet another objective of the CAP—to ensure reasonable prices for consumers. In response to Germany's argument, the Court replied that this objective must be considered in the common market as a whole, and that some adjustment of prices throughout the Community is inevitable in the context of creating a common organization of the market.<sup>80</sup> The Court also reit-

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compensation to cover the loss of income which may derive from implementation of the new system . . .

*Id.* ¶ 12 (preamble).

76. See *supra* note 72.

77. *Banana Case*, *supra* note 57, ¶ 46 (judgment). The objectives of the CAP under Article 39 are to increase agricultural productivity, to ensure a fair standard of living for the agricultural community, to stabilize markets, to assure the availability of supplies, and to ensure that supplies reach consumers at reasonable prices.

78. *Id.* ¶ 47 (judgment).

79. *Id.*

80. *Id.* ¶ 51 (judgment).

erated its argument that the Community institutions may temporarily give some of the objectives of Article 39 (safeguarding Community production and maintaining the income of Community producers) priority over others (reasonable consumer prices).<sup>81</sup>

Germany also argued that since the *Banana Regulation* implies a *development* policy in favor of the ACP countries, it cannot be based on provisions of the EEC Treaty concerning the common *agricultural* policy, but "at most," must be based on Articles 235 or 238 of the EC Treaty.<sup>82</sup> Article 235 extends the Council's powers beyond the express provisions of the EC Treaty in the exceptional case where a particular decision which is not explicitly provided for in the EC Treaty nevertheless needs to be taken to attain one of the objectives of the Community. Article 238 provides the Community with the possibility of concluding so called association agreements with third states or international organizations "involving reciprocal rights and obligations, common action and special procedures." Germany probably invoked Articles 235 and 238 because those articles require that decisions of the Council are taken unanimously, whereas the decision on the *Banana Regulation* was adopted by qualified majority.<sup>83</sup> The *Banana Regulation* was adopted in accordance with Article 43 of the EC Treaty which lays down the procedure for the adoption of EC legislation in the field of agricultural policy, including the creation of common agricultural markets.

The Court said that Article 43 is the appropriate legal basis for any EC legislation concerning the production and marketing of agricultural products, even if the objectives of the legislation are manifold and do not only include objectives of agricultural policy.<sup>84</sup> Furthermore, said the Court, the creation of a common organization of the market requires the establishment of an import regime if, as in the case of bananas, the internal and external aspects of the common policy cannot be separated.<sup>85</sup> The Community institutions also have to take into account the inter-

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81. *Id.*

82. *Id.* ¶ 53 (judgment). In the EC Treaty, after the Maastricht amendments, there is now a special section dealing expressly with development cooperation. EC TREATY arts. 130u-130y.

83. The votes of the different Member States are weighted, but not to the full extent of the difference in size and population of the different states. Thus, the smaller states have more votes and the larger states have less votes than they should have if the weighting is strictly proportional to the size of their country and population.

84. *Banana Regulation*, *supra* note 58, ¶ 54.

85. *Id.* ¶ 55.

national obligations of the Community under the Lomé Convention when implementing internal policies.<sup>86</sup> It is evident from the Court's approach that, under the EC Treaty and the EEC Treaty, the objective of supporting internal agricultural production and guaranteeing the sales of internal agricultural products on the common market is generally superior to any objective of free trade with third countries. This is particularly true for third countries not belonging to the privileged group of ACP countries protected under the Lomé Convention.<sup>87</sup>

Agricultural policy is also given priority over competition policy, which otherwise constitutes one of the central pillars of the European common market. In connection with a relatively marginal complaint by Germany that certain aspects of the *Banana Regulation* violated the principle of free and undistorted competition within the common market, the Court said that it is true that the objective of undistorted competition is laid down in Article 3 of the EEC Treaty, but so are other objectives, including the establishment of a CAP.<sup>88</sup> As the Court stated, both elegantly and euphemistically, "[t]he authors of the Treaty were aware that the simultaneous pursuit of those two objectives might, at certain times and in certain circumstances, prove difficult."<sup>89</sup> Therefore, Article 42 of the EEC Treaty provided that the rules on competition shall apply to production and trade in agricultural products *only* to the extent determined by the Council within the CAP. So even if there is distortion of competition in the agricultural sector, the distortion prevails until the Council decides to pursue a different policy. Consequently, Germany's complaint that the *Banana Regulation* distorted competition in the banana market was practically irrelevant. The agricultural policy is still a sacred—and mad—cow compared with the other common market policies.

It should also be noted, however, that despite its relative lack of weight in the agricultural sector, the ECJ remains the ultimate arbiter of the constitutionality of policy of the Commu-

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86. *Id.* ¶ 56.

87. While the Council may adopt legislative measures under Article 130w to promote the development and cooperation of the Community, the provisions of Article 130w shall not affect cooperation with ACP countries in the framework of the Lomé Convention. The ACP countries retain their special position *vis-à-vis* the EC.

88. *Banana Case*, *supra* note 57, ¶¶ 58-59 (judgment). Article 3a also notes that the economic policy of the EC is based on the principle of an open market economy with free competition.

89. *Id.* ¶ 60 (judgment).

nity institutions, regarding form as well as substance. Hypothetically, the Court could declare that a certain policy choice infringes the EC Treaty. A political choice could thus be declared illegal, but as the Court itself emphasized, in matters concerning the CAP in particular, the Community legislature enjoys broad discretion.<sup>90</sup>

#### D. BREACH OF FUNDAMENTAL RIGHTS AND PRINCIPLES?

This part of the *Banana Case* is interesting and important from an EC legal perspective because it concerns possible violations of fundamental individual rights and fundamental general principles of EC law. The fundamental rights and principles which make up part of the EC law are not evident from the text of the EC Treaty, but instead have been created by the ECJ in its case law.

In addition to laying down the 2 million ton import quota—which was later augmented to 2.2 million tons—the *Banana Regulation* also establishes a system for licensing operators within the EC to import bananas within the quota.<sup>91</sup> The quota applies to bananas imported from ACP countries not among the traditional banana exporters to the EU, to imports from traditional ACP exporters of bananas above their traditional export quantity, and to third-country bananas. Within the tariff quota, as noted above, imports of third-country bananas are subject to a levy of seventy-five ECUs per ton, whereas non-traditional ACP bananas are imported duty-free. Above the quota, non-traditional ACP bananas are subject to a levy of 750 ECUs per ton and third-country bananas are subject to a levy of 850 ECUs per ton.

The system for licensing operators established in the EC also regulates imports. Sixty-six and a half percent of the quota is allocated to operators who marketed third-country or non-traditional ACP bananas (i.e. necessarily bananas from non-traditional ACP exporting countries since the traditional ACP exports of bananas to the EC have never reached the quantitative limit where they would begin to be called “non-traditional”). Thirty percent is allocated to operators who marketed Community or traditional ACP bananas; and the remaining three and a half percent is allocated to operators in the EC who started marketing bananas other than Community or traditional ACP ba-

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90. *Id.* ¶ 47 (judgment).

91. *Banana Regulation*, *supra* note 58, art. XIX.

nanas from 1992.<sup>92</sup> The Regulation imposes no licensing or other requirements on the marketing of bananas produced within the EC including overseas dependencies.

In the *Banana Case*, Germany argued, firstly, that the subdivision of the quota constituted unjustified discrimination against traders in third-country bananas.<sup>93</sup> Secondly, Germany argued that the loss of market shares suffered by those operators constituted an infringement of several of their fundamental economic rights and freedoms.<sup>94</sup> Thirdly, Germany argued that the introduction of the quota was contrary to the principle of proportionality.<sup>95</sup> The principles of non-discrimination—or equality if put in positive terms—and of proportionality are principles fundamental to EC law.

Germany argued that the subdivision of the tariff quota in favor of importers of Community or traditional ACP bananas equalled a transfer to them of a thirty percent market share and that the subdivision to the detriment of the class of operators trading in third-country bananas, without any justification, constituted discrimination contrary to the EEC Treaty.<sup>96</sup> Through its earlier case law, the ECJ had specified that the principle of equality means that “comparable situations are not treated in a different manner unless the difference in treatment is objectively justified.”<sup>97</sup> In the *Banana Case*, the Court cited Article 40(3) of the EEC Treaty, which states that the means used to achieve the common organization of agricultural markets must “exclude any discrimination between producers or consumers” within the EC.<sup>98</sup> The Court pointed out that the common organization of the banana market covered economic operators who are neither producers nor consumers, but the Court stated in the *Banana Case* that the prohibition of discrimination also covered other categories of economic operators who are subject to a common organization of a market.<sup>99</sup>

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92. *Id.*

93. *Banana Case*, *supra* note 57, ¶ 64 (judgment).

94. *Id.* The principle of proportionality was developed in the case law of the ECJ and eventually inserted in the text of the EC Treaty at Maastricht: “Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.” EC TREATY art. 3b.

95. *Banana Case*, *supra* note 57, ¶ 64 (judgment).

96. *Id.* ¶ 65 (judgment).

97. *Id.* ¶ 67 (judgment) (referring to earlier cases where the question of discrimination arose in the context of agricultural policy).

98. *Id.* ¶ 66 (judgment).

99. *Id.* ¶ 68 (judgment).

