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Competence of the European Community in the Field of International Trade Law: Limitations on Foreign Policy of the Member States and Turkey

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ABSTRACT

The possible accession of Turkey to the EU would produce important consequences in many fields and for both sides. One issue rarely considered is the relationship of Turkey, as a WTO member, with third states. Today, Turkey is fully responsible for the fulfillment of WTO obligations even though the regime of the Customs Union may lead to violations of WTO law. In contrast, EU Member States' sovereignty as independent trading nations is considerably reduced by the exclusive competence of the EC for the Common Commercial Policy and, under the Nice Treaty amending the EC Treaty, also for the trade-related aspects of services and intellectual property rights. In the light of this situation, the following article reviews the participation rights of EU Member States in the treaty-making process of the Community and the effect of WTO law within the Community legal system. The article explains that the current situation only formally safeguards Turkey's sovereignty as an independent trading nation, whereas EU membership would empower Turkey to take an active role in the decision-making procedure on the Community level and help to protect the country against being held liable for WTO violations.

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• Editors's note: Since the author conforms to EU terminology throughout the article, he uses the term "competence" where "jurisdiction" may be more familiar to the reader.

ÖZET

Türkiye'nin AB'ne muhtemel üyeliği bir çok alanda her iki taraf açısından önemli bir takım sonuçlar doğurabilecek niteliktedir. Türkiye'nin DTÖ üyesi olarak üçüncü ülkelerle olan ilişkisi bu kapsamda çok az incelemeye konu olmuştur. Gümrük Birliği Rejimi, DTÖ hukukunu ihlal edebilecek nitelikte bile olsa, Türkiye DTÖ yükümlülüklerinden kaynaklanan sorumluluklarını tam olarak yerine getirmek mecburiyetindedir. Buna karşılık, AT'nun Ortak Ticaret Politikası kapsamındaki müstakil yetkisi ve AT Antlaşması'nı değiştiren Nice Antlaşması çerçevesinde, AB üyesi ülkelerinin bağımsız ticari ilişkiler kurma konusundaki egemenlikleri önemli ölçüde kısıtlanmıştır. Bu kısıtlama ticaretle bağlantılı fikri mülkiyet hakları ile hizmetleri de kapsamaktadır. Bu durum ışığında, bu makale AB üyesi ülkelerin Topluluğun Antlaşma yapma sürecine katılım haklarını ve DTÖ Hukuku'nun Topluluk hukuk sistemine etkisini incelemeye çalışacaktır. Makale, hâlihazırdaki durumun Türkiye'nin bağımsız ticaret yapma konusunda egemenliğini güvence altına aldığına, buna mukabil AB üyeliğinin Türkiye'ye Topluluğun karar alma süreçlerine aktif katılım hakkı vereceğine ve Türkiye'nin DTÖ ihlallerinden kaynaklanacak sorumluluklardan korunmasına yardım edeceğine işaret etmektedir.

Keywords: *European Community Law, International Trade Law, WTO, Turkey, Accession.*

Anahtar Kelimeler: *Avrupa Topluluğu Hukuku, Uluslararası Ticaret Hukuku, DTÖ, Türkiye, Katılım.*

I. Introduction

With the establishment of the Customs Union on December 31, 1995, Turkey took an important step on its long journey towards accession to the European Union.[1] From the very beginning of Turkey's association with the European Economic Community under the Ankara (Association) Agreement of 1963,[2] the Customs Union was always considered to be only an intermediate step.

[1] The Preamble to the Association Council Decision No. 1/1995 adopts the objectives of the Ankara Association Agreement establishing an Association between the European Economic Community and Turkey (signed at Ankara, 12 September 1963), O.J. EC 1963 (L 361) 1. Art. 28 of the Ankara Association Agreement envisages the full accession of Turkey to the Community.

[2] The history and current status of Turkey's association is reviewed by Felix Böllmann, "Aktuelle Entwicklungen im Rahmen der Assoziation der Türkei mit der EU" (Current Developments in the Framework of the Association of Turkey with the EU), Zeitschrift für europarechtliche Studien (ZEuS) (Review for European Legal Studies) 2003, 643-660.

