

The Conclusion and Implementation of the Uruguay Round Results by the European Community

Pieter J. Kuijper *

I. Introduction

The conclusion and the implementation of the Uruguay Round by the European Community proved to be an arduous and long drawn-out operation. In particular the conclusion of the WTO Agreement and its Annexes,¹ caused fundamental legal problems related to the division of powers between the Community and the Member States, the relation between treaty law and Community law and the position of the Community in the WTO. Finally, an Opinion of the Court, discussed elsewhere in this issue, was necessary to find a solution for certain differences that had arisen between the Commission and the Member States in the Council. It was also the first time that the European Parliament played an important role in the approval of the results of a trade negotiations round.

For these reasons this contribution focuses its attention on important aspects of the procedure leading up to formal conclusion of the Uruguay Round Agreements by the Community, including the role of the European Parliament. Although the implementation package contains interesting regulations, in particular the new so-called 'trade barriers instrument' – the successor to the new commercial policy instrument – only a brief factual summary of the implementation package will be given.

The troubles surrounding the conclusion of the Uruguay Round were of a double nature: they sprouted from the external aspects of the new EC market organization for bananas – which will not be further discussed here² –, and they flowed from institutional problems between Commission and Member States about the position

* Legal Adviser, Commission of the European Communities, specially charged with GATT and WTO matters. This contribution has been written in his personal capacity. It was completed during a stay as EC fellow and visiting professor to the University of Michigan Law School.

1 For the structure of the WTO Agreement and the contents of its Annexes see the contribution of Petersmann in this issue, at 161.

2 See the contribution by Hilf in this issue, at 245.

of the latter in the new WTO. Briefly stated, the question was whether all of the subject matter of the WTO was covered by exclusive Community competence, primarily under the common commercial policy (Article 113 EC Treaty), or not. The Commission was of the first view – which logically would lead to the Community alone becoming a Member of the WTO. Almost all of the Member States and the Council did not agree and believed that the WTO Agreement covered important subjects which had remained within the Member States' power, and thus should be concluded as a mixed agreement.

A serious and open discussion about this question was probably avoided for too long. Even when, in an effort to clear the air with the Member States, Sir Leon Brittan, the Commissioner for foreign trade relations of the Community, announced in early November of 1993 that all decisions during the last stages of the Uruguay Round negotiations should be taken unanimously and that Member States should be Members of the future WTO next to the Community, in the same way as Member States and the Commission had functioned alongside one another in the GATT, the Commission did not succeed in clearly conveying the implications of this statement to the Member States in the Council.

To the Commission this meant that, though the Member States would be Members of the WTO, most, if not all, matters treated in the WTO would come under Community discipline, according to Article 113 of the EC Treaty,³ as had been the case with most matters in the GATT.⁴ Obviously the Member States had more restrictive views of the scope of matters treated in the WTO, which would come under the discipline of Article 113, arguing that the GATS and the TRIPS Agreement were largely within Member State competence. Moreover, the repeated strong statements of the Commission about the Community's exclusive competence in WTO matters, although intended to reaffirm Community discipline within a mixed membership WTO, often sounded to many Member States as if the Commission wanted to keep Member States out of the WTO, even after Sir Leon had made it clear that this was not the case. Hence the recurring accusations against the Commission that it had a hidden agenda.

This was a problem inherent in the Commission's position that continued to haunt it throughout the procedure of conclusion and implementation of the WTO Agreement and its Annexes, and in the defence of its position in the request for Opinion 1/94 before the Court. The Commission's assertion that the Community was competent across the board for WTO matters created the impression – at best – that Member States would be WTO Members not in order to grant them any actual powers but merely for reasons of political expediency. Member States chafed at that, because many suspected, and rightly so, that this was only too true for the actual

3 In the interpretation of the Court of Justice of the EC Art. 113 gives exclusive power in the field of commercial policy to the Community, see Opinion 1/75. [1975] ECR 1355.

4 In GATT the Member States *de facto* had some liberty of action outside Community discipline only in the sector of budgetary and administrative matters.

situation in GATT.⁵ Most Member States did not want to see such a situation recreated in WTO and hence insisted strongly on their own competences in the fields of services and TRIPS. This again created great anxiety on the part of the Commission, where such insistence on extensive Member State powers was seen as a wanton attempt to destroy the strong position the Community – and therefore the Commission – had traditionally occupied in the GATT. It was feared to be an attempt to shift their position in this field to one more similar to that which they held in the FAO or the Law of the Sea Convention.⁶ That is to say a situation in which the Community is barely tolerated by third States and its own Member States as a Member of the organization, where constant explanations of, and declarations on Community competence have to be given *vis-à-vis* third States and where internal quarrels about Community competence in respect of different points on the agenda of the organization are often drawn out so long as to make it impossible to make a meaningful, or even any, statement on the Community position for lack of time.⁷

It must be clear by now that the positions adopted by the two sides inexorably led to misunderstandings and constant doubt about the other side's true motives. It is perhaps testimony to the solidity of the Community system that it proved possible to finalize the Uruguay Round and to arrive at a satisfactory result, not least because it was possible to canalize many of the underlying problems into the procedure to request Opinion 1/94 before the Court.⁸

II. Conclusion of the WTO Agreement and its Annexes

A. The Commission Proposal

The Commission proposal for the conclusion of the results of the Uruguay Round was very simple.⁹ In the familiar format of a decision *sui generis* the Council was asked to approve the WTO Agreement, its Annexes 1, 2, and 3,¹⁰ the ministerial

5 The continued independent action of the Member States in respect of budget and administration had no serious foundation in law, as appears clearly *ex post facto* from Opinion 1/94, point 19-21.

6 For a critical comment of the Law of the Sea Convention's arrangements for 'regional economic integration organizations', see Simmonds, 'The Community's Declaration upon Signature of the UN Convention on the Law of the Sea', *CML Rev.* (1986) 521-544. On the FAO, Frid, 'The European Economic Community, A Member of a Specialized Agency of the United Nations', *EJIL* (1993) 239-255.

7 The manner in which the Member States treat well-established Community powers in the framework of the FAO is exemplified by the way they have treated a fisheries agreement concluded within the framework of the FAO, see Case 25/94, *Commission v. Council* (pending).

8 Rereading accounts of the implementation of the Tokyo Round, one is struck by the statement that the two Legal Services co-operated in interpreting how Opinion 1/78 should be applied to the Tokyo Round results. Nothing of the kind has happened after Opinion 1/94, see Louis, 'The European Economic Community and the Implementation of the Tokyo Round Results', in J.H. Jackson, J.-V. Louis, M. Matsushita (eds), *Implementing the Tokyo Round* (1984) 21-76, at 36-37.

9 See Doc. COM (94) 143 final.

10 These agreements constituted the so-called single undertaking, i.e. every Member had to adhere to them and present schedules of concessions and commitments under them without being allowed to

decisions and declarations and the Understanding on Commitments in Financial Services which appear in the Final Act of the Uruguay Round¹¹ (Article 1), the Agreements contained in Annex 4 to the WTO Agreement¹² (Article 2), and a minor side agreement on bovine meat concluded with Uruguay (Article 3). The Council would have to give its approval on the basis of Article 113 of the EC Treaty. This made explicit what the Commission had been saying all along, namely that all matters within the ambit of the WTO would be under Community discipline. The explanatory memorandum reiterated that both the Community and the Member States were to become Members of the WTO. It was also asserted that the Community and its Member States should participate in the WTO and its organs in the same way in which they had participated in the GATT and its institutions, that is to say that the Member States would sit on the organs of the WTO grouped together as *individually identifiable* members of a Community delegation.