The subdivision of the import quota as one means to achieve the common organization of the EC market in bananas concerned neither the banana growers nor the consumers, but the traders who import and distribute bananas to the local retailers in Europe. Thus, the ECJ stated that this kind of economic operator was also protected by the prohibition of discrimination in Article 40(3) of the EEC Treaty even though the Article explicitly mentions only producers and consumers.

Discrimination occurs when comparable situations are treated differently and therefore the Court inquired whether this was so as a consequence of the Banana Regulation. The Court analyzed the situation prior to the Regulation and observed that within the EC there were open, national markets—the German market being the most open, where importers were even exempt from customs duties—and protected national markets.<sup>100</sup> In the protected national markets, economic operators marketing Community and traditional ACP bananas, in the words of the Court, were ensured the possibility of disposing of their products without being exposed to competition from suppliers of more competitive third-country bananas.<sup>101</sup> In somewhat circular reasoning, the court concluded that, because economic operators holding the tariff quotas were not comparable before the Banana Regulation, the fact that they were in different situations after adoption of the Banana Regulation could not constitute a breach of the principle of non-discrimination.<sup>102</sup> However, any differences that existed before the *Banana Regulation* still cannot justify any difference in effects on these groups of operators introduced by the *Banana Regulation* itself.

The Court conceded that the two categories of operators on the EC market had been affected differently by the Regulation. Operators who used to market third-country bananas now found their import possibilities at sixty-six and a half percent of the tariff quota, whereas those who formerly marketed Community and ACP bananas were permitted to import up to thirty percent of the tariff quota.<sup>103</sup> In the Court's view, this did not constitute discrimination. It seems more reasonable, however, to adopt the argument of Ulrich Everling, a former Judge of the ECJ who is critical of the *Banana Case* decision, that the introduction of a quota only for imports of third-country bananas was acceptable,

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100. *Id.* ¶ 71 (judgment).

101. *Id.*

102. *Id.* ¶ 72 (judgment).

103. *Id.* ¶ 73 (judgment); see also *Banana Regulation*, *supra* note 58, art. 19.

but that the internal repartition of the quota was not. Everling argues that, in comparison with the usual criteria for allowing access to import quotas under equal conditions, reserving a high percentage of the quota to operators who have had no relation to third-country imports in the past obviously constitutes discriminatory treatment.<sup>104</sup>

It should be noted that, under the *Banana Regulation*, established operators may transfer their licenses to each other.<sup>105</sup> Most transfers will take place from operators traditionally marketing ACP bananas to operators traditionally marketing third-country bananas, who want their market back. The latter category of operators will have to pay for the licenses, of course, so any transfers will function as indirect subsidies from the operators marketing third-country bananas to the operators marketing Community and ACP bananas.<sup>106</sup> This is in line with the *Banana Regulation's* objective to support ACP and Community banana production,<sup>107</sup> which as the Court says, is "a means intended to contribute to the competitiveness of operators marketing Community and ACP bananas."<sup>108</sup>

Alternatively, operators marketing the less competitive Community and ACP bananas will now get the opportunity to earn money from the competitive Latin American bananas. It is more likely, however, that the Community and ACP operators will sell their licences to the third-country operators, because the trade in bananas is based on long-term relationships between exporters and importers, including considerable economic investment, and therefore it is difficult for new operators to enter the market.<sup>109</sup> In any case, the Community and ACP operators will profit from the subdivision of the tariff quota, whereas the operators marketing third-country bananas will lose from it, just as Germany argues.

In response to the German argument that the subdivision of the tariff quota constitutes discrimination against the traders in third-country bananas, the ECJ also said that the subdivision of

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104. Ulrich Everling, *Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts*, 33 COMMON MKT. L. REV. 401, 415 (1996).

105. *Banana Regulation*, *supra* note 58, art. 20.

106. This fact is also recognized by the ECJ. *Banana Case*, *supra* note 57, ¶ 86 (judgment).

107. *Banana Regulation*, *supra* note 58, ¶¶ 15-16 (preamble).

108. *Banana Case*, *supra* note 57, ¶ 86 (judgment).

109. See Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207 (discussing the vertical integration of the banana trade and its effect on competition in the EC).

the quota and the ensuing difference in treatment between the two categories of operators is inherent in the objective of integrating previously compartmentalized markets.<sup>110</sup> Market integration is indeed and by definition an important element in the creation of the common European market. The objective of market integration makes itself particularly felt in the field of EC competition law. The thought is that third-country bananas will now be able to make their way into countries where mostly Community and ACP bananas were marketed before, thanks to the protected national markets. Operators formerly marketing only third-country bananas will also start importing ACP bananas to compensate for their lost market share in third-country bananas.<sup>111</sup> In the unlikely event that the operators traditionally marketing Community and ACP bananas sell their third-country banana import licenses to the operators traditionally marketing third-country bananas, it would seem that the objective of market integration will come to nothing. In the end, the overriding objective of the Regulation seems to be to protect the Community and ACP banana production.

Everling argues that the real objective of the repartition of the quota for the benefit of the traditional traders in ACP/Community bananas was to obtain higher prices for third-country bananas.<sup>112</sup> This is not the kind of objective justification which would support the otherwise discriminatory difference in treatment between third-country and ACP/Community operators.<sup>113</sup> It was apparent to everybody, Everling writes, that the utilization of quotas in such capital intensive fields as banana imports, requiring investments in the producing countries and in domestic ports as well as in distribution networks, demanded long-term relationships with the producers.<sup>114</sup> Since the transfer of licences was allowed, it was clear to the Council and to the Commission that the favored group of operators would sell their

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110. Banana Case, *supra* note 57, ¶ 74 (judgment).

111. *Id.* ¶ 83 (judgment).

112. Everling, *supra* note 104, at 415. The Advocate-General in the Banana Case stated that in his view, it was to be foreseen that prices on third-country bananas would rise, among other "perceptible disturbances of trade in the markets which had hitherto been open." Banana Case, *supra* note 57, ¶ 83 (opinion of the Advocate-General). The World Bank estimates that the Banana Regulation costs EC consumers \$2.3 billion (US) a year, of which only \$300 million (US) benefit ACP producers. Ernst-Ulrich Petersmann, *The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L. 161, 169 (1995).

113. Everling, *supra* note 104, at 415.

114. *Id.*

licences to operators whose traditional imports were drastically cut.<sup>115</sup> Everling draws the conclusion that the allocation of the quota was therefore not appropriate to integrate the market, but "leads to a pure and arbitrary financial transfer from one group of operators to another."<sup>116</sup> Thus, in Everling's view, the Court accepted a clear discrimination between operators under Article 40(3) of the EEC Treaty in the *Banana Case*.<sup>117</sup>

Germany also argued that by depriving operators who traditionally marketed third-country bananas of market shares, the Regulation breached those operators' right to property, their freedom to pursue their trade or business, and their acquired rights.<sup>118</sup> Fundamental human rights and freedoms are not expressly part of EC law under the EC Treaty, but over the years the ECJ has followed the lead of the Member States' constitutions and the European Convention on Human Rights,<sup>119</sup> incorporating human rights into the body of EC law as general principles of Community law. Since the EC is primarily an organization for economic cooperation, the human rights in question have been primarily economic rights, among them the right to property and the freedom to pursue a trade or business. Protection of acquired rights, without being expressly stated in any Bill of Rights or in the European Convention on Human Rights, is a general principle of law found in several European legal systems.

In the *Banana Case*, the Court pointed out, however, that the general principles of Community law are not absolute, but "must be viewed in relation to their social function."<sup>120</sup> Considering the strong position of the CAP within the EC, we can already guess what the conclusion of the Court was in relation to the fundamental rights and freedoms in this case. The exercise of the right to property and the freedom to pursue a trade or profession may be restricted, said the Court, "*particularly in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very*

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Banana Case*, *supra* note 57, ¶¶ 64, 77 (judgment).

119. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (adopted within the framework of the Council of Europe).

120. *Banana Case*, *supra* note 57, ¶ 78 (judgment).

substance of the rights guarantee."<sup>121</sup> Judging from this statement, it is obvious that there is plenty of room for restrictions of fundamental rights and freedoms in the event they conflict with the the CAP.

The Court's response to the German complaint was that the right to property of traders in third-country bananas was not called into question by the introduction of the tariff quota and the rules for its subdivision.<sup>122</sup> The Court stated that no economic operator can claim a right to property in a market share, since such a market share constitutes only a momentary economic position exposed to the risks of changing circumstances.<sup>123</sup> Consequently, it would seem that, in the name of the CAP and the common organization of agricultural markets, the EC legislature may reshuffle market shares as it wishes without infringing the right of property.<sup>124</sup>

Concerning the acquired rights and legitimate expectations of third-country banana operators, the Court said, in a somewhat circular way, that no economic operator can legitimately expect that an existing situation will be maintained if it is capable of being altered by decisions taken by Community institutions within the limits of their discretionary power.<sup>125</sup> This is especially true if the existing situation is contrary to the rules of the common market.<sup>126</sup> The Court implied that the existing banana market was contrary to the CAP.<sup>127</sup> The point is, though, that the limits of the Community institutions' discretionary power are not clear and are ultimately decided by the ECJ itself.

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121. *Id.* (emphasis added).

122. *Id.* ¶ 79 (judgment).