In addition to establishing an advanced form of economic integration between the two parties,[3] especially in the field of trade in goods,[4] the Customs Union involves a strong external dimension. The following analysis will try to assess the current situation of Turkey as a trading nation within the framework of the World Trade Organisation, in comparison to the situation of EU Member States. As will be seen, the sovereignty of both Turkey and EU Member States is limited by their being embedded in the specific institutional structure of European integration. This evaluation is intended to highlight the consequences of a Turkish accession to the EU with regards to foreign trade policy and Turkey's loss of sovereignty as a trading nation, which may help Turkey make its own decision on accession.

In the first section, the analysis will look at Association Council Decision No. 1/1995,[5] as the legal basis of the Customs Union, and its impact on Turkey's sovereignty in matters of international trade policy (Section II). In light of future full accession, the following analysis will explain to what extent Member States are limited in their international trade policy. Then, in Section III, this article will look at the Community's power in the field of trade policy, followed by an analysis of the procedural participation of the Member States in the formation of Community trade policy (Section IV), and the legal status of trade agreements concluded by the Community in the internal legal order of the Community and the Member States (Section V). Existing limitations on Turkey's and Member States' trade policy will be assessed in the context of the WTO system (Sections VI and VII).

[3] As to the economic consequences of the Customs Union, *see* G. Schiller, The Customs Union EU-Turkey: A First Assessment, in W. Gumpel (ed.), Turkey as a Political and Economic Factor in Europe and Central Asia, Berlin, 1999, 15; Sadi Uzunoğlu, The Implementation of the Customs Union in Turkey and its Macroeconomic Effects, [1997] Zeitschrift für Türkeistudien (Review for the Study of Turkey), 1997, 193; and contributions in Zentrum für Türkeistudien (Center for Studies on Turkey) (ed.), Turkey in the EU Customs Union: Empiricism – Theory – Perspectives, Münster, 1999.

[4] Only some agricultural products are covered by the Customs Union, *see* Harald Grethe, Auswirkungen einer Einbeziehung von Agrarprodukten in die gegenwärtige Zollunion zwischen der Türkei und der EU (Effect of the Inclusion of Agricultural Products in the Present Customs Union between Turkey and the EU), in Verband deutsch-türkischer Agrar- und Naturwissenschaftler e.V. (Association of German-Turkish Agricultural and Natural Scientists) (ed.), Deutsch-Türkische Agrarforschung (German-Turkish Agricultural Research) – Fifth Symposium 1997 (Antalya), 1998.

[5] Decision No. 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, 1996 O.J. (L 35) 1.

II. Limitations under the Current Regime of the Customs Union

As to the external trade dimension of Decision 1/95, three different fields of regulation need to be distinguished: the field of customs duties, the field of other trade measures, and the field of intellectual property protection.[6] These topics will be addressed in the next three subsections, respectively.

A. Customs Duties

Articles 13 through 16 of Decision 1/95 constitute the core of the Customs Union. According to Art. 13, Turkey has to adapt its law to the Common Customs Tariff regarding countries that are not members of the EU. According to its second paragraph, this obligation even extends to future changes of the Common Customs Tariff. In compliance with Art. 16, Turkey had to align itself progressively with the preferential customs regime of the Community by the end of 2000.[7] Article 15 allowed higher Turkish customs tariffs for specific goods until the end of 2000. Since the beginning of the year 2001, the Turkish customs system has had to conform completely with the Community system.

In principle, goods originating from a third county entering the territory of one of the two parties may circulate freely within the enlarged Customs Union, whereas in a free trade area such goods would be excluded from the advantages of trade liberalization. All customs duties and quantitative restrictions, as well as charges and measures having equivalent effect, are abolished between the two parties (Arts. 4, 5 and 6 of Decision 1/95). Despite these clear prohibitions, EU Member States and Turkey may still justify measures having an effect equivalent to quantitative restrictions (i.e. quotas) under certain conditions, and thereby restrict trade between the two parties.[8] Also, antidumping measures may still be applied between the Community and Turkey under certain conditions.[9]

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[6] In addition, Decision 1/95 is extremely important regarding the obligation of Turkey to introduce a competition law system similar to Community competition law. This was accomplished with the introduction of the Turkish Competition Law in 1994 and the establishment of the Turkish Competition Authority in 1997.