The positions to be taken by the Community, according to the explanatory memorandum, should be identified in co-ordination meetings preceding the relevant WTO meetings, according to the procedures laid down in the EC treaty; if divergent views were to arise so strong as to be difficult to overcome, the Community would express a waiting reserve, until such time as a solution could be found in the 113 Committee, the Coreper, or even the Council. The Community position would be expressed by the Commission in the organs of the WTO. Member States which were particularly affected by certain issues would have the possibility to express themselves, but their statements would have to be in line with the general Community position. The Commission would cast the votes of the Community Member States as a bloc.

make any reservations, see Articles II:2, XI and XVI:5 WTO. Annex 1 includes the GATT '94 and the agreements on trade in goods (Annex 1A), the General Agreement on Trade in Services, GATS (Annex 1B), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C); Annex 2 contains the Understanding on Rules and Procedures Governing the Settlement of Disputes; Annex 3 covers the Trade Policy Review Mechanism.

- 11 It is doubtful whether the various decisions and declarations were of a kind so as to require approval under international law. The only decision which creates rights and obligations is the one on least-developed countries, which in para. 1 actually contains a modification of the WTO Agreement. All other so-called decisions were drafts for decisions to be taken later by WTO organs and the declarations did not hide anything that was not of a declaratory nature. The Understanding set out a different way of making commitments that had been followed in the sector of financial services and could still be followed insofar as these negotiations were still going to continue, but they were in no sense legally binding. There is, however, a standing EC practice not merely to attach, but to approve Final Acts, or at least certain documents from it, see, e.g., various Europe agreements in OJ 1994 L 357, L 358, L 359.
- 12 These were the so-called plurilateral agreements, i.e. the agreements which were not part of the single undertaking and which could be concluded by Members *à la carte*, see Art. II:3 WTO. They included the Dairy Agreement, the Bovine Meat Agreement, the Government Procurement Agreement and, possibly the Aircraft Agreement. The first two have been marginally modified, the third one was substantially overhauled and extended as compared to their Tokyo Round equivalents. The last one has not yet been included, as parties have not yet been able to agree on its adaptation to the new WTO structure.

The Commission proposal asked that the European Parliament give its assent to the WTO Agreement and its Annexes. This was justified by the fact that the WTO was 'an agreement establishing a specific institutional framework by organizing cooperation procedures', within the meaning of Article 228(3), second alinea. There can be little doubt, indeed, that the modest, but still fairly elaborate institutional structure of the WTO, and certainly the detailed dispute settlement procedures, justified this characterization. Only an overly restrictive interpretation of Article 228, limiting it to cases involving association-like agreements not based on Article 238, would have permitted otherwise, but would not have been in conformity with the Commission's original proposals to the Intergovernmental Conference preparing the Maastricht Treaty.¹³ Although it would also have been possible to characterize the WTO Agreement as 'having important budgetary implications for the Community', given the reduction in tariff revenue and hence in the Community's own resources over the years to come, this terrain was carefully avoided by the Commission, as the border-line between important and unimportant budgetary implications threatened to become a contentious issue between the institutions.

The last recital of the Commission proposal was remarkable in that it openly stated that it should not be possible for individuals to invoke the provisions of the WTO Agreement and its Annexes directly before national or Community courts and tribunals. In the explanatory memorandum it was argued that, as it was clear that the US and many other partner States in the WTO would explicitly exclude such direct effect, an important disequilibrium would arise in the possibilities of enforcement of the provisions of the WTO Agreement as between the Community and its partner States if direct effect were not explicitly excluded in the Community act of the conclusion of the results of the Round.

It should be added that during the middle stages of the Round, Switzerland took the initiative to try to ensure that either the domestic legal systems of Members should assure direct effect or self-executingness of the provisions of the agreements being negotiated or that the agreements themselves would somehow stipulate this. This initiative was roundly rejected by the large majority of participants in the negotiations. There is therefore some support in the negotiation record for the Commission's proposal, although it does seem to go against the Court's view in *Kupferberg* that direct effect is inherent in the (monist) system that certain States and the Community have embraced and cannot be subject to reciprocity.¹⁴ The Commission was only too aware of this and also of the fact that many provisions of the agreements had been drafted in a manner which suggested that they could be

13 Although a restrictive interpretation of Article 228(3), second alinea, limiting it to cases of circumvention-by-treaty of the Parliament's budgetary and legislative powers and of its power to approve 238 agreements, is not entirely excluded, there are hardly any indications for it in reported preparatory work, see J. Cloos *et al.*, *Le Traité de Maastricht* (1993) 386ff.

14 See Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, [1982] ECR 3641, point 18.

invoked directly.¹⁵ Nevertheless the Commission could not accept that, for instance, subsidiaries of US companies would be able to enforce their rights directly through Community courts, including the Member State courts, leading to a striking down of laws or regulations contrary to the WTO Agreement, whilst subsidiaries of EC companies in the US would have to go through the Commission, a Member State, or a special procedure under Regulation 3286/94¹⁶ and subsequently await the result of an international dispute settlement procedure with no guarantee that the offending law or regulation would be modified.¹⁷

Another interesting matter mentioned in the Commission's explanatory memorandum, but not referred to in either the preamble or the text of the proposal, was the Commission's affirmation that it should be understood that the fact that the Member States were to be Members of the WTO alongside the Community did not result in rights and obligations on the basis of the WTO Agreements being created between them. It was said to be highly opportune to communicate this viewpoint to the Community's future WTO partners by formal declaration at the moment of depositing the Community's instruments of ratification. As a matter of fact these phrases represented an attempt by the Commission to undo the so-called 'Airbus effect'.

This effect was so named for the unadopted panel report in the case concerning the German exchange guarantee scheme for Airbus fuselages to be delivered for assembly to Toulouse in France. In this report¹⁸ the panel claimed that, though the Subsidies Agreement had been concluded by the Community – and the obligations flowing from that agreement were therefore obligations between the Community and its Member States on the one hand and third States on the other – nevertheless obligations on export subsidies existed between Germany and France, from which the United States could derive rights under the Subsidies Agreement. It was argued by the panel that, since the Subsidies Agreement was intended to be a further development and interpretation of the GATT and since the Member States were still contracting parties to GATT, the 'relevant border' for determining whether there

- 15 It is purely by coincidence that the Agreement on Pre-shipment Inspection is the only one of the Uruguay Round Agreements to have consistently avoided this and to have used such formulae as 'Members shall ensure' etc. throughout.
- 16 OJ 1994 L 349/71. This is the so-called trade barriers regulation, the successor to the new commercial policy instrument, Reg. 2641/84.
- 17 According to Article 22 DSU compensation or retaliation may be the outcome of a dispute settlement procedure under the WTO, even if compliance remains the ultimate goal. But note that USTR Kantor has openly stated that the US may legally not comply, as long as it is prepared to pay for it, see his declaration on the occasion of the Car Taxes panel. See *Inside US Trade*, 23 September 1994, at 1, 12-14. Note that there is nothing new under the sun, since under international law (monetary) compensation is always an option, if *restitutio in integrum* is not to be had, see *Chorzow Factory* case, PCIJ Series A, No. 17, 27-30. And even if a court specifically orders *restitutio* and a State is unwilling to provide it, reprisals are the measures of last resort under general international law, as they are in GATT. Therefore, the stark contrast in effectiveness between self-executingness of treaty provisions and their enforcement through international dispute settlement has always existed.
- 18 Doc. SCM/142.

was an export subsidy on Airbus fuselages was the border between Germany and France and not the one between the Community and its co-contracting parties to the Subsidies Agreement.¹⁹ The Commission saw the danger that, though it had successfully stopped the adoption of this misguided and unpalatable report,²⁰ its reasoning could subsequently be generalized, when the situation which had existed in GATT alone but not in most Tokyo Round Codes – a side-by-side membership of the Community and its Member States – extended to all WTO agreements.