123. *Id.* However, the relevant property of the banana importers is not market share but the return on investments made in the producing countries and in domestic ports and distribution networks. Everling, *supra* note 104, at 416. Four proceedings have been launched before the ECJ in which German courts have presented preliminary questions concerning import enterprises which claim to risk bankruptcy because of the reduction of the quota for traditional dealers in third-country bananas. Case C-68/95, T. Port GmbH & Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung, November 26, 1996 (on file with the author) [hereinafter T. Port GmbH]; see 1995 O.J. (C-182/95) 12; 1996 O.J. (C-364/95 & C-365/95) 8, 9; Joined Cases C-466 & 465/93, Atlanta Fruchthandelsgesellschaft mbH and Others v. Bundesamt für Ernährung und Forstwirtschaft, 1996 E.C.R. I-3761, 3802 (answering a request by a German court for a preliminary ruling by restating its argument in the Banana Case).

124. 1995 O.J. (C-181/95) 12.

125. Banana Case, *supra* note 57, ¶ 80 (judgment).

126. T. Port GmbH, *supra* note 123.

127. Banana Case, *supra* note 57, ¶ 80 (judgment).

The Court then went on to discuss the alleged infringement of freedom to pursue a trade or business. The Court stated that the introduction of the tariff quota and the machinery for subdividing it did indeed alter the competitive position of economic operators on the German market, particularly those who were previously able to import third country bananas free of any tariff restriction within an annually adjusted quota.<sup>128</sup> However, the Court continued, “[i]t must be examined whether the restrictions introduced by the Regulation correspond to *objectives of general Community interest* and do not impair the *very substance* of [the freedom to pursue a trade or business].”<sup>129</sup> With our knowledge of the Court’s reasoning in other aspects of this case, we can guess what the result of this test will be.

The Court concluded that the financial advantages given traders in Community and ACP bananas must be assessed within the general framework of all the measures adopted by the Council to ensure the disposal of Community and traditional ACP products.<sup>130</sup> Here again, we have the unassailable superior principle of protecting Community and ACP agricultural production. It could be noted, however, that the interest of banana growers in the Member States, including their overseas dependencies,<sup>131</sup> and in the ACP countries is promoted to a general Community interest, whereas the interest of approximately 370 million consumers within the EC in purchasing bananas of the highest quality at the lowest price is not recognized as a general Community interest.

Germany also argued that the arrangements for banana trade with third countries breached the fundamental principle of proportionality, in that the objectives of supporting ACP producers and guaranteeing the income of Community producers could have been achieved by less revolutionary measures.<sup>132</sup> Germany argued that a more extensive system of aid for Community and ACP producers, “coupled with a system of levies on imports of third-country bananas serving to finance that system

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128. *Id.* ¶ 81 (judgment).

129. *Id.* (emphasis added).

130. *Id.* ¶ 86 (judgment).

131. Some growers are even encouraged to stop growing bananas “in certain very small regions of the Community where conditions are particularly unsuited to the production of bananas.” Banana Regulation, *supra* note 58, ¶ 13 (preamble). “A single premium shall be granted to banana producers in the Community who cease to produce bananas.” *Id.* art. 13(1).

132. Banana Case, *supra* note 57, ¶ 88 (judgment) (concerning the principle of proportionality); *see supra* note 87.

of aids, would have made it possible to achieve the objective pursued."<sup>133</sup>

Again the Court made the significant remark that the Community legislature, the Council, has a broad discretion in matters concerning the CAP.<sup>134</sup> The Court said that the lawfulness of a measure adopted in the sphere of agricultural policy "can be affected only if the measure is *manifestly inappropriate* having regard to the objective which the competent institution is seeking to pursue."<sup>135</sup> The Council's assessment of the future effects of its legislation is open to criticism "only if it appears *manifestly incorrect* in light of the information available to it at the time of the adoption of the rules in question."<sup>136</sup> In other words, it is practically impossible to successfully attack legislation adopted by the Council in the sphere of agricultural policy.<sup>137</sup>

It is the ECJ's task to review the legislation of the Council. But the Court's review of agricultural policy, as the Court itself pointed out, must be limited if the Council has to reconcile divergent interests by making policy choices which are its responsibility.<sup>138</sup> In the case of the banana market, the Council had to reconcile the conflicting interests of some Member States which produce bananas and other Member States which do not produce bananas and were primarily concerned with ensuring supplies on the best price terms.<sup>139</sup> This is the whole *problématique* of the CAP in a nutshell. The fact that the *Banana Case* goes to the heart of the CAP is one of the reasons the case is of such great interest and significance. So far, reconciling the objective of protecting the Community's agricultural population, on the one hand, and interests of consumers on the other, has generally turned out to the benefit of the former and to the detriment of the latter.

#### E. GATT AND EC LAW

One of the most important aspects of the *Banana Case* is that it brings to the fore the conflict between GATT law and EC

133. *Id.* ¶ 93 (judgment).

134. *Id.* ¶ 89 (judgment).

135. *Id.* ¶ 90 (judgment) (emphasis added).

136. *Id.*

137. "[B]y submitting the principle of proportionality to the discretion of the institutions, the Court. . . grants them a *carte blanche* and reduces judicial control to a minimum. This is particularly dangerous with regard to human rights." Everling, *supra* note 104, at 419.

138. *Banana Case*, *supra* note 57, ¶ 91 (judgment).

139. *Id.* ¶ 92 (judgment).

law. Should the ECJ try the legality of EC acts not only in relation to the EC Treaty and the EEC Treaty, but also in relation to the GATT agreement?

The EC was not a formal party to the GATT agreement, whereas the individual EC Member States were. But as the competence of the Member States in foreign trade was transferred to the Community due to the Common Commercial Policy (CCP) laid down in the EEC Treaty, the Community began exercising a *de facto* membership of the GATT in place of the EC Member States.<sup>140</sup> In time, only the Community was competent to deal with matters falling under the GATT. The substitution of the EC for the Member States in the GATT without any formal amendments of the GATT agreement has been recognized both within the EC<sup>141</sup> and by the other members of the GATT.<sup>142</sup>

The ECJ has found, in earlier judgments, that the GATT binds the EC and thereby that the provisions of the GATT form part of the EC legal system.<sup>143</sup> This does not necessarily mean, however, that the provisions of the GATT will be applied in concreto in a particular case. Whether or not the GATT provisions will be applied—whether they have *direct effect*—depends on the degree of precision of the part of the GATT agreement which is in issue. The ECJ has stated in a famous formula that the spirit, the general scheme, and the terms of GATT must first be considered.<sup>144</sup>

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140. Jörn Sack, *The European Community's Membership of International Organizations*, 32 COMMON MKT. L. REV. 1227, 1237-38 (1995).

141. Joined Cases 31-24/72, *Int'l Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219 [hereinafter *Int'l Fruit Co.*].

142. Ernst-Ulrich Petersmann, *The EC as a GATT Member—Legal Conflicts Between GATT Law and European Community Law*, in THE EUROPEAN COMMUNITY AND GATT 23, 37-39 (Meinhard Hilf et al. eds., 1986).

143. See *Int'l Fruit Co.*, *supra* note 141; Case 38/75; *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, 1975 E.C.R. 1439; Case 266/81, *Società Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze*, 1983 E.C.R. 731 [hereinafter *SIOT*]; Joined Cases 267 & 269/81, *Amministrazione delle Finanze dello Stato v. Società petrolifera Italiana SpA (SPI)*, 1983 E.C.R. 801 [hereinafter *SPI*]; Joined Cases 290 & 291/81, *Compagnia Singer SpA and Geigy SpA v. Amministrazione delle Finanze dello Stato*, 1983 E.C.R. 847; Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, 1989 E.C.R. 1781 [hereinafter *Fediol*]; Case C-69/89, *Nakajima All Precision Co. Ltd. v. Council*, 1991 E.C.R. I-2069 [hereinafter *Nakajima*].

144. *Banana Case*, *supra* note 57, ¶ 105. This formula was first stated in relation to the GATT in *International Fruit Company. Int'l Fruit Co.*, *supra* note 141. Originally the test whether a rule had direct effect within EC law was

According to the ECJ, the GATT is characterized by great flexibility and conditionality.<sup>145</sup> Consequently, the Court has determined that the provisions of the GATT agreement do not have direct effect. That is, they cannot be invoked by an individual—physical or legal—before a court to challenge, for instance, the lawfulness of a Community act.<sup>146</sup> The fact that, in the *Banana Case*, the plaintiff was not an individual but a Member State, did not change the reasoning of the Court.<sup>147</sup> The GATT is not precise and unconditional enough to be relied on to challenge Community legislation.<sup>148</sup>

Only under very special circumstances would individuals or Member States be able to challenge the lawfulness of community legislation by invoking the GATT agreement.

[I]t is only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules.<sup>149</sup>

So, the result in the *Banana Case* was that Germany could not invoke the provisions of the GATT to challenge the Banana Regulation.

The ECJ's decision on this point has been severely criticized by Michaël Hahn and Gunnar Schuster, who argue that it is wrong to place individuals and Member States on the same foot-

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carried out by the EC in respect of an article in the E(E)C Treaty itself. Van Gend & Loos, *supra* note 43.