[7] According to this rule, Turkey may no longer give preferential treatment to states that do not enjoy such treatment under the Community regime. This prohibition also applies to the Turkish Republic of North Cyprus; *see* Christian Rumpf, Die Zollunion EU-Türkei (The EU-Turkey Customs Union), Recht der Internationalen Wirtschaft (RIW) (Review of the Law of the International Economy) 1999, 46, 50.

[8] Art. 7 of Decision 1/95 allows restrictions justified by specific mandatory requirements. Thereby, Decision 1/95 adopts the regulatory scheme of Arts. 28 through 30 regarding the EC principle of free movement of goods. As to the application of Decision 1/95, it is therefore possible to refer to the extensive case law of the ECJ. It remains doubtful, however, whether, in line with intra-Community law, a principle of exhaustion of intellectual property rights may be derived from Art. 7 of Decision 1/95. Article 10 (2) of Annex 8 to Decision 1/95 states that the

B. Other Trade Measures

Customs duties, as can be seen from the regulation of the internal dimension of the Customs Union, constitute only one instrument of national trade policy. Based on Art. 133 of the EC Treaty, the Common Commercial Policy provision, the Community has vast powers to adopt measures relating to foreign trade. Apart from customs duties, the Community may adopt any measures liberalizing and protecting trade, with antidumping measures probably being the most prominent instrument. Such measures may be adopted either on the basis of tariff and trade agreements concluded by the Community or by unilateral action by the Community, usually in the form of trade regulations. Full integration of Turkey into the Customs Union, hence, would argue in favour of extending this scheme of trade policy to Turkey.

Since, however, Turkey has not yet become an EU Member State, the Common Commercial Policy cannot be applied as such. In principle, Turkey remains sovereign in defining its own foreign trade policy outside the field of customs duties. Nevertheless, Art. 12 obliges Turkey to apply provisions and implement measures which are "substantially similar" to those set out in a number of listed EC Regulations.[10] Quite surprisingly, this obligation does not cover future amendments to such Regulations. According to these rules, for instance, Turkey has an obligation to implement a regime that is equivalent to the Community antidumping and antisubsidy regimes.[11] However, neither Community trade law applies directly in Turkey, nor is there an obligation to apply the full body of Community trade law.

Decision does not imply exhaustion of intellectual, industrial and commercial property rights between the two parties. On this issue, *see* Hamdi Pınar, Zur Erschöpfung der Rechte an Geistigem Eigentum zwischen den Mitgliedstaaten der Europäischen Union und der Türkei (On the Exhaustion of of Intellectual Property Rights between the Member States of the European Union and Turkey, Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRUR Int.) (International Review of Industrial Property and Copyright Law), 2004, 101-106. A similar discussion relates to the exhaustion problem under the so-called Europe Agreements on associations with Central and Eastern European countries; see Stanislaw Sołtysiński, International Exhaustion of Intellectual Property Rights under the TRIPs, the EC Law and the Europe Agreements, [1996] Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRUR Int.) (International Review of Industrial Property and Copyright Law), 1996, 316, at 323-326.

[9] *See Kuschel*, Die Zollunion zwischen der EG und der Türkei (The Customs Union between the European Community and Turkey), [1996] 2 AW-Praxis 44, at 47 et seq.

[10] In particular, Art. 12 obligates Turkey to apply Community trade policy standards on textiles.

[11] *See* Council Regulation (EC) No. 3283/94 and Council Regulation (EC) No. 3284/94 against dumped and subsidized imports.

Retaining autonomy in the field of foreign trade policy may especially lead to conflicting individual decisions made on the basis of substantially similar legal provisions. The Community may decide to act on the basis of the Antidumping Regulation or adopt other trade policy measures, whereas similar measures might be rejected by Turkey. In order to avoid such conflicts, Art. 45(2) of Decision 1/95 obligates the parties to coordinate their actions. In case of unsuccessful coordination, the party taking a particular trade measure is authorized to apply such measures (like antidumping, for example) to imports of the goods concerned from the other party as well.