It is clear as a matter of international law that a mixed Community agreement, concluded simultaneously between the Community, its Member States and third States, is in principle capable of creating rights and obligations between all the parties and hence also between the Member States *inter se*. It is most of the time equally obvious, as a matter of practical intention, that it is the objective of the Community negotiators to create rights and obligations only between the Community and its Member States on the one hand and one or more third States on the other. In bilateral mixed treaties this is nearly always explicitly expressed, broadly in terms comparable to those used in the preceding sentence.²¹ In multilateral mixed agreements, very often a so-called disconnection clause is employed, stating that the relations between the Member States of the Community, parties to the agreement, will be governed exclusively by Community law, that is to say not by the law of the treaty concerned.²² As the Community and its Member States always negotiated in the Uruguay Round as one unit, represented by the Commission, there can hardly have been any misunderstanding about the intention of the Community and its Member States to negotiate exclusively obligations with third States and not between Member States *inter se*. This was, however, never explicitly expressed in any text during the negotiations, except in the headnote of the Community's commitments in the field of services. The Commission made a brief attempt to bring the matter up and to have a clause or declaration comparable to a disconnection clause accepted by the Community's negotiation partners, after it had officially become fully clear in November of 1993 that the WTO would be of mixed Membership as far as the Community was concerned. At this time however, on the brink of the close of negotiations, the mistrust of the Member States was, if possible, even greater than that of third States. They believed that this was another convoluted tactic of the Commission to undermine their full status of membership in the WTO

19 Ibid., paras. 5.5-5.7.

20 It is to be noted that, as usual when the US is the adversary, the Community, i.e. Germany, in practice abided by the report, though it remained implacably opposed to its adoption. There was the obvious legal error in the report relative to which entity was subject to the obligation not to give export subsidies and *vis-à-vis* whom. There was also the fundamental lack of equality between aircraft producers which resulted from it. Transport between assembly lines across State frontiers in the USA could give rise at most to difficult-to-prove internal subsidies, whereas in Europe it could result in export subsidies which were *ipso facto* illegal.

21 E.g. the Association Agreement with Turkey, Art. 23, OJ 1973 C 113.

22 This formula is often used in Conventions of the Council of Europe to which the Community and its Member States adhere, see, e.g., European Convention on Transfrontier Television, Art. 27, ETS No. 132 and Protocol to the Insider Trading Convention, ETS No. 133.

and, therefore, although plain Community self-interest was involved, the initiative was killed.

Thus, the inclusion of the issue – in the form of a suggestion of a unilateral declaration – in the memorandum accompanying the proposal for conclusion of the Uruguay Round results represented a further attempt by the Commission to make the Member States in the Council recognize their interest in this matter and to give notice to the other WTO Members of how the Community saw the character of its obligations under the WTO Agreement and its Annexes.

B. Parliament's Assent and the Legal Basis for the Conclusion of the WTO Agreement

1. The Transmission of the Request for Assent

The Commission habitually sends all its proposals, and therefore also the proposal for the conclusion of the Uruguay Round, including the request for parliamentary assent, to the European Parliament, but it is the Council, in accordance with the terms of Article 228(3), that officially transmits these proposals to Parliament for the necessary opinion, and in this case, assent, to the Parliament. Likewise, the Parliament sends back its official reaction under the relevant Treaty Article to the Council, and not to the Commission.

In the case of the parliamentary assent for the agreements resulting from the Uruguay Round, matters were considerably complicated by two factors: the time factor and the fact that at that stage (late April 1994) there was no agreement on the legal basis proposed by the Commission, either in favour or against. This raised the further question as to what precisely the Parliament would be asked to give its assent to: only the WTO Agreement and its Annexes or the Agreement *and* the Council decision approving it, including the legal bases?

The time factor was caused by the European elections; the old Parliament was having its last session in May 1994 and the new Parliament would be able to consider the Uruguay Round results seriously only after the summer break. Leading representatives of the old Parliament laid a moral claim to the right to give their assent to the WTO Agreement, as they had followed virtually the whole process of negotiations. This required very quick Council transmission of the Commission proposal to the Parliament. As no unanimity could be mustered to change the legal basis of Article 113, as proposed by the Commission, strong emphasis was placed on the question as to whether Parliament *had* to also give its assent to the decision approving the agreements. The picture was further complicated by the Commission's request for a Court Opinion under Article 228(6). If this Opinion were to necessitate changes in the legal bases of the conclusion of the agreements, would the Council have to request a new assent from the European Parliament? This was another reason for some to find the theory of assent to the agreements alone attractive.

As a matter of fact, the position of Parliament, or at least of its Committee for Foreign Economic Relations (the so-called REX-Committee), leaned strongly in the direction of assent for the treaty texts only. And, indeed, the text of Article 228(3) does not give much guidance; it merely says that certain specific agreements 'shall be concluded after the assent of the European Parliament has been obtained'. Apparently the REX-Committee was interpreting this text to mean that, as long as it was clear from the visa and the recitals of the decision on approval of the agreement that the latter required assent, it mattered only that assent were given to the agreement and not to any other legal basis mentioned in the decision. From the point of view of Parliament this may perhaps be an attractive approach, because it saves Parliament the trouble of taking position on competence fights between other institutions. It is not, however, a position that is compatible with case-law of the Court of Justice on legal bases of Community legislation, which clearly implies that all Community institutions must know with the requisite precision what the legal basis of Community legislation is.²³ This must be true for treaty approval as much as for any other Community act, and even more so in the assent procedure, where Council and Parliament approve an act on a virtually equal basis and where it is quite conceivable that Parliament could make its assent dependent on certain conditions being fulfilled, including conditions relating to the legal basis.²⁴

Therefore, those who took the position that the assent of Parliament must include the decision approving the agreement were probably correct. The conclusion drawn from this, namely that the Council had to change the legal basis of the decision before the Council transmitted the whole package to Parliament, if it did not agree with the legal basis proposed by the Commission, seems slightly overdrawn. It would not seem impossible for the Council to ask Parliament to begin the assent procedure, while indicating to it that the Council is considering changing the legal basis and stressing the fact that ultimately the acts approved by Council and Parliament must be identical; in such a situation it would be possible to have a meaningful discussion between the two institutions about the legal basis of the conclusion of an agreement for which parliamentary assent is being requested. In this case, however, time was lacking for such a procedure, if the old Parliament still had to rule on the matter. As it continued to be impossible to find unanimity for a thorough modification of the Commission proposal, the matter was dropped and no official request for parliamentary assent went out from the Council during the lifetime of the old Parliament.

The matter was taken up again under the new (German) Presidency and with the newly elected Parliament after the summer break of 1994. It now proved possible for the Presidency to find a compromise which would enable the Council to transmit to Parliament a substantially modified decision approving the Uruguay Round Agreements, including a large number of legal bases over and above the references

23 See Case 45/86, [1987] ECR 1517, points 7-9; see also H.G. Schermers, M. Waelbroeck, *Judicial Protection in the European Communities* (5th ed., 1992) 208.