145. Gerhard Bebr, *Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg*, 20 COMMON MKT. L. REV. 35, 45 (1983).

146. *Banana Case*, *supra* note 57, ¶¶ 125-151 (opinion of the Advocate-General); *id.* ¶¶ 106-109 (judgment). The cases referred to by the Court in this context are: *Int'l Fruit Co.*, *supra* note 141; *Case 9/73, Schlüter v Hauptzollamt Lörrach*, 1973 E.C.R. 1135; *SIOT*, *supra* note 143; and *SPI*, *supra* note 143. See also Gerhard Bebr, *supra* note 145; Joël Rideau, *Les Accords Internationaux dans la Jurisprudence de la Cour de Justice des Communautés Européennes: Réflexions sur les Relations entre les Ordres Juridiques International, Communautaire et Nationaux*, 94 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 289, 291-418 (1990); Ernst-Ulrich Petersmann, *supra* note 68, at 1167-69. But see Ernst-Ulrich Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 COMMON MKT. L. REV. 397, 403-404 (1983) (arguing that the GATT is indeed precise and unconditional enough to be taken into consideration by the ECJ).

147. Nor does the fact that the case was brought directly before the ECJ and did not reach the ECJ by way of a national court.

148. *Banana Case*, *supra* note 57, ¶ 109 (judgment).

149. *Id.* ¶ 111 (judgment).

ing to challenge Community legislation.<sup>150</sup> Individuals who challenge a Community act are doing this in their own interest only, even though such an action may incidentally also be of general interest. Consequently, if individuals challenge the legality of a Community act directly before the ECJ, which they may do under special circumstances according to Article 173(4), they have to show that the Community act affects them directly and individually.<sup>151</sup>

The Member States, on the other hand, have an unconditional right according to Article 173(2) to turn to the ECJ to challenge the legality of Community legislation, irrespective of whether they have any particular interest in the Community act in question. Hahn and Schuster argue that international agreements concluded by the Community, including the GATT,<sup>152</sup> are part of Community law and are superior to the legislative acts issued by the Community institutions, such as the *Banana Regulation*. Thus, the Member States should have the same unconditional access to the ECJ to challenge Community legislation infringing the GATT as they have when challenging the legality of Community legislation infringing the EC Treaty.<sup>153</sup> Hahn and Schuster also argue that Article 173(2) of the EC Treaty is the constitutional counterbalance to the democratic principle which finds its expression in decision making by a qualified majority in the Council.<sup>154</sup> Action under Article 173(2) is the only instrument by which the Member States can defend themselves against acts by the Community institutions which infringe upon EC law.<sup>155</sup> All limitation of the right of access to the ECJ of the Member States, Hahn and Schuster write, disturbs the institutional equilibrium of the EU, to which the ECJ normally at-

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150. See generally Michaël J. Hahn & Gunnar Schuster, *Le Droit des États Membres de se Prévaloir en Justice d'un Accord Liant la Communauté*, 99 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 367, 376-77 (1995) (claiming that political considerations rather than legal inspired the ECJ); Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, in *THE EUROPEAN COMMUNITY AND GATT* 187, 195-226 (Meinhard Hilf et al. eds., 1986) (applying GATT principles within the United States).

151. Some individual enterprises have brought actions against Community acts relating to GATT matters. Fediol, *supra* note 143; Nakajima, *supra* note 143.

152. The GATT was concluded by the EC Member States themselves but the Community replaced the Member States *de facto* as a party to the GATT after it had taken over the Member States' competence in the field of foreign trade. See *supra* note 141 and accompanying text.

153. Hahn & Schuster, *supra* note 150, at 371-72.

154. *Id.*

155. *Id.*

taches great weight.<sup>156</sup> Finally, Hahn and Schuster also point out that the EC Member States can be held responsible under international law on state responsibility for violations of international agreements concluded by the Community. As a result, the Member States should have an unconditional right to turn to the ECJ if and when they think that Community legislation infringes an international agreement.<sup>157</sup>

The somewhat perplexing result of the *Banana Case* is that the ECJ found that the *Banana Regulation* did not infringe EC law, including the GATT, whereas the GATT panel, as we saw above, found that the Regulation infringed several GATT rules and was therefore partly illegal from the GATT perspective.<sup>158</sup>

There is no difference between the GATT and the EC Treaty as far as their place in the hierarchy of international legal norms is concerned.<sup>159</sup> They are both multilateral international

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156. *Id.*

157. *Id.* at 372-73. Under Article 228(7) of the EC Treaty, agreements concluded by the Community "shall be binding on the institutions of the Community and on Member States." EC TREATY art. 228 (emphasis added).

158. Banana Report, *supra* note 68. When the ECJ delivered its judgment, on October 5, 1994, the results of the deliberations of the GATT panel were already known (as of January 18). Petersmann comments that the EC apparently cannot disregard its international obligations under the Lomé Convention but may disregard its worldwide GATT obligations. Petersmann, *supra* note 68, at 1169. Petersmann's sulphurous analysis of the conflict underlying the Banana Regulation and the subsequent Banana Case is worth quoting at length:

[M]ore important than the international conflict between GATT contracting parties is the domestic conflict between, on the one side, the general interest of EC consumers, tax-payers and EC traders in a liberal GATT-consistent trade regime for less expensive, high quality imports (e.g. "dollar bananas"); and, on the other side, the rent-seeking group interests of import-competing EC producers of expensive, low-quality products (e.g. EC bananas) in trade protection. No less important is the . . . conflict between, on the one side, the general interest in rule of law (including GATT law), especially by those EC Member States which had liberal import regimes for bananas and had voted against adoption of EEC Regulation No. 404/93; and, on the other side, the rent-seeking interests of those EC Member States which had voted for the EEC Regulation in order to continue their long-standing but wasteful trade protection of the more expensive "EC bananas" and "ACP bananas" from their former colonies.

*Id.*, at 1166-67.

159. See Generally Wolfram Karl, *Conflicts Between Treaties*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 467, 467-473 (1984) (concerning the horizontal international legal system in general). See, e.g., MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 39-40 (1987); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 66, 74-83 (1991); MALCOLM N. SHAW, INTERNATIONAL LAW 98-100 (1991); I.A. SHEARER, STARKE'S INTERNATIONAL LAW 47-48 (1994).

treaties. One could argue that since the GATT is global in scope it would occupy a higher position in the international legal hierarchy than the EC Treaty, which is merely regional. On the other hand, the EC Treaty is more precise; it includes an elaborate legal and institutional system and includes efficient mechanisms for enforcement of its laws in the Member States.

The correct analysis remains, however, that the GATT and the EC Treaty are of the same international normative value, and that the arbiters of the two respective systems came to different conclusions as to the legality of the Banana Regulation. There is no legal authority to settle the issue. Such a conflict has to be settled by political means through negotiations and it was apparently settled through the Framework Agreement on Banana Imports concluded between the EC and the dissatisfied Latin American banana exporters.<sup>160</sup> Germany's request for an Advisory Opinion with the ECJ concerning the Framework Agreement,<sup>161</sup> which turned out to be unsuccessful, will be treated further at the end of Part V, since it concerns both the *Banana Case* and the Opinion on the WTO.<sup>162</sup>

#### IV. THE WTO OPINION—ADVISORY OPINION ON THE EC'S TREATY-MAKING POWERS

##### A. INTRODUCTION TO THE CASE

The agreement on the World Trade Organization (WTO) and the agreements annexed thereto (the Multilateral Agreements on the Trade in Goods, including the revised "GATT 1994," the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)) were concluded in 1993 at the end of the Uruguay Round of multilateral trade negotiations.<sup>163</sup> This complex of agreements is more extensive than the former GATT, and the creation of the WTO implies that the mode of cooperation between the parties to the different agreements will become more structured and more institutionalized. The creation of the

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160. Framework Agreement, *supra* note 65.

161. *Cf.* Opinion 3/94, 1995 E.C.R. I-4577.

162. Germany has afterwards launched another action with the ECJ against the decision of the Council to conclude the Framework Agreement. 1995 O.J. (C174) 3 (C-122/95). This second case has not yet been decided by the Court.

163. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Final Act].

WTO brought about many changes in the way the GATT and the other treaties will be implemented.<sup>164</sup>

The issue of interest here is where the competence lay on the European side to conclude the GATS and the TRIPs agreement. Did the competence lie with the EC or did it lie with the Member States themselves? If the competence lay with the EC, what was the legal basis of that competence? These are the issues dealt with by the ECJ in its Advisory Opinion on the WTO (*WTO Opinion*).<sup>165</sup> According to Article 228(6) of the EC Treaty "[t]he Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty." Before the different agreements were concluded by the Council on the part of the EC, or by the Member States, the Commission, which held the view that the EC had exclusive competence to conclude all the agreements, requested an Advisory Opinion from the ECJ to solve this issue.<sup>166</sup>

It was clear that the competence to conclude the revised GATT and most of the other Multilateral Agreements on the Trade in Goods lay with the Community under the CCP. We have already seen in connection with the discussion of the GATT law in the Banana Case that the EC, for all practical purposes, had replaced the Member States as a party to the GATT.<sup>167</sup> Therefore the issue of who was competent to conclude the GATT and the other agreements on trade in goods did not arise except so far as agreements on trade in goods coming within the scope of the ECSC Treaty or the Euratom Treaty were concerned. The issue of treaty-making competence also arose with regard to agricultural products. These were relatively easy questions for the ECJ to solve, as we will see below.