C. Intellectual Property Protection

Another field with an external dimension, covered by the Association Council Decision 1/95, relates to the protection of intellectual property. In this regard, Art. 31(2) of the Decision holds that the Customs Union can function properly only if equivalent levels of effective protection of intellectual property rights (IPRs) are provided by both parties to the Customs Union.

In order to implement such protection, Annex 8 to the Decision (Annex on protection of Iintellectual, Iindustrial and commercial property) first of all, refers to the WTO / TRIPs Agreement (Trade-Related aspects of Intellectual Property rights) in establishing in Art. 1(1) an obligation for Turkey to implement the Agreement by the end of 1998. Article 1(2) of the Annex provides for the application of the TRIPs Agreement with regards to the scope, level of protection and enforcement of intellectual property rights between the two parties. Other provisions of the Annex obligate Turkey to accede to additional intellectual property conventions and agreements and to introduce protections similar to the standards of the law of EU Member States, even in fields where Community legislation does not or did not yet exist.

Despite these guarantees of substantive protection of intellectual property rights, the Annex, in its Art. 10(2), tries to exclude the application of an intra-Customs Union principle of exhaustion. Although an IP right holder in a Member State of the EU may allow distribution of the goods in Turkey, the Annex here tries to preserve this person's right to prohibit parallel imports into the Community. Obviously, the Community is aiming to protect its market against cheaper imports from Turkey, an attitude that collides with the very philosophy of future membership.[12]

[12] Whether the free movement principles of the Decision may be interpreted in the sense of an exhaustion principle in accordance with Arts. 28 and 30, EC remains doubtful. *See also supra* note 8.

TRIPs constitutes one of the important pillars of the WTO trading system. In reinforcing the intellectual property system in Turkey, the Customs Union indirectly creates advantages for right holders from countries that are not EU Member States.

D. Direct Effect

Association Council Decision 1/95, establishing the Customs Union, creates obligations for the two parties under public international law. Whether the Decision may be applied by national courts and whether private parties may rely on its provisions in order to derive rights from it remains an issue of Community law and Turkish constitutional law, respectively.

According to ECJ case law, an agreement concluded by the Community with non-member countries must be regarded as being directly effective when, having regard for its wording as well as the purpose and nature of the agreement itself, the provision contains a clear and precise obligation that is not subject, in its implementation or effects, to the adoption of any subsequent measure.[13] Within the Community legal order, the legal regime of the Ankara Association Agreement is considered to be an integral part of Community law[14] from which private parties, under certain conditions, may derive individual rights, especially in order to override conflicting law of the Member States.[15] In a recent decision, the ECJ also accepted the direct effect of a provision of a Decision of the Ankara Association Council.[16] The direct effect of the law of the Ankara Association can only be enforced by the ECJ in the legal orders of the EU Member States, but not in Turkey.[17]

The legal status of law of the Ankara Association in Turkey has to be decided based on Turkish constitutional law only. According to Art. 90(5) of the Turkish Constitution, treaty law concluded by Turkey has internal legal effect, provided that it has been given effect under Turkish law following the constitutional procedure. Under these conditions, international agreements

[13] *See*, in particular, Case C-262/96, Sürül, 1999 ECR I-2685, para. 60.

[14] Case 12/86, Demirel, 1987 ECR 3719, para. 7.

[15] *See, e.g.*, Case C-192/89, Sevince, 1990 ECR I-3461, para. 18 and 26 (on the direct effect of Art. 7 Asscociation Council Decision 2/76); also Case C-37/98, Savas, 2000 ECR I-2927, para. 39-40 and 46-54 (on direct effect of Art. 41(1) of the Additional Protocol). Direct effect of Ankara Association law in the EU is also reviewed by Böllmann, *supra* note 2, at 647-649.