24 This would give Parliament in reality a right of amendment, where the Treaty does not grant it.

to Articles 113 and 228(3) already included in the Commission proposal: Articles 43, 54, 57, 66, 75, 84, paragraphs 2, 99, 100, 100A and 235 were added and it was specifically made clear that the Community was only partly competent to conclude the Uruguay Round Agreements. These modifications were made acceptable to the Member States which had so far resisted them, by drawing the attention of the Parliament, in the accompanying letter to its President, to the fact that the Commission had requested an Opinion of the Court on the legal bases for the agreements and that the Court's Opinion would impose itself on all institutions of the Community. Although it was perhaps wilfully naïve to implicitly assume that all institutions would be bound to draw exactly the same consequences from the Opinion of the Court, it provided a basis on which the Council of 4 October 1994 could formally transmit the request for assent to Parliament.²⁵

2. Parliament's Assent

As a matter of fact, the old Parliament had already expressed its generally favourable reaction to the Uruguay Round Agreements in a resolution adopted shortly before Marrakesh, where MEPs had been part of the Community delegation.²⁶ Even though the elections had changed its composition, Parliament had not changed so dramatically as to make assent unlikely.²⁷ The main interest lies, therefore, in how Parliament gave its assent and what it said about the questions concerning legal basis and competence. In order to understand better Parliament's position, it is necessary to recall *how* Parliament strove for more power over agreements concluded under Article 113 and was denied it by the Member States during the Intergovernmental Conference leading up to Maastricht.²⁸

This led to the somewhat perverse result that, by denying Parliament powers, Member States gained Parliament as an ally in their fight with the Commission to restrict the scope of Article 113 to the minimum. Because the Treaty Articles on the internal market, such as those on freedom of movement of persons, freedom of establishment and freedom to provide services,²⁹ gave the Parliament co-decision powers after Maastricht, there was no question that Parliament would easily accept that such subjects of the 'new' trade policy, such as establishment and trade in services, could be subsumed under Article 113. The Parliament usually rejected any

25 In the accompanying letter the attention of Parliament was also drawn to a new request for an Opinion of the Court from the FRG on the compatibility of the procedure of approval of the framework agreement on bananas with Colombia, Costa Rica, Nicaragua and Venezuela; i.e. on the way this agreement had been sneaked into the tariff schedules of the Uruguay Round. This request for Opinion 3/94 is still pending.

26 Resolution of 24 March 1994 on the results of the Uruguay Round of the GATT Multilateral Trade Negotiations, OJ 1994 C 114/25.

27 Two of the key MEPs, the President of the REX Committee, Mr. De Clercq, and the Rapporteur on the Uruguay Round Agreements, Ms. Randzio-Plath, remained in these functions after the elections.

28 See Cloos *et al.*, *supra* note 13, at 386-389.

29 See Articles 49, 54, 57 and 66 EC Treaty.

argument on a broader interpretation of Article 113 with scant attention for the repercussions on Community competence. It was often of little concern to Parliament that resort to other legal bases than Article 113 would lead to mixed competence in most cases.³⁰ The Commission had hoped that requesting assent under Article 228(3), second alinea, in the case of the Uruguay Round Agreements, might break the objective alliance between Council and Parliament on the minimalistic interpretation of Article 113, but that was not to be.

In her report to Parliament the Rapporteur did not notice that the Commission was the institution which originally requested parliamentary assent and in this particular instance had broken the link between Article 113 and lack of parliamentary powers.³¹ Again Article 113 was condemned as a legal basis or at least it was said to be inadequate. The Rapporteur notes that the additional legal bases included in the text transmitted by the Council, viz. 43 (agricultural policy), 54, 57, 66, 75 and 84(2) (trade in services), 100, 100A (protection of intellectual property) and 235 (investment) are entirely in keeping with her position. But she asserts that this does not necessarily imply that it has been decided to treat the agreement as a mixed-type agreement. She asserts bluntly that the Community has full external powers, where it has internal powers.³² Although that is certainly true, the finer point that such external power is generally not exclusive in nature in all areas is overlooked.

The Rapporteur then arrives at the conclusion that it is not necessary to 'consult Member States in order for the final act of the Uruguay Round to be concluded as legally binding on behalf of the European Union'. In the next paragraph she recommends that the Final Act of the Uruguay Round be referred to national parliaments for ratification, because 'it is the Member States and not the Union, that are the contracting parties to the GATT'.³³ Towards the end of the report, however, she states the view that it would make sense if, 'in the long term, only the European Union were a member of the WTO'.³⁴

30 Resort to implied powers under the ERTA doctrine (see Case 22/70, *ERTA* [1971] ECR 263) may sometimes result in exclusive Community competence, but in any agreement of some breadth one is always likely to find some matters that have remained within the competence of the Member States.

31 See Report on the proposal for a Council Decision concerning the conclusion of the results of the Uruguay Round of Multilateral Trade Negotiations, Ms. Randzio-Plath Rapporteur, A4-0093/94, PE 208.961/fin, paras. 5-6.

32 *Ibid.*, para. 8.

33 *Ibid.*, paras. 8-9. With all due respect for the Rapporteur, who had acquired a considerable expertise on the Uruguay Round Agreements as such, her text is marred by some very painful legal errors. Mixed agreements are not concluded by consulting the Member States, but by having them ratify the agreement alongside the Community. Such ratification is still the prerogative of the executive; parliaments merely approve agreements prior to ratification. The Union has no international legal personality and therefore cannot conclude treaties. One also fails to see why the fact that Member States were contracting parties to the GATT should imply that their Parliaments should approve the WTO Agreement, if the Rapporteur really held the view that the WTO should not be concluded as a mixed agreement. One cannot help but feeling that Committee staff should have prevented such legal errors and glaring inconsistencies from appearing in the report.

34 *Ibid.*, para. 41.

Parliament finally gave its assent on 14 December. It is difficult to discern from the form of the legislative resolution whether Parliament intended to give its assent to the whole text – including the decision approving the agreements – which had been transmitted to it by the Council.³⁵ The impression given by the text, however, is that the Parliament gave its assent to the conclusion of the Uruguay Round treaties in general, rather than to the specific way in which the Council intended to conclude them, as manifested by its decision.

The institutional problems involved in the conclusion of the WTO Agreement as a mixed one were addressed in a clearer way than in Ms. Randzio-Plath's report in a resolution which was adopted simultaneously with the assent and which was intended to wind up a debate on two oral questions concerning the Uruguay Round and the future functioning of the WTO. The resolution asserted, that as a consequence of the Opinion of the European Court of Justice, it was essential for Council, Commission and Parliament to get together with a view to concluding 'an inter-institutional' agreement defining the role of the European Union in the WTO. It went on to insist that the *acquis* of the Common Commercial Policy should be safeguarded, that the Union should adopt a single line of action in the WTO, if only to maintain the single market, and therefore called upon the Member States to accept the Commission as the sole representative of the Union in all areas of activity of the WTO.³⁶

It is obvious and wholly understandable that Parliament should want to play a greater role in the conclusion and overseeing of important international agreements, such as the WTO. It is doubtful, however, whether the Parliament should seek to meddle in the day-to-day management of the WTO. The Parliament should rather use its normal overseeing powers and, in the last resort, its powers of censure over the Commission in order to be informed on a regular basis about developments in the WTO, very much as it was being informed, through its REX-Committee, of ongoing developments in the Uruguay Round. Any agreement negotiated within the framework of the WTO should follow the normal route of any agreement under the provisions of Article 228 EC Treaty, and the same is true for any binding decision made by the WTO. Thus all of Parliament's rights will be sufficiently safeguarded. Any Code of Conduct on the behaviour in practice of the Commission and the Member States in the organs of the WTO should be left to these two parties. The Parliament should see to it, of course, that its wishes with respect to single outside representation in the WTO are heeded in such a Code of Conduct, but the separate discussion of the assent resolution and the procedural resolution meant loss of leverage for Parliament; if it had really cared about unified outside representation of

35 In para. 1 of the Legislative Resolution, Parliament gave its assent 'to the conclusion of the results of the Uruguay Round of Multilateral Trade Negotiations', while in the preambular paragraphs reference was made both to the proposal of the Commission and to the request for assent of the Council. There would seem to be some room for further co-ordination between the Legal Services of the Parliament and the Council on these matters for future cases of assent. See Legislative Resolution A4-0093/94, OJ 1995 C 18/61.