Much of the discussion in the *WTO Opinion* focused on Article 113 of the EC Treaty.<sup>168</sup> Article 113 applies to trade in goods. Paragraphs 1 and 4 of Article 113 are particularly relevant. According to paragraph 1, "[t]he common commercial pol-

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164. For instance, the system for the settlement of disputes between party states was reformed and strengthened. Cf. Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1157-1244 (1994).

165. Opinion 1/94, Opinion pursuant to Article 228(6) of the EC Treaty, 1994 E.C.R. I-5267.

166. Currently, the EC concludes international treaties, not the EU, which lacks international legal personality.

167. See *supra* note 142 and accompanying text.

168. EC TREATY art. 113.

icy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures to protect trade such as those to be taken in the event of dumping or subsidies."<sup>169</sup> And according to paragraph 4, the Council in exercising the powers conferred on it by Article 113 shall act by a qualified majority.<sup>170</sup>

These two paragraphs of Article 113 taken together thus imply that the EC has the exclusive competence to conclude international agreements in the sphere of trade in goods. When the Council concludes such agreements, it is not dependent on the acceptance of the representative of every Member State in the Council of the agreement. Decisions to conclude an international agreement may be taken by a qualified majority. This is as close to supranationality as the EC Treaty comes so far.

Because of the ongoing struggle for power between the Member States and the Community, the Member States are afraid that more and more areas of international trade will be brought under the umbrella of Article 113 of the EC Treaty and thus be removed from their own national competence. The argument that goods coming within the scope of the ECSC Treaty or the Euratom Treaty were not covered by the exclusive Community competence deriving from Article 113 of the EC Treaty illustrates the Member States' reluctance to relinquish more power concerning trade in goods to the Community. The Member States made the same argument with respect to agricultural products and sanitary and phytosanitary measures, which were also the subject of an agreement within the group of agreements on the trade in goods. So, according to the Member States' argument, certain kinds of goods or certain policy areas related to the trade in goods should not be included in the Community's competence to conclude trade agreements.

The Member States' resistance is even stronger to the inclusion of completely new sectors of international trade within the exclusive Community competence under Article 113. These new sectors include trade in services (GATS) or issues concerning trade-related aspects of intellectual property rights (TRIPs). It can be noted that the Council of the EC sided with the Member States against the Commission in the WTO case.<sup>171</sup> The Commission argued, alternatively, that if the Community lacked

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169. *Id.*

170. *Id.*

171. So did the European Parliament, incidentally.

competence to conclude the GATS or the TRIPs agreement on the basis of EC Treaty Article 113, it had competence, according to the ECJ's own doctrine of implied treaty-making powers of the Community, in fields where the Community is competent to legislate internally. These include the competence to adopt EC legislation, or where an international agreement is otherwise necessary to achieve an internal Community objective. In cases where an international agreement is necessary to achieve a Community objective, the Community does not need to wait until the corresponding internal legislation is adopted before exercising exclusive external powers, but may instead conclude the international agreement directly, whereby its external powers in this field automatically become exclusive.<sup>172</sup>

The way the ECJ solved all these issues has been aptly characterized by one author as "effectuating the core-competences of the EC such as the CCP and at the same time limiting the implied extension of the competences of the EC to the detriment of the Member States."<sup>173</sup> The ECJ found that under Article 113 the Community was competent to conclude all the agreements relating to the trade in goods. The Community did not benefit from any implied treaty-making powers in the field of GATS and TRIPs, however, according to the ECJ.

So far as the trade in services is concerned, the ECJ found that the Community was exclusively competent under Article 113 of the EC Treaty to conclude the section of the GATS which relates to one of the four modes of supply of services: cross-frontier supplies not involving any movement of persons.<sup>174</sup> The three remaining modes of supply of services—consumption abroad, commercial presence, or the presence of natural persons supplying the services—are not covered by the CCP. Thus the ECJ found that some but not all international trade in services should be subsumed under Article 113 of the EC Treaty. The ECJ also found, however, that the Member States retained the competence to conclude the remaining parts of the GATT and for that reason the Court concluded that the Community and the Member States were jointly competent to conclude the GATS.

The ECJ found that the exclusive competence of the Community regarding the TRIPs agreement was very restricted.

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172. See *supra* note 50 and accompanying text.

173. Meinhard Hilf, *The ECJ's Opinion 1/94 on the WTO—No Surprise, but Wise?*, 6 EUR. J. INT'L L. 245, 258 (1995).

174. See Friedl Weiss, *The General Agreement on Trade in Services 1994*, 32 COMMON MKT. L. REV. 1177 (1995) (overview of the contents of GATS).

But the Community was found to be exclusively competent to conclude the parts of the TRIPs agreement relating to measures against the international trade in counterfeit goods. Consequently, the ECJ concluded that the Community and the Member States were jointly competent to conclude the TRIPs agreement.

#### B. EXPLICIT AND IMPLICIT TREATY-MAKING POWER

In the *WTO Opinion*, the respective treaty-making powers of the Council and the Commission of the EU were not at issue. Rather, the issue was the treaty-making powers of the EC as a whole compared to the individual Member States. Nevertheless, the case indirectly resembles *France v. Commission*, where the immediate question was whether the Commission or the Council was the competent institution to conclude the treaty, and the ultimate underlying issue was the struggle for power between the EC, represented by the Commission, and the Member States, represented by the Council.

The case law of the ECJ has considerably expanded the EC's competence to conclude treaties with third countries and other organizations. The EC Treaty contains express provisions concerning the treaty-making power of the EC, primarily in Article 113 on the CCP. But the ECJ has found in addition that where the EC has the power to regulate an issue internally, it also has the implicit power to conclude treaties with third countries on the same subject.<sup>175</sup> Where the implicit treaty-making power is concerned, initially the Community and the Member States have parallel treaty-making powers. Then, as soon as the EC has laid down common internal EC rules on a subject, the competence of the EC to conclude international agreements within the same field becomes exclusive, and the Member States lose their interim parallel treaty-making power.

The possible implicit exclusive treaty-making powers discussed in the *WTO Opinion* would flow, in the view of the optimistic Commission, from the provisions of the EC Treaty establishing the community's internal competence (relating to services and transport); from existing community legislation giving effect to that internal competence; from the need to enter into international commitments in order to achieve a specific internal objective; or finally, from the more general Articles 100a

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175. See *supra* note 50 and accompanying text.

and 235.<sup>176</sup> Article 100a of the EC Treaty deals with establishment of the EC internal market (comprising the free movement of goods, persons, services and capital). Article 235 states that, where action by the Community is necessary to attain a Community objective and the EC Treaty has not provided the necessary powers, the Council shall nevertheless take appropriate measures. Article 235 functions as an "emergency exit" for the Community when measures are needed, but the legal basis for the EC to undertake them is not provided in the EC Treaty.

It has already been established by the ECJ that Article 235 provides a legal basis for the EC to conclude treaties with third countries in the exceptional case where the internal powers of the EC can only be effectively exercised if combined with the conclusion of a treaty with a third country or countries.<sup>177</sup> We will see below the respective roles of the EC's explicit treaty-making powers under Article 113 and implicit treaty-making powers under Article 100a and Article 235 as they relate to the EC's competence to conclude the WTO agreements.

### C. THE COMPETENCE TO CONCLUDE THE MULTILATERAL AGREEMENTS ON TRADE IN GOODS

A relatively easy question for the ECJ to answer in the *WTO Opinion* was whether the Community had exclusive competence to conclude the Multilateral Agreements on Trade in Goods, in so far as those agreements concern products within the scope of the ECSC Treaty and products coming within the scope of the Euratom Treaty.<sup>178</sup> It was obvious in the eyes of the Commission that the Community had exclusive competence to conclude the agreements concerning products other than the ones covered by the ECSC Treaty and the Euratom Treaty, so the Commission did not raise that question. The Court found that the Euratom Treaty does not contain any provisions relating to external trade and therefore nothing prevents treaties concluded under Article 113 of the EC Treaty from extending to trade in Euratom Treaty products.<sup>179</sup> So far as ECSC Treaty products are concerned, the Commission claimed that these were also covered by the Community's exclusive competence to conclude trea-

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176. Opinion 1/94, *supra* note 165, ¶72.

177. Opinion 1/76, *supra* note 50. *See, e.g.*, Council Decision 75/437 on the Convention for the Prevention of Marine Pollution from Land-Based Sources, 1975 O.J. (L 194) 5 (concluded under Article 235).

178. Opinion 1/94, *supra* note 165, ¶¶ 22-34.

179. *Id.* ¶ 24.

ties. The Council and the Member States claimed that the Member States hold exclusive competence to conclude treaties relating to coal and steel products.<sup>180</sup>

Article 71 of the ECSC Treaty provides that "[t]he powers of the Governments of Member States in matters of commercial policy shall not be affected by this Treaty, save as otherwise provided therein."<sup>181</sup> Article 232(1) of the EC Treaty provides that the EC Treaty shall not affect the provisions of the treaty establishing the ECSC, particularly regarding the rights and obligations of Member States or the powers of the institutions of that Community. This would seem to mean that the individual Member States have kept their treaty-making powers respecting trade in coal and steel products.