[16] Case C-171/01, Wählergruppe Gemeinsam Zajedno/Birlikte, 2003 ECR I-4301, para. 54-67, (discussing Art. 10(1) Decision 1/80, containing a prohibition of discrimination against Turkish migrant workers regarding pay and other conditions of work).

[17] In this sense also Rumpf, *supra* note 7, at 47.

create rights for individuals that may be invoked before national courts.[18] Whether Decision 1/95 might have direct effect seems to be an issue in dispute.[19] The dispute arises from the fact that the Constitution usually requires ratification by an act of Parliament, whereas Decision 1/95 was only approved by Turkish representatives on the Association Council.

Direct effect certainly contributes to the functioning and enforcement of Association law. However, Association law does not constitute supranational law for the two parties. The Ankara Association Agreement and its secondary law remain in the sphere of traditional public international law. Association law is the result of the exercise of sovereign power in the field of foreign trade law by both sides. In this sense, Turkish sovereignty is only given up in a very limited sense, namely to the extent that Turkey has to adapt its law to the Common Customs Tariff that can have future and therefore unforeseeable, amendments.

III. Competence of the European Community in the Field of International Trade Law

Analysis of the limitations to EU Member States' sovereignty in the field of trade policy has to start with the external competence of the European Community for international trade law.

As seen before, Art. 133 of the EC Treaty constitutes the core provision conferring legislative and treaty-making power on the Community for international trade law. Article 133 gives rise to the exclusive competence of the Community, excluding the Member States from getting involved as parties to the negotiations. However, the ECJ, giving its opinion on Community jurisdiction to conclude the WTO Agreement, only accepted a narrow reading of the scope of Art. 133. According to this reading, the area of commercial policy in Art 133 EC covers issues related to cross-border trade.[20] Harmonization of intellectual property law, granting protection to foreign right

[18] *See* Temel Nal, Probleme der türkischen Urheberrechts aus der Sicht des deutschen und europäischen Rechts (Problems of Turkish Copyright Law from the Perspective of German and European Law), C H Beck, Munich, 2000, 21 *et seq*., (referencing Turkish court decisions).

[19] Against direct effect *see* Böllmann, *supra* note 2, at 649; Hamdi Pınar, Das Recht der Werbung in der Türkei im Vergleich zum deutschen und europäischen Recht (Advertising Law in Turkey in Comparison to German and European Law), Peter Lang, Frankfurt/M., 2003, 10. For direct effect *see* Nal, *supra* note 18, at 23; Rumpf, *supra* note 7, at 52.

[20] Opinion 1/94, 1994 ECR I-5267. *See also* Josef Drexl, The TRIPs Agreement and the EC: What Comes Next After Joint Competence?, in Friedrich-Karl Beier and Gerhard Schricker (eds.), From GATT to TRIPs, Weinheim, 1996, 18, at 28 *et seq*.

holders without referring to international trade as such, therefore does not fall within the scope of Art. 133.[21]

In a second step, the Court also limited the argument, according to which exclusive external Community power can be derived, under the doctrine of implied powers, from the internal competence to harmonize the domestic law of the Member States.[22] The Court was prepared to follow the doctrine of implied powers in the sense of exclusive Community competence only in two alternative situations: situations in which international agreements concluded by the Member States would impair already existing internal Community legislation and situations in which no secondary Community legislation exists and harmonization necessarily requires agreement with third countries.[23]

In its decision on the WTO Agreements, the ECJ denied exclusive competence of the Community for the Multilateral Trade Agreements of TRIPs and the GATS. Instead, the Court only affirmed "joint competence" of the Community and its Member States to conclude the Agreements.[24] As a consequence, quite rightly, the WTO Agreement was negotiated and was concluded on the level of public international law simultaneously by the Community and its Member States as a so-called "mixed agreement."[25]