36 Resolution B4-0464/94, OJ 1995 C 18/165.

the Community by the Commission, it could have driven a harder bargain and made assent conditional on sole representation by the Commission being accepted by the Council.

C. The Council's Final Decision to Conclude the WTO Agreement

1. Are the Legal Bases in Conformity with the Court's Decision?

First of all, it is striking to note that the legal bases in the Council's decision of 22 December³⁷ are absolutely identical to those included in the modified proposal that was transmitted to Parliament by the Council on 4 October, i.e. before the Court had handed down its Opinion 1/94. Although the Council had written to the Parliament that the Opinion of the Court would impose itself equally on all institutions, thus implying that all of the institutions should change the legal basis of the agreement simultaneously, the Council, unwilling to negotiate with Commission and Parliament about a few small changes which would have been appropriate after the Opinion, decided by unanimity to stick with its original redraft of 4 October. It would seem, however, that the references to Articles 43, 99 and 100 as legal bases are either contrary to the Court's opinion or superfluous.³⁸

At any rate, the days when Community lawyers did their utmost to elegantly pare the number of legal bases to the strict minimum for each legislative act are clearly over, at least in the domain of external affairs. The proliferation of legal bases after Opinion 1/94 is certainly accompanied by the drawback that the acts of conclusion of international agreements may become more vulnerable to legal challenge. This may lead to embarrassing situations, where an agreement is still in force as a matter of international law, but annulled as a matter of Community law.³⁹

The Decision concluding the Uruguay Round Agreements contains another number of legislative 'firsts' which do not seem to point the Community in a

37 Dec. 94/800/EC, OJ 1994 L 336/1.

38 Article 43 was justified, because a regulation on the denomination of spirit drinks and another one on aromatic wines, both based on Articles 43 and 100a, were affected by the TRIPS Agreement. See Reg. 3378/94, OJ 1994 L 366/1. If one reads together paras. 29-30 and 69-70 of Opinion 1/94, it would seem incontrovertible that the Court has accepted that those aspects of TRIPS which affect the common agricultural policy in its external aspects come under Article 113. Reference to Article 99 was justified for reasons related to taxes, notably the so-called tax exception in the GATS. This is clearly an ancillary aspect of that agreement, however, that requires no separate legal basis; it is notable, moreover, that provisions relating to non-discrimination in tax matters, which have abounded in many international agreements of the Community, including agreements based on Article 113, have never required a separate legal basis for that reason. The reference to Article 100 is equally mysterious, even though it is bolstered by reference to two directives in the 9th preambular paragraph. Again tax would seem to be the reason and, therefore, the same objections apply as those mentioned in respect of Article 99.

39 This was the situation in respect of the EC-US anti-trust cooperation agreement after the Court had struck down its conclusion by the Commission alone, Case C-327/91, [1994] ECR, 3641 and before it was reconcluded by the Council, OJ 1995 L 95/45.

promising direction. It is the first time that it is made explicit in the title, the preambular paragraphs, and the Articles that this is an agreement for which the Community is competent only in part, i.e. that it is a mixed agreement.⁴⁰ Moreover, it is the first time that the preambular paragraphs contain explicit ERTA reasoning,⁴¹ both in a positive sense and in a negative sense. This serves to justify the selection of the legal bases, but thus far the Council had never sought explicitly to justify the resort to particular legal bases of a Community act in the preambular paragraphs, except in very broad terms for the invocation of Article 235.⁴² The negative ERTA justification is extremely striking; it is said that no Community act has yet been based on Article 73C of the Treaty. This would seem to imply that, since there are no Community acts of that nature, no affectation of them is possible and hence there is no (exclusive) Community treaty making power in that respect. This is patently incorrect, as the text of Article 73C would seem to found both an autonomous and a contractual Community power to act in the field of free movement of capital to or from third countries involving direct investment, establishment, the provision of financial services or the admission of securities to capital markets.⁴³

This last example serves to illustrate the undesirability for internal Community reasons of recourse to this kind of preambular justification of legal bases. Moreover, the ERTA reasoning in the preambular paragraphs tends to freeze the external competence of the Community in respect of the treaty concerned to what it is at the moment of the conclusion of the treaty. As has been argued a thousand times *vis-à-vis* third States, it is not appropriate to fix the division of powers in the external relations field, because it is evolutive by nature, given the way the AETR doctrine refers to developing internal powers of the Community. The Court has clearly stated that third States in principle have nothing to do with the division of powers between the Community and the Member States in the external relations field.⁴⁴ Everybody knows that this is a difficult principle to uphold in practice *vis-à-vis* the Community's treaty partners. But here we have the Council itself making it totally impossible to live up to the admonitions of the Court.

40 Cf. the Europe Agreements (OJ 1994 L 357, L 358, L 359) which do not contain such an explicit justification of mixity, but the Energy Charter Treaty does (OJ 1994 L 380/1).

41 Reasoning based on the existence of internal common rules which in the domain covered by them and to the extent that they would be affected by projected treaty rules, entail an exclusive external competence for the Community, see Case 22/70, *ERTA*, *supra* note 30.

42 Curiously enough the use of Article 235 as the legal basis of Dec. 94/800/EC is justified through ERTA reasoning, see preambular para. 9, not by reference to the fact that the powers to reach a Community objective are missing.

43 This 'mistake' has been corrected in the case of the conclusion of the Agreement executing the Energy Charter, where Article 73C is mentioned directly as one of the legal bases, see OJ 1994 L 380/1.

44 Ruling 1/78, [1978] ECR 2151, point 35.

2. *No Direct Effect, and No Disconnection*

The preambular paragraph on the WTO's lack of direct effect managed to survive all of the parliamentary and Council debates and now states that the WTO Agreement 'by its nature ... is not susceptible to being directly invoked in Community or Member State courts'.