The ECJ stated, however, that Article 71 of the ECSC Treaty only reserved the treaty-making competence to the Member States as regards agreements relating specifically to coal and steel products and that the EC has the sole competence under Article 113 to conclude external trade agreements of a general nature, i.e. encompassing all types of goods, including ECSC Treaty products.<sup>182</sup> None of the Multilateral Agreements on Trade in Goods relates specifically to ECSC Treaty products and therefore it followed, according to the ECJ, that the exclusive competence of the Community cannot be impugned on the ground that they also apply to ECSC Treaty products.<sup>183</sup>

The Council also raised the question whether trade in agricultural products was covered by Article 113.<sup>184</sup> The Court found that the conclusion of both the Agreement on Agriculture and the related Agreement on Sanitary and Phytosanitary Measures could be based on Article 113.<sup>185</sup> The ECJ determined that the Community has exclusive competence pursuant to Article 113 to conclude all the Multilateral Agreements on the Trade in Goods.<sup>186</sup>

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180. *Id.* ¶ 25.

181. ECSC TREATY art. 71.

182. Opinion 1/94, *supra* note 165, ¶ 27.

183. *Id.*

184. *Id.* ¶ 28.

185. *Id.* ¶¶ 28-31.

186. *Id.* ¶ 34.

D. WHO SHOULD CONCLUDE THE GATS AND TRIPS AGREEMENTS—THE EC OR THE MEMBER STATES?

The next important question considered by the ECJ was whether the EC also had exclusive competence by virtue of Article 113 to conclude GATS and TRIPs. As to GATS, the Commission pointed out that the ECJ, in its earlier case law, had applied a non-restrictive interpretation to the concept of the CCP in Article 113.<sup>187</sup> Also, according to the Commission, in certain developed countries, services have become the dominant sector of the economy, and whereas basic industry is being transferred to developing countries, the developed countries have become exporters of services and goods with a high value-added content.<sup>188</sup> The ECJ pointed out that this trend was recognized in the WTO agreement and its annexes, since these were negotiated together and included both goods and services.<sup>189</sup>

To see more specifically whether the international trade in services can be included within the scope of Article 113, the Court looked at the four different ways in which GATS classifies the way services from one country are supplied to another. The Court concluded that when the service is rendered by a supplier established in one country to a consumer residing in another—so-called cross-frontier supplies—the provision of the service can be included under Article 113.<sup>190</sup> This includes the banking, insurance, and telecommunications sectors.<sup>191</sup> The cross-frontier supply situation is, in the words of the Court, not unlike trade in goods, which is unquestionably within the meaning of the EC Treaty.<sup>192</sup> The Court held that there is no particular reason why such a supply should not fall within the concept of the CCP.<sup>193</sup>

The Court's interpretation of the EC treaty is very interesting, especially in comparison with the way treaty texts, includ-

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187. See generally Opinion 1/75, Opinion of the Court given pursuant to Article 228 of the EEC Treaty of 11 November 1975, 1975 E.C.R. 1355; Opinion 1/78, Opinion of the Court of 4 October 1979 given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty, 1979 E.C.R. 2871 (two Advisory Opinions of the ECJ).

188. Opinion 1/94, *supra* note 165, ¶ 40.

189. *Id.*

190. *Id.* ¶¶ 43-44. See also Case C-360/93, European Parliament v. Council of the European Union, 1996 E.C.R. I-1209.

191. *Id.*, Final Act, General Agreement on Trade in Services, Annex on Financial Services, at 1189; Annex on Telecommunications, at 1192.

192. Opinion 1/94, *supra* note 165, ¶ 44.

193. *Id.*

ing the EC Treaty, are normally interpreted. The Court took the approach that there was no reason why the EC Treaty should *not* be interpreted in a particular way. This makes it seem as if there is a presumption in favor of an expansive interpretation of the EC Treaty. On the other hand, the other three modes of supply of services covered by GATS—consumption abroad, commercial presence, and the presence of natural persons—are not to be included under Article 113.<sup>194</sup>

The Court also considers the issue of transport services. Since these are the subject of a specific title in the EC Treaty on transport—distinct from the title on the CCP—the ECJ dealt with them separately. Referring to its earlier case law, the Court clearly stated that all international agreements concluded in the field of transport were excluded from Article 113.<sup>195</sup>

The Commission, which argued that international agreements in the field of transport were indeed included under Article 113, invoked a number of embargoes decided by the Council based on Article 113 and involving the suspension of transport services.<sup>196</sup> In an interesting parallel to its reasoning in *France v. Commission*, the Court stated that a mere practice of the Council cannot derogate from the rules laid down in the EC Treaty; therefore it cannot create a binding precedent regarding the correct legal basis for a particular measure.<sup>197</sup> This is the very issue of the *WTO Opinion*.

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194. *Id.* ¶ 45.

195. *Id.* ¶ 53; see ERTA, *supra* note 50; Opinion 1/76, *supra* note 50 (cases referred to by the Court to prove its point); cf. Joined Cases 3,4, & 6/76, *supra* note 50.

196. Opinion 1/94, *supra* note 165, ¶ 51.

197. *Id.* ¶ 52. Jacques Bourgeois, discussing what he refers to as the inconsistencies of the reasoning in the *WTO Opinion*, points out that the ECJ sometimes takes previous practice into consideration and sometimes not. Jacques Bourgeois, *The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession*, 32 COMMON MKT. L. REV. 763, 777-78. In *France v. Commission* the issue was the interpretation of the expression "powers vested in the Commission" in Article 228(2) in the EC Treaty, not the correct legal basis as such, which was not disputed. See *supra* note 17. Hilf argues that the Court, in the *WTO Opinion*, "confirms the doctrine which negates the existence of any customary Community law as it is always the ECJ which in the last resort has the power and responsibility to conclusively define the extent of EC competences." Hilf, *supra* note 173, at 257-58. Against this it can be argued that since the EC Treaty is (as yet) an international treaty and not a national constitution it is not the ECJ but the Member States who ultimately set the limits to EC competences, and that the applicable rules of interpretation are the ones contained in the Vienna Convention on the Law of Treaties (of 1969), not the ones concerning the interpretation of national constitutions.

As to TRIPs, the ECJ considered whether provisions of the TRIPs agreement can be based on Article 113, and thus deprive the Member States of treaty-making power in this field. The Court soon reached the conclusion that the Community is exclusively competent to conclude international agreements only in matters regarding the release of counterfeit goods into free circulation.<sup>198</sup> This is because measures against the release into free circulation within the EC of counterfeit goods relate to measures to be taken by customs authorities at the external frontiers of the Community.<sup>199</sup> The Community can decide these kinds of measures autonomously on the basis of Article 113. Therefore, the Court held, the Community is exclusively competent to conclude international agreements on such matters.<sup>200</sup>

The Court used several arguments to explain why Article 113 could not control the rest of the TRIPs agreement. First, the Court stated that intellectual property rights do not relate specifically to international trade, which would bring them within the scope of Article 113. Rather, they affect internal trade just as much as international trade.<sup>201</sup> Second, the Court referred to the fact that, even though the Community is competent to legislate internally in the field of intellectual property under Articles 100 and 100a of the EC Treaty on the internal market<sup>202</sup> and under Article 235 on "extra-EC Treaty" measures, its internal competence is subject to voting rules and rules of procedure. These rules do not apply to the competence of the Community to conclude international treaties under Article 113.<sup>203</sup> For instance, decisions have to be taken unanimously by the Council under Articles 100 and 235, whereas decisions under Article 113 are taken by qualified majority voting. Furthermore, in the

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198. Opinion 1/94, *supra* note 165, ¶¶ 55-56.

199. *Id.* ¶ 55.

200. *Id.*

201. *Id.* ¶ 57. Bourgeois criticizes the ECJ for inconsistently applying this criterion (that internal trade is concerned just as much as international trade) for defining the scope of the common commercial policy: "[I]f this were a relevant criterion to define the scope of the Common Commercial Policy, quite a few other matters, such as the Agreement on Sanitary and Phyto-sanitary Measures and the Agreement on Subsidies and Countervailing Measures, would be excluded from the scope of Article 113." Bourgeois, *supra* note 197, at 777. The Agreement on Technical Barriers to Trade would also fall outside Article 113 if this criterion were applied consistently. *Id.*

202. Article 100a, along with many other articles, was inserted in the EC Treaty through the Single European Act concluded in 1987. Article 100a was designed to speed up the creation of a fully integrated common EC market.

203. Opinion 1/94, *supra* note 165, ¶ 59.

cases of Articles 100, 100a and Article 235, the European Parliament is also involved in decision-making. This is not the case under Article 113.

The Court pointed out that exclusive competence of the Community to enter into international agreements implying the harmonization of the protection of intellectual property would mean that the Community institutions would be able to escape the internal constraints just mentioned.<sup>204</sup> Again, "[i]nstitutional practice in relation to autonomous measures or external agreements adopted on the basis of Article 113 cannot alter this conclusion."<sup>205</sup> Although the ECJ conceded that the Community has concluded (under Article 113) bilateral trade treaties which have included clauses relating to intellectual property rights, the ECJ held that those clauses were limited in scope and merely ancillary to the treaties as a whole.<sup>206</sup> In the words of the Court, this means that the Community does not have exclusive competence to conclude an international agreement of the type and scope of TRIPs.<sup>207</sup>

The Commission also argued that, in case the ECJ would not recognize that the Community held exclusive competence to conclude the GATS or TRIPs agreement under Article 113, competence would flow implicitly from the provisions in the EC Treaty establishing the Community's internal competence to legislate, or else from the more general Articles 100a and 235 mentioned earlier.<sup>208</sup> The Commission, being well acquainted with the ECJ's earlier case law, also invoked the existence of internal legislation and the need to enter into international commitments to achieve an internal Community objective as alternative bases for exclusive Community treaty-making competence concerning the GATS and TRIPs.<sup>209</sup>

The Court rejected these arguments for exclusive Community competence. The Court's basic counter-argument was a relatively simple one derived from earlier case law: the external competence of the Community does not become exclusive until

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204. *Id.* ¶ 60. Bourgeois remarks that this institutional consideration probably implicitly played a role in the Court's reasoning on other points in the judgment. Bourgeois, *supra* note 197, at 783.