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[21] *Id.*, para 58 *et seq.* Jacques Bourgois, L'avis de la Cour de justice des Communautés européennes à propos de l'Uruguay Round: un avis mitigé (The Opinion of the Court of Justice of the European Communities on the Uruguay Round: an Opinion Causing Mixed Feelings), 4 Revue du Marché Unique Européen (Review of the Single European Market), 1994, 11, 13, (criticizing the Court's view as disappointing, and favoring a broader understanding of Art. 133 of the EC treaty in the light of the objectives of TRIPs). More recently, the Court continued with its narrow understanding of Art. 133, denying jurisdiction of the Community on this basis to conclude the Cartagena Protocol on Biosafety; *see* Opinion 2/00, 2001 ECR I-9717; see also comments by *Schwarz*, Die Außenkompetenz der Gemeinschaft im Spannungsfeld von internationaler Umwelt- und Handelspolitik (The External Competence of the Community in the Field of Tension of International Environmental and Trade Policies), Zeitschrift für europarechtliche Studien (ZEuS) (Review of European Legal Studies), 2003, 51.

[22] Such conclusion did not seem unlikely under the early decision of the ECJ; Case 22/70, AETR, 1971 ECR 263.

[23] ECJ Opinion 1/94, *supra note* 20, para. 99. *See also* A. Dashwood, The Limits of European Community Power, 21 E.L. Rev. 113 (1996), at 124 *et seq*.; *Drexl*, *supra* note 20, at 30.

[24] As to a better understanding of the concept of joint competence in respect of TRIPs, *see* Drexl, *supra* note 20, at 31-37.

[25] On the concept of mixed agreements, *see* N.A. Neuwahl, Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member States: Mixed Agreements, 28 Common Mkt. L. Rev. 717 (1991).

Because of its very broad scope of application, the Ankara Association Agreement had to be concluded as a mixed agreement as well.[26]

The WTO experience with the result of joint competence only, and its considerable disadvantages, led to a reform of Art. 133 of the EC Treaty in the Amsterdam version. The Amsterdam Treaty, amending the EC Treaty, created a new Art. 133(5), conferring on the Council the power to extend the application of the exclusive commercial policy competence to international negotiations and agreements on trade in services and intellectual property. However, such a transfer required a unanimous decision of the Member States in the Council. In addition, it is quite doubtful whether the provision allowed a general transfer of such power for all future cases, or whether such a decision could only cover individual negotiations and agreements.[27]

The Nice Treaty, which came into force on February 1, 2003, amended Art. 133(5) and extended Community powers to trade in services and the commercial aspects of intellectual property generally. According to Art. 133(5)(4), Member States only retain the competence to conclude such trade-related service and IP agreements with third countries and international organizations to the extent that these agreements do not conflict with other international agreements or with Community law. According to Art. 133(7) of the EC Treaty, services and IP agreements that are not trade-related remain in the competence of the Member States as long as the Council, acting unanimously, does not confer the power on the Community.

IV. Procedural Participation of the Member States in the Conclusion of Trade Agreements

Even within the scope of the exclusive competence of the Community for international trade, i.e., the current Common Commercial Policy, where no mixed agreement is possible, the Member States maintain some influence through the procedural provisions of the EC Treaty on the adoption of international agreements by the Community. In this respect, Member States act through their representatives in the Council.

Already, at the stage of opening negotiations for individual agreements, the Commission needs special authorization by the Council.[28] The Commission

[26] *See* Rumpf, *supra* note 7, at 46.

[27] Christoph Vedder, commentary in E. Grabitz & M. Hilf (eds.), Das Recht der Europäischen Union (The Law of the European Union), Munich 2001, Art. 133 n. 56.

[28] Art. 133(3)(1) of the EC Treaty. Authorization by the Council requires prior recommendation by the Commission to start negotiations for an individual agreement.

remains the Community body empowered to conduct such negotiations, but yet it is assisted by a committee appointed by the Council. In addition, the Commission may only act within the framework of directives that the Council may issue to it.[29] These rules guarantee that the Member States have an influence on the ongoing negotiations.[30] The influence of individual Member States, however, is limited to a considerable extent by the qualified majority rule,[31] according to which Member States may be outvoted in the Council when giving authorization to the Council and setting up directives for negotiations.