Obviously this is not a *treaty* clause denying direct effect, as the Court of Justice envisaged it in the *Kupferberg* case;⁴⁵ this is a unilateral declaration, in the same way as the comparable, but operative and not merely preambular, provision of the US Uruguay Round Agreements Act.⁴⁶ It is, therefore, beyond doubt that the question of what effect the Uruguay Round Agreements will have in the internal legal order of the Community, and in particular of whether they are of such a nature as to be able to be invoked before the courts of the Community, including the national courts and tribunals of the Member States which serve as ordinary courts for Community law, is still in the hands of the European Court of Justice.⁴⁷ Although the Court is, of course, the one institution of the Community that can authoritatively decide the question of direct effect, there is no reason why it should have the monopoly of opinion on this matter. The executive and the legislative powers in the Community are fully entitled to express their views on this matter at the moment of conclusion of the Agreements.⁴⁸ It would not seem to be without significance that both the negotiator (the Commission) and the institutions jointly responsible for the adoption (Council and Parliament) subscribe to the view that the Uruguay Round Agreements are not susceptible to being invoked directly before the Courts. This does not necessarily imply that these institutions have in this way intended to undermine certain fundamental rules of Community law, such as the monist supremacy of treaties concluded by the Community over secondary Community law, or the basic possibility that such treaties may be invoked directly before the Community's jurisdictions.⁴⁹ They have merely pointed out that the particular nature of the WTO Agreement makes it unsuitable for direct invocation before the courts. By restricting this view to a preambular paragraph and not placing it in the body of a Community act they have been respectful of the prerogatives of the Court and leave the Court of Justice the necessary freedom to adapt any judgment to the circumstances of the case. But the Court is bound to take these views into account, when taking any decision on this matter.

The Court has recently re-emphasized, of course, its long-standing view that the GATT cannot be invoked directly before the Courts, except in cases where

45 Case 104/8, *Kupferberg*, [1982] ECR 3641, point 17.

46 Sec. 102(a) and (b)(2) of the Uruguay Round Agreements Act.

47 *Kupferberg*, *supra* note 45.

48 Cf. also the traditional preambular paragraph in the anti-dumping regulations which state that in applying these rules the Community takes account of their interpretation by the Community's major trading partners, see Reg. (EC) 3283/94, OJ 1994 L 349/1, 4th preambular para.

49 Such fears have been expressed by Mengozzi, 'Les droits des citoyens de l'Union européenne et l'applicabilité directe des accords de Marrakesh', 4 *RMUE* (1994) 165-174.

Community legislation or decisions themselves refer directly to GATT provisions. This judgment in the well-known banana case⁵⁰ illustrates on the one hand that individuals retain considerable rights of recourse under the 'application of GATT by reference approach'⁵¹ and on the other that questions of direct effect under the GATT may border on questions of justiciability.⁵² The Uruguay Round Agreements, however, remedy many of the weaknesses in the GATT structure, in particular in dispute settlement, which the Court had indicated as determinative in forming its opinion that GATT had no direct effect.⁵³ In view of this evolution it is doubly important that the three institutions express their view on this issue explicitly in the decision on the conclusion of the Uruguay Round Agreements.

The pronouncement in the Commission's explanatory memorandum on a possible declaration to the effect that the WTO Agreement is not supposed to create rights and obligations between Member States has borne no fruit. No declaration of this kind was made on the occasion of the deposit of the instrument of the Community and its Member States. The Community will have to shoulder the risks that will flow from this lack of foresightedness.

3. *The Problem of the Plurilateral Agreements*

One of the remarkable features of the decision concluding the Uruguay Round is that not only the Multilateral Agreements but also the Plurilateral Agreements are approved 'with regard to that portion of them which falls within the competence of the European Community'. Implicitly, therefore, one or more of the plurilateral agreements are regarded by the Council as not being entirely within Community competence. There can be little doubt that this concerns the Government Procurement Agreement (GPA), since the other so-called Annex IV Agreements (the Dairy and Bovine Meat Agreements) clearly fall within the exclusive competence of the common commercial policy as will the Agreement on trade in civil aircraft as soon as it is included.⁵⁴

50 Case C-280/94, *Germany v. Council*, Judgment of 5 October 1994, not yet reported, points 103-112.

51 See on this point Timmermans, 'L'Uruguay Round, sa mise en œuvre par la Communauté européenne', 4 *RMUE* (1994) 175-183.

52 The 'political question' here would be: 'If the Community and Latin-American banana producing countries come to an agreement under Article XXVIII of GATT, even if it is considered of doubtful legality by some, is it for the Court to undo that agreement by giving direct effect to certain GATT provisions?' In the end the question is, therefore, who is 'best equipped' to solve this dispute, the executive and legislative powers of the Community or the Court. Giving direct effect or not thus almost becomes a question of judicial self-restraint, cf. Vázquez, 'Treaty-based Rights and Remedies of Individuals', 92 *Columbia Law Review* (1992) 1082ff., at 1128.

53 See in particular Art. 22 of the DSU, showing that it is *de facto* no longer possible to block adoption of panel reports, listing precise steps in relation to implementation, compensation and authorized retaliation etc.

54 As long as the parties to that agreement have not yet agreed on the technical modifications necessary to bring it within the WTO system, it will remain outside Annex IV.

The Council seems to have been of the view that, since services and public works contracts were now included in the new GPA and the Court had decided in Opinion 1/94 that services were of mixed competence, the GPA was now also of mixed competence. Although the Commission protested against this view in December 1994, the Council pushed it through with very little discussion. Any serious consideration of the matter, however, would have to take account of the fact that the GPA is not concerned with either trade in goods or trade in services as such. Although its ulterior objective is to open up markets in goods and services, the true subject matter of the Agreement are opportunities to bid; access to government tendering procedures is what the GPA is all about. The goods or services which might be finally delivered or rendered are not the subject of the GPA; *their access* to the markets concerned, *after* a successful bid for a tender made under the GPA, will remain subject to GATT consolidated tariff rates or to the market opening conditions of the GATS. Any bids proffered under the GPA regime would also have to take into account what the competitive position of the goods and services concerned would be after tariffs or services trade barriers had been overcome. The special nature of the rights under the GPA has also been recognized by the single adopted panel report rendered under the agreement, the *Trondheim Toll case (US v. Norway)*. In discussing the difficulties of compensation under the GPA, the panel remarks that a lost opportunity to bid cannot be valued in the same way as a loss of contract, as it is not sure that the contract would have been awarded, if and when the opportunity to bid had been granted.⁵⁵

The *sui generis* character of the rights under the GPA could lead us to regard them as subject to the common commercial policy either directly or by analogy. The latter because the opportunities to bid under the GPA are exercised directly across frontiers; any subsidiary to a foreign company established within another country would exercise bidding rights under the national regime (or, in the case of the EC, directly under the regime of the EC directives on public procurement). Such direct cross-frontier bidding may be compared, therefore, to direct cross-frontier supply of services which, according to the Court in Opinion 1/94, is like trade in goods, and, therefore, subject to the common commercial policy.⁵⁶

But even assuming, for the sake of argument, that the specific character of GPA obligations would not allow us to go so far as to conclude that the GPA was in reality concluded on the basis of Article 113 of the EC Treaty, then the AETR doctrine applies to them, since the domain covered by the GPA is pervasively regulated by five Community directives.⁵⁷ It is difficult to imagine how Community level harmonization of the treatment of opportunities to bid could encompass more

55 See Doc. GPR.DS2/R, paras. 4.17-4.27.

56 See para. 44 of Opinion 1/94. I am indebted to Fanis Christoforou for this idea.

57 These are: Council Directive (EEC) 93/36 on public supplies, OJ 1993 L 199/1. Council Directive (EEC) 93/37 on public works, *ibid.*, at 59. Council Directive (EEC) 93/38 on 'excluded sectors', *ibid.*, at 84. Council Directive (EEC) 92/50 on public services OJ 1992 L 209/1. Council Directive (EEC) 89/665 and 92/13, the so-called 'remedies directives' esp. OJ 1989 L 395/33 and OJ 1992 L 76/14.