205. Opinion 1/94, *supra* note 165, ¶ 61.

206. *Id.* ¶¶ 66-68.

207. *Id.* ¶ 68.

208. *Id.* ¶ 72; see Part IV.B (discussing explicit and implicit treaty-making power).

209. Opinion 1/94, *supra* note 165, ¶ 72.

and unless its internal competence has been exercised in the form of the adoption of internal legislation of some kind.<sup>210</sup>

With regard to the TRIPs, the Court rejected the Commission's argument that the exclusive competence of the Community could be derived from the need to enter into an international commitment (i.e. the TRIPs) in order to achieve an internal Community objective. The Court simply held that achieving unification or harmonization of intellectual property rights within the Community *does not necessarily* have to be accompanied by the conclusion of an international agreement with third countries.<sup>211</sup> In relation to the GATS, the Court used the similarly narrow formula *not inextricably linked*.<sup>212</sup>

As far as the existence of internal Community legislation is concerned, the Court pointed out that the only Community Acts adopted so far in the field of intellectual property rights concerned the harmonization of laws relating to trademarks and measures to prohibit the release of counterfeit goods for free circulation in the Community.<sup>213</sup> The latter piece of legislation is based on Article 113 of the E.C. Treaty, and thus the corresponding treaty-making power of the Community is exclusive. In addition to the two areas just indicated, TRIPs covers many other areas also relating to the protection of intellectual property in which there is no Community legislation. There has been *only partial harmonization* of Community rules in this field, in the words of the ECJ.<sup>214</sup> In relation to GATS, the Court similarly points out that there has been no *complete harmonization* of rules in *all service sectors* within the community.<sup>215</sup> From this follows, according to the Court, that the Community could not be exclusively competent to conclude treaties either in the field of intellectual property rights or in the field of services.

The ECJ found that the Community and the Member States were jointly competent to conclude the TRIPs agreement.<sup>216</sup> In the case of the GATS, as we saw above, the Court found that so far as certain parts of GATS are concerned, dealing with the cross-frontier supplies of services not involving any movement of persons, the Community is exclusively competent to conclude

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210. Cf. ERTA, *supra* note 50.

211. Opinion 1/94, *supra* note 165, ¶ 100.

212. *Id.* ¶ 86.

213. *Id.* ¶¶ 55, 103-104; Council Directive 89/104, 1989 O.J. (L40) 1; Council Regulation 3842/86, 1987 O.J. (L 33) 18.

214. Opinion 1/94, *supra* note 165, ¶ 103.

215. *Id.* ¶¶ 96-97.

216. *Id.* ¶ 105 and conclusion of the Court.

the GATS under Article 113 on the CCP. Concerning the remaining parts of the GATS, the ECJ found that the Community did not benefit either from its exclusive competence under Article 113 or from any exclusive implied treaty-making powers. The only remaining possibility was that the Member States retained their own national treaty-making competence in those areas. Thus the Court found that the Community and the Member States were jointly competent to conclude the GATS as well.<sup>217</sup> In respect to both the GATS and the TRIPs agreement, the ECJ applied a restrictive interpretation of its own doctrine on the implied treaty-making powers of the Community.<sup>218</sup>

#### E. THE DUTY OF COOPERATION

After concluding that the Community and the Member States are jointly competent to conclude both the GATS and the TRIPs agreement, meaning that the Community can only conclude parts of the agreements and the Member States must conclude the rest, the Court discussed the duty of cooperation between the Member States and the Community. The Commission pointed to administrative problems which would arise with the joint participation of the Community and the Member States in the GATS and TRIPs agreements. In matters within the competence of individual Member States, the consensus rule applies. In matters within the competence of the Community, Community procedures will apply, which in this case means the rule of qualified majority.<sup>219</sup> Also, the Commission, probably realistically, feared that the issue would often arise whether a given matter fell within the competence of the Community or within that of the Member States. If this question arose, the

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217. Opinion 1/94, *supra* note 165, ¶ 98.

218. Bourgeois calls the WTO Opinion a "step back." Bourgeois, *supra* note 197, at 780-82. The restrictive interpretation was confirmed in Opinion 2/92, 1995 E.C.R. I-521 (Competence of the Community or one of its institutions to participate in the Third Revised Decision of the OECD on national treatment). As concerns the direct effect of the WTO and annexed agreements within the EC/EU, the Council stated explicitly in the preamble to its decision to conclude the WTO agreement that the WTO and annexed agreements would not have direct effect in Community or Member State courts. Council Decision 94/800, 1994 O.J. (L 336) 1. The last resort is for the ECJ to decide, but the Court, based on its own case law on GATT, would seem to agree with the Council, and yet the Court probably also shares the same view as the Parliament and the Commission. As Pieter Kuijper writes, the ECJ is bound to take these views into account when taking any decision on this matter. Kuijper, *supra* note 13, at 236.

219. Opinion 1/94, *supra* note 165, ¶ 106.

Community's unity of action and negotiating power *vis-à-vis* the rest of the world would be significantly weakened.<sup>220</sup>

The Court held, however, that the many problems which may arise in the implementation of the WTO Agreement and its annexes cannot affect the prior issue of whether the EC or the Member States is competent to conclude the different treaties.<sup>221</sup> Competence is one thing, and administration is another. On the other hand, the Court stressed the duty of cooperation existing between the Community and the Member States in fulfilling commitments when the subject-matter falls partly within the competence of the Community and partly within the competence of individual Member States.<sup>222</sup> The Court, however, did not elaborate on how cooperation should be enforced.<sup>223</sup>

In the case of the WTO agreements, the problem of cooperation between the Community and the Member States is particularly acute. Cross-retaliation measures, which are foreseen as an important sanction against a party who violates one of the treaties, may have to be implemented against either the Community or the Member States. This may be in a field in which the entity is not itself competent—i.e. it may be necessary for the Community to impose sanctions in a field in which it does not have the powers to act (and therefore in practice cannot take the necessary sanctions), or vice versa.<sup>224</sup> Under the WTO scheme, if a party has violated its obligations under a given agreement, others may suspend their obligations under another agreement *vis-à-vis* that WTO member. As stated by the Court,

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220. *Id.*

221. *Id.* ¶ 107.

222. *Id.* ¶ 108; Opinion 1/78, *supra* note 187; Opinion 2/91, Opinion delivered pursuant to the second subparagraph of Article 228(1) of the EEC Treaty, 1993 E.C.R. I-1061 (cases providing legal basis for the duty to cooperate). The Court could also have referred to the general principle of mutual loyalty (deriving from Article 5 of the EC Treaty) and that of external coherence relevant to all activities under the umbrella of the EU. See TEU, *supra* note 1, arts. A, C; see generally *id.* art. J(1) (on the common foreign and security policy); *id.* art. K(5) (on cooperation in the fields of justice and home affairs). Hilf, *supra* note 173, at 256.

223. See Editorial Comment, *The Aftermath of Opinion 1/94 or How to Ensure Unity of Representation for Joint Competences*, 32 COMMON MKT. L. REV. 385 (1995). See also Nanette A. Neuwahl, *Shared Power or Combined Incompetence? More on mixity*, 33 COMMON MKT. L. REV. 667 (1996); Kuijper, *supra* note 13, at 243-44 (discussing two modes of implementing the duty of cooperation, one treaty-based and the other informal, and concluding that the Member States, the Commission and the Council will probably choose the informal mode of cooperation); MIXED AGREEMENTS (David O'Keefe & Henry G. Schermers eds., 1983).

224. Opinion 1/94, *supra* note 165, ¶ 109.

however, if an EC Member State, duly authorized within its sphere of competence to take cross-retaliation measures, for reasons of effectiveness would want to retaliate in the area of trade in goods instead, it would not be empowered to do so.<sup>225</sup> The same principle would apply if the Community would want to retaliate, not in the sector of goods, but in the areas covered by the GATS or the TRIPs agreement.<sup>226</sup> It appears that this internal division of competences on the European side will probably lead to trouble.<sup>227</sup> There is room for optimism, though, since all EC Member States realize the importance of the EC's bargaining power and "none could have an interest in undermining this power by refusing the required cooperation."<sup>228</sup>

#### F. GATT, WTO, AND BANANAS: ANOTHER ADVISORY OPINION

In another attempt to attack the *Banana Regulation*,<sup>229</sup> Germany requested an Advisory Opinion from the ECJ on the compatibility of the Framework Agreement on Banana Imports<sup>230</sup> with the EC Treaty.<sup>231</sup> *Opinion 3/94* ties the *Banana Case* and the *WTO Opinion* together in that the Framework Agreement was one of the many agreements annexed to the WTO agreement. According to the ECJ, the Framework Agreement is an integral part of the agreements resulting from the Uruguay Round.<sup>232</sup> Thus, when the EC expressed its consent to be bound by the agreement on the WTO and annexed agreements on 22 December 1994, it also ratified the Framework Agreement on Banana Imports. At that point in time, Germany had requested an Advisory Opinion, but the Court had not yet issued one.<sup>233</sup>

The Court eventually dismissed the German request for an Advisory Opinion, because ratification had already taken place before the Court announced a decision. Thus, the request no longer had any object, in the Court's view, because an interna-

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225. *Id.*

226. *Id.*

227. However, this division does not affect the possibilities of cross-retaliation measures by third contracting parties.