than rules on the advertisement of the contract – including rules on what may be prescribed in respect of qualifications of the supplier and the standards his goods or services have to respect –; rules on the possible procedures to follow in the process of awarding the contract (open, semi-closed or closed procedures), rules and criteria to be followed when awarding the contract, and rules to respect in the post-awards phase (disclosure and challenge). Both the GPA and the Community directives contain rules on all these aspects of the treatment of opportunities to bid for public procurement contracts. Thus the GPA falls into a domain which is for the most part covered by Community rules which represent an ongoing progressive harmonization with a view to eliminating obstacles to intra-Community trade.⁵⁸

The possible argument that the Community directives are concerned only with eliminating internal barriers created by public procurement practices and thus cannot be affected by the GPA, which is limited exclusively to access of third State companies to the public procurement in the Community, does not withstand closer scrutiny. The contracting authority which makes a decision about a particular procurement contract will have to decide at the same time whether to award the contract to a European bidder on the basis of the rules of the directives or to a third State bidder on the basis of the rules of the GPA. It is clear that in making this choice the rules of the directives are affected. If Member States were allowed to conclude the GPA or any other treaty on government procurement on their own, the choice might be a foregone conclusion in favour of the third State company, thus undermining the system of the directives.⁵⁹ Therefore, the Community directives would be affected if the Member States were allowed to conclude the GPA, or any other agreement on public procurement, alone, or even collectively.⁶⁰ Hence it is reasonable to conclude that the GPA, even if it now includes services and public works, is still within exclusive Community competence. If that is the case, the phrase 'with regard to that portion of them which falls within [EC] competence' in Article 2 has no operational meaning, because there would be no such portion.⁶¹

It is interesting to note in this regard that with respect to the conclusion of the separate government procurement treaty that was signed with the US at Marrakesh, the Council has come round to the view that it falls within exclusive Community competence and should be concluded by the Community alone. As there is no basic reason to distinguish between that treaty and the GPA, one wonders why the latter should be regarded as a mixed agreement.

58 See Opinion 2/91, [1993] ECR I-1061, points 25-26.

59 An illustration is provided by the lowering of the threshold in the case of public services supply from ECU 200.000, according to Art. 7(1) of Dir. 92/50, to SDR 130.000 in Art. 1(4) of the GPA. It is clearly contrary to the rationale of the *AETR* judgment, [1971] ECR 263, para. 17, if Member States could modify the threshold separately by treaty, so as to give third States better treatment than Member States. It is precisely to prevent such reverse discrimination that the Commission proposed a modification of the Community schedule, see Doc. COM (95) 107 final.

60 Case 22/70, *ERTA*, *supra* note 30.

61 The Member States have followed diverging policies in relation to the deposit of their instruments of ratification of the GPA thus far.

III. Implementation

A. Structure and Adoption of the Implementing Legislation

The structure of the proposal for the Uruguay Round implementing legislation was determined by an unfortunate incident at Marrakesh, where certain Member States forced the Commission into proposing the implementing legislation as a single *legal package*.⁶² The Commission had only reluctantly accepted this, because it did not believe that it should do as a matter of law what the Council normally does as a matter of politics, namely build legislative packages.

In the end the Commission devised a very elegant construction: all the proposals for the various implementation acts were presented separately with their own legal bases,⁶³ but they were held together by a draft Council decision which permitted all the other acts to enter into force simultaneously and on the date to be fixed by the so-called Uruguay Round implementation conference which was going to be held in early December of 1994.⁶⁴ This construction allowed each proposal to be discussed separately in the competent Council group and to be voted upon in the Council according to the voting procedure applicable to the subject in question. After the adoption of each separate act, the entry into force of the whole package would depend on the adoption of the legal string that held it together: the decision on simultaneous entry into force.

Obviously, the Council would not like – or so the Commission believed – this decision to be proposed on the basis of Article 113, but if it disliked it strongly enough, it could easily be changed to include the legal bases of the acts whose entry into force was assured by it and this would include Article 235 which required unanimity. However, the Council's dislike was even stronger than that; in the end, it decided that if the construction of one legal package entailed these particular consequences, it no longer wanted a single legal package. The German Presidency in September of 1994 devised a political package deal which assured the simultaneous discussion and the simultaneous adoption at the Council meeting of 21-22 December of all components of the implementation package and the conclusion of the Uruguay Round Agreements themselves by consensus. This was decided at the 4 October 1994 Council meeting.

The positive aspect of this decision was that obviously sufficient trust had been restored between the Member States since the Marrakesh incidents in order for the

62 This incident was linked to the banana policy of the Community, see *Agence Europe*, No. 6211, at 6 and No. 6212, at 6.

63 See Doc. COM (94) 414. The legal bases as proposed were virtually identical to those as they now appear in the adopted acts in OJ 1994 L 349. The episode is also described by Timmermans, *supra* note 51, at 175-183.

64 The Commission felt that the simultaneous entry into force of the Community implementation acts, which would be dependent on the so-called 'critical mass' of ratification being reached at the Implementation Conference of early December 1995, was a commercial policy decision. The Council was of the view that a decision on the entry into force of an act could only be based on the same legal basis as the act itself.

Council to be capable of doing again what it should have done all along; build a political package instead of requiring the Commission to go through all kinds of legal contortions. The negative side of it clearly was that, once again, majority voting was deliberately excluded in relation to subjects (commercial policy, agriculture, internal market) where it had already been in operation for a long time.

Ultimately, this proved no obstacle to the adoption of the implementation package and on 22 December, one Regulation of the Council and Parliament,⁶⁵ eight Council Regulations,⁶⁶ and one Council Decision⁶⁷ were adopted. As in respect of the conclusion of the agreements themselves, Parliament had cooperated in exemplary fashion, rendering its opinions on those matters which did not require its co-decision in record time and speeding up its procedure in respect of the Single Act requiring co-decision so as to compress two readings of the – fortunately non-controversial – proposal on the amendment of the Council regulations on spirit drinks and aromatized wines for reasons related to the TRIPS Agreement⁶⁸ into one week's session.

At the same time, i.e. in late December 1994, the Commission published a new tariff nomenclature,⁶⁹ including the Uruguay Round tariff rates, pursuant to the basic nomenclature Regulation.⁷⁰ Article 12 of that Regulation requires the Commission to publish every year before 31 October a tariff nomenclature with next year's tariff rates (which are the consequence of Council decisions or Commission decisions taken by delegated authority). A publication at that date, however, would have been misleading, as it still would have had to contain the pre-Uruguay Round tariff rates. It was only after adoption of the Uruguay Round schedules concomitant with the conclusion of the agreements in December 1994, that it was possible to publish the rates which resulted from the first steps of tariff reductions agreed in the Round. After long discussions with the competent Council group, the Commission decided that this was still the best way to go, even if the early announcement effect for private interests which is intended by the October 31 publication, would be lost.

65 Reg. (EC) 3378/94, OJ 1994 L 366/1.

66 Reg. (EC) 3284/94 on protection against dumped imports from countries not members of the European Community. Reg. (EC) 3283/94 on protection against subsidized imports from countries not members of the European Community. Reg. (EC) 3283/94 on the common rules for imports and repealing Reg. (EC) 518/94. Reg. (EC) 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization. Reg. (EC) 3287/94 on pre-shipment inspections for exports from the Community. Reg. (EC) 3288/94 amending Reg. (EC) 40/94 on the Community trade mark for the implementation of the agreements concluded in the framework of the Uruguay Round. Reg. (EC) 3289/94 amending Reg. (EEC) 3030/93 on common rules for imports of certain textile products from third countries. Reg. (EC) 3290/94 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations. All published in OJ 1994 L 349.