228. Hilf, *supra* note 173, at 256.

229. See *supra* note 58 and accompanying text.

230. See *supra* note 65 and accompanying text.

231. *Opinion 3/94*, *supra* note 161. Afterwards, Germany brought an action before the ECJ under Article 173(2) of the EC Treaty challenging the legality of the Council decision to conclude the agreement. 1995 O.J. (C-122/95) 3.

232. *Opinion 3/94*, *supra* note 161, ¶ 8.

233. Germany submitted its request on July 25, 1994, before the EC ratified the WTO agreements.

tional agreement must be "envisaged" if the Court shall have the right to pronounce on the legality of the agreement and, by definition, an agreement already concluded cannot be "envisaged."<sup>234</sup>

Moreover, the Court found it legally pointless to pronounce on an agreement already concluded. If the ECJ found that a planned agreement is contrary to the EC Treaty, but if the political institutions of the EC still wanted to conclude the agreement, the only available "sanction" would be to amend the EC Treaty. This would involve the cumbersome process of ratification of the agreement by all the Member States, rather than ratification by the Council.<sup>235</sup> If the Court found post factum that an agreement was in fact contrary to the EC Treaty, the finding would have no legal effect and would conflict with the internal logic of Article 228(6). Conclusion of the agreement would already irrevocably have taken place, and it would not be possible to apply the procedures of ratification by the Member States afterward.<sup>236</sup>

These arguments of the Court seem irreproachable from a strictly logical point of view. But this makes application of Article 228(6) dependent upon how long it takes the ECJ to handle a request for an Opinion. If it takes a long time, chances are that the agreement will already have been concluded when the Court is ready to pronounce on the case, just as occurred in *Opinion 3/94*.<sup>237</sup> Also, it seems that the EC would be able to adopt any agreements and thus circumvent the more complicated procedures for ratification by acting quickly—i.e. before the ECJ would have had the chance to declare the agreement illegal under the EC Treaty. The ECJ said in its own defense that, instead of asking for an Advisory Opinion, there is always the alternative of launching a complaint against the legality of the

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234. *Opinion 3/94*, *supra* note 161, ¶ 23. According to the EC Treaty, "The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement *envisaged* is compatible with the provisions of this Treaty." EC TREATY art. 228(6) (emphasis added). "Envisaged" in Article 228(6) means that while the EC is planning to conclude an international agreement, the ECJ may pronounce on the compatibility of the agreement with the EC Treaty.

235. EC TREATY art. 228(6); TEU, *supra* note 1, art. N.

236. *Opinion 3/94*, *supra* note 161, ¶ 13.

237. *Id.* ¶ 2. In the case of the *WTO Opinion*, the Court received the request for an Opinion from the Commission on April 6, 1994, and issued its Opinion on November 15. As to the German request for an Opinion, it was handed in on July 25, 1994, and answered on December 13, 1995; it took more than twice as long for the Court to answer the much simpler second request.

decision whereby the Council ratifies a treaty, and in connection with such a complaint asking the Court to take interim measures to stop the ratification process.<sup>238</sup>

Germany had argued that the relevant time in question was when the request for an Advisory Opinion was made—i.e. the time when the Framework Agreement was undisputably still planned and not yet concluded—not when the Court delivered its Opinion. It is not clear from *Opinion 3/94* why Germany did not also bring an action for the annulment of the decision whereby the Council ratified the WTO and annexed agreements. Perhaps Germany thought that the request for an Advisory Opinion which had already been launched would be enough.<sup>239</sup>

The real reason why the ECJ dismissed the German request for an Advisory Opinion on the Framework Agreement was probably that the rules on imports of bananas to the EC had already been thoroughly evaluated by the Court in the *Banana Case*. Presumably, these rules were the real, albeit indirect, object of Germany's request for an Advisory Opinion on the Framework Agreement, even though most of the German criticisms had to do with formalities of the intra-Community procedure for negotiating and concluding the Agreement. In fact, the German argument seems somewhat strained, as if Germany were trying any and all means to stop the new common organization of the banana market.

The ECJ may have suspected that Germany's primary concern was not that the Framework Agreement would violate the EC Treaty but that the Framework Agreement (and the *Banana Regulation*) were contrary to Germany's economic interests. The Court stated that the point of Advisory Opinions on planned international agreements is to prevent problems which would arise if the Community entered into agreements which turned out to be contrary to the EC Treaty; the purpose is *not* to protect the interests or rights of the Member State or institution requesting the Opinion.<sup>240</sup>

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238. *Id.* ¶ 22. Complaints in order to obtain the annulment of the act were launched by France and Germany in the first two cases discussed in this article. France was successful, but Germany was not.

239. See *supra* note 162 (the new complaint launched by Germany).

240. *Opinion 3/94*, *supra* note 161, ¶ 21. Everling argues against this statement and says that the same difficulties which the Court claims would arise if the Court found in an Advisory Opinion post factum that an agreement was contrary to the EC Treaty would also arise if the Court post factum annulled the decision by which the Council concluded the agreement. Everling also does not accept the argument of the Court concerning the objectives of Advisory opinions on the ground that it does not correspond to the constitutional position

Another possible reason that the ECJ dismissed the German request is that revising the Framework Agreement would most certainly cause a number of serious practical, economic, political, and legal problems. The Court simply may not have been willing to risk such consequences by pronouncing on the substance of the request for an Opinion. When the Uruguay Round of negotiations finally had come to a successful conclusion, the Court probably did not want to threaten the precarious balance that had been achieved.

### CONCLUSION

In *France v. Commission*,<sup>241</sup> the ECJ agreed with French criticisms that the Commission, on behalf of the EC, had concluded an agreement on competition with the United States. The French Government was obviously afraid that the Commission, and thereby the Community, would take on more tasks than absolutely necessary. The Court upheld the French claims and once again indicated indirectly that its decisions are becoming considerably less favourable to the Community than they once were. The *WTO Opinion*<sup>242</sup> on the Uruguay Round treaties confirms this new cautiousness by the ECJ. The result in the *WTO Opinion* was the unwieldy arrangement whereby the EC is a party to the agreements on trade in goods, whereas the EC and the Member States individually are parties to the agreements on services and intellectual property rights. The tug-of-war between the Member States and the Community was again felt, and the Court sided with the Member States rather than with the EC.

This may be considered a good judicial policy or a bad one, and it may be based on a number of different rationales. The ECJ, which in the end is largely dependent on the Member States, may not dare to defy their desire to keep as much power to themselves for as long as possible. It may even be counter-productive for the Court to be too defiant; if the Member States find the Court too active in judicial policy-making, they may choose to ignore its decisions completely. After some decades of activism, perhaps the time has come for the Court to retreat

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of the Member States within the EC as "amici curiae" with an unconditional right, as confirmed in Article 173(2), to appeal to the ECJ to guard the legality of Community law, including agreements with third countries. Everling, *supra* note 104, at 422, 428.

241. See *supra* note 10.

242. See *supra* note 165.

somewhat and content itself with applying the law, rather than making law and taking upon itself the task of pushing European integration forward.<sup>243</sup>

The *Banana Case*<sup>244</sup> shows, however, that even if the Community tends to lose in a conflict between the Community and the EC Member States, the ECJ does not hesitate to protect the interests of the Community if they come into conflict with other interests in a global context. This is especially true if what is at stake is the EC's protectionist common agricultural policy confronted with the international free-trade challenges of the GATT. Instead of being cautious, one could argue that the ECJ went too far in its integrationist zeal in the *Banana Case*.<sup>245</sup>

The dominant trend toward more cooperation by the Member States and relatively less by the EC proper was evident already in the Maastricht Treaty with its emphasis on inter-governmental cooperation. As for the ECJ, the new cautiousness has made itself felt in the field of competition law<sup>246</sup> and in the law on the free intra-European movement of goods.<sup>247</sup> It is still too early to state anything concerning the outcome of the ongoing revision of the TEU<sup>248</sup> as to the balance of power between the Member States and the Community.

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243. Cf. Andrea Appella, *Constitutional aspects of Opinion 1/94 of the ECJ concerning the WTO agreement*, 45 INT'L & COMP. L.Q. 453, 459-460 (1996); Hilf, *supra* note 173, at 245-246, 255, 258.

244. See *supra* note 57.

245. Cf. Everling, *supra* note 104, at 436.

246. See generally Case C-234/89, *Stergios Delimitis v. Henniger Bräu*, 1991 E.C.R. I-935 (an earlier significant case).

247. See generally *Joined Cases C-267 & 268/91, Bernard Keck and Daniel Mithouard*, 1993 E.C.R. I-6097 (a landmark case).

248. The Intergovernmental Conference began in March 1996.