67 Dec. 94/824/EC on the extension of the legal protection of topographies of semiconductor products to persons from a Member of the WTO, OJ 1994 L 349/201.

68 See *supra* note 59.

69 Reg. (EC) 3115/94, OJ 1994 L 345/1.

70 Reg. (EC) 2658/87, OJ 1987 L 256/1.

A further publication of the agricultural tariff rates which are the consequence of tariffication in that sector and of which the first step should enter into force on 1 July 1995, will follow in the spring of this year. At the same time the Commission will be adopting the necessary derived legislation with a view to further implementing the Council amendments to various agricultural market organizations⁷¹ and thus also placing the common agricultural policy in full conformity with the Uruguay Round commitments by 1 July 1995.⁷²

Of the two agreements which by their own terms could be implemented a year late, i.e. the TRIPS Agreement and the GPA, the former has already been implemented, but the full application of these acts has been delayed for one year.⁷³ The latter is going through the process of implementation, with the Commission recently having filed the necessary proposals for the amendment of the various public procurement directives.⁷⁴

There can be no doubt, therefore, that the Community has fully implemented its Uruguay Round commitments on time and will still do so for the portions which either by consent (agriculture), or by law (TRIPS, GPA) are to become operative at a later date than 1 January 1995.

B. Whither the Duty of Cooperation?

During the last stages of the Uruguay Round and during the year of its implementation many Member States did not seem to shirk from undermining the strong position that the Community had hitherto enjoyed in the GATT and ensuring that it would never hold a comparable position in the WTO. The Court has not done much in its Opinion 1/94 to stem that tide.⁷⁵ It is going to be extraordinarily difficult to operate within the WTO along the line of the division of powers indicated by the Court, certainly in questions of dispute settlement involving cross-retaliation.

The only step the Court has been willing to take is to emphasize once again the duty of cooperation between Community institutions and Member States, a duty which is said to flow from the requirement of unity in the international representation of the Community. It had been hoped that the Court might be giving a bit more precise content to this concept after Opinion 2/91,⁷⁶ but the Court has not

71 Reg. (EC) 3290/94 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations restricted itself to the most basic changes in the various market organizations and left further implementation to the Commission in the framework of the usual agricultural management committee procedure.

72 The date of 1 July 1995 had been agreed as being better suited to the actual opening of the marketing year for most agricultural products.

73 See, e.g., Article 2 of the Decision cited in note 67.

74 See Doc. COM (95) 107 final. For the public procurement directives being amended see *supra* note 57.

75 Bourgeois, 'L'avis de la Cour de justice des Communautés européennes à propos de l'Uruguay Round: un avis mitigé', 4 *RMUE* (1994) 11ff, at 24.

76 Opinion 2/91, [1993] ECR I-1061, paras. 36-38.

been willing to go beyond saying that the duty is all the more imperative in the case of the WTO, because its agreements are inextricably linked through cross-retaliation.⁷⁷

Thus far nothing irreparable has happened in Geneva. Member States have restrained themselves more than one might have expected given the views they expressed in the Council and before the Court in 1994. Third States have thus far exhibited similar restraint; rules of procedure have been drawn up for the major WTO organs which include voting rules which are virtually identical to Article IX of the WTO Charter and thus do not require declarations of competence from the side of the Community, either in general, or in respect of each item of the agenda before the meeting, as in the case of the FAO.⁷⁸ Notably, the EC's big trading partners in the WTO, the US and Japan, have surprisingly been less demanding in this respect than they normally are in the context of the UN or its specialized agencies.⁷⁹ It may be that, where trade is concerned, they prefer one interlocutor to twelve or fifteen.

It is impossible for the Community and its Member States to continue life in the WTO as if nothing had happened. Some kind of formula must be found to settle who speaks on what subject and on behalf of whom and perhaps also on the negotiation of further agreements within the WTO. Parliament's promotion of a complete inter-institutional agreement discussed above (in Section II) does not appear to be an appropriate method of dealing with this issue.

The Commission and the Council can choose between two approaches in devising such a formula or 'Code of Conduct'.⁸⁰

Given that the Court seems to anchor the 'duty of cooperation' somehow in the treaty or in the principles of Community law⁸¹ it would seem appropriate to create a treaty-based instrument, laying down both the internal procedures for arriving at a common position in matters of joint competence and the rules for the external presentation of such position in the WTO. The utility of such an approach is that it can be invoked in a case before the Court and enforced⁸² (even if normally after the fact) against the Community institutions and the Member States. It would give some solid treaty-based contents to the treatment of mixed competence matters in the WTO. On the other hand, it would be somewhat annoying to sanctify what probably

77 Opinion 1/94, paras. 106-109. It is somewhat disappointing that the Court does not recognize the linkage through cross-retaliations as an important *substantive* aspect of the Uruguay Round Agreements confirming the commercial policy nature of the whole.

78 On the EC in the FAO, see Frid, *supra* note 6.

79 For recent developments in respect of the UN Commission on Sustainable Development, see UN Doc. E/1994/L.51.

80 In the summer of 1994 a so-called Code of Conduct was already under negotiation, see *Inside US Trade*, *supra* note 17.

81 The Court is not very explicit about this; the Court originally advanced the principle in EAEC Ruling 1/78 and later stated that it was also applicable in the EC context. This pleads for a general principle of Community law.

82 If necessary, in principle even provisional measures enjoining a Member State or an institution from acting contrary to the agreed procedures could be requested.

will be a procedure not fully in conformity with the Community treaties⁸³ by a treaty-based decision.

The Commission has followed this route in the case of the procedure to be followed for the drafting, negotiation and adoption of ILO Conventions by the Member States on behalf of the Community.⁸⁴ The fate that has befallen this official Commission proposal, however, is not very encouraging. It has been buried in the deepest drawers of the Council and is effectively dead after a year of inaction.

The alternative is an informal code, as was in the process of being discussed between the Member States and the Commission before Opinion 1/94 was rendered. Another example is the so-called PROBA-20 document which laid down the compromise solution on the mixed conclusion of commodity agreements after Opinion 1/78.⁸⁵ Although this compromise served the Community institutions and Member States well for a certain time, it soon became outdated as commodity agreements became more and more study and exchange of information agreements rather than market stabilization agreements. PROBA-20 was almost being abused to maintain mixity in respect of agreements where that was no longer justified, as the organizations concerned shed their true financial policy instruments and reverted to a normal operating budget.⁸⁶ In the end, the PROBA-20 compromise was treated almost as a formal decision, whereas it could easily have been – and deserved to be – terminated by one of the parties.

On the basis of this experience, it would seem the best course of action to opt for an informal instrument, but one that should not be clung to, if circumstances change or one of the parties (probably Commission, Council and Member States will be the parties) does not live up to the commitments given. It is not wise to speculate on the contents of the instrument, but it would seem indispensable that the Commission functions as *porte-parole* in all cases. Otherwise, the unity of Community representation will be broken, the forbearance of the Community's partner Members in the WTO will be sorely tried and one may well see a revivification of the abhorred FAO-model in the WTO context.

83 A special procedure for situations of joint competence would normally lead to requirements of unanimity even for subjects which under the Treaty would require only a qualified majority. Inevitably full conformity with treaty procedures is not possible.

84 Doc. COM (94) 2 of 12 January 1994.

85 See E.L.M. Völker, J. Steenbergen (eds), *Leading Cases and Materials on the External Relations Law of the EC* (1985) 62ff.

86 Opinion 1/94, para. 21.