After negotiations have been concluded, the Council's influence increases considerably at the agreement adoption stage. Art. 300 of the EC Treaty, the general provision of the Treaty on the adoption and ratification of Community agreements, also applies in the context of the Commercial Policy of Art. 133.[32] According to Art. 300(2)(1) of the EC Treaty, the Council, upon a proposal from the Commission, decides on the signing and conclusion of such an Agreement. In the field of the Common Commercial Policy of Art. 133, the European Parliament does not even have a right to be consulted.[33] Again, the Council acts by qualified majority.

The situation regarding the conclusion of agreements is quite different in fields outside of Art. 133 of the EC Treaty. Here, Art. 300 provides different rules. In the Council, unanimity is required whenever internal legislation would also require unanimity. Qualified majority is sufficient in cases in which only harmonization of the law of the Member States, pursuant to Art. 95, is at stake.[34] Whenever the conclusion of an agreement requires unanimity in the Council, prior authorisation given to the Commission for initiating negotiations also needs to be unanimous.[35] Again, the position of the European Parliament is especially weak. Even where the co-decision procedure or the coordination

[29] Art. 133(3)(2) of the EC Treaty. Art. 133(3)(1) and (2) are in line with the general procedure on the adoption of international agreements under Art. 300(1)(1).

[30] *See* Vedder, *supra* note. 27, at n. 79.

[31] Art. 133(4) of the EC Treaty.

[32] Art. 133(3)(3) of the EC Treaty.

[33] Art. 300(3)(1) of the EC Treaty. Assent of the Parliament is only needed for association agreements under Art. 310 of the EC Treaty, agreements establishing a specific institutional framework by organising cooperation procedures, agreements having important budgetary implications for the Community, and agreements entailing amendment of an act adopted under the co-decision procedure of Art. 251 of the EC Treaty.

[34] Art. 300(2)(1) of the EC Treaty.

[35] Art. 300(1)(2) of the EC Treaty.

procedure applies for internal legislation, the Treaty only requires consultation for the corresponding international agreements.[36]

These principles may be summed up as follows: the Council is the Community body with the authority to conclude international agreements. The Commission remains the Community institution competent to conduct negotiations, but the Council retains considerable influence. The influence of the Member States on international agreements reflects their influence on corresponding internal legislation; in general, it is reduced by the qualified majority rule, unless internal legislation would require unanimity. On the other hand, the influence of the European Parliament is considerably weaker in concluding international agreements than in the field of internal Community legislation. It may be argued that weaker influence of the Parliament corresponds with stronger influence of the Council[37] and, indirectly, of individual Member States.

Most importantly, however, the principle of concluding international agreements by mere qualified majority is only rarely replaced by the unanimity rule. This marks the strong supranational character of the Community legal order in the field of foreign trade law. Of course, the majority rule is critical to guaranteeing the ability of the Community to act efficiently as an international player. On the other hand, replacing national sovereignty of the Member States, protected by the unanimity rule, by the qualified majority procedure would call for strong judicial protection of those Member States outvoted on the Council. However, the ECJ, referring to a lack of direct effect, rejected the right of a Member State to invoke a conflict between secondary Community legislation that had not been approved by a given Member State and the law of GATT, when Germany challenged the legality of the Community Banana Regulation.[38]

The strongest protection of Member States' influence on the conclusion of international agreements, therefore, would be a narrow definition of the scope

[36] Art. 300(3)(1) of the EC Treaty.

[37] For this argument, *see* Robert Cooter & Josef Drexl, The Logic of Power in the Emerging European Constitution: Game Theory and the Division of Powers, 14 Int'l Rev. L. & Econ. 307 (1994)(discussing public choice analysis of the legislative power of Community institutions).

[38] Case C-280/93, Germany v. Council, 1994 ECR-I-4973, para. 106-108. Whereas Advocate General Gulmann, starting in para. 137 of his opinion, argued that the same reasons that justify the lack of direct effect for private parties would also justify why Member States should not be able to rely on GATT provisions in actions for annulment, the Court simply stated the lack of direct effect without discussing the policy reasons behind it. *See also* Castillo de la Torre, The Status of GATT in EEC Law: Some New Developments, 1992 26/5 J. World Trade 53, at 58. The decision in the Banana case was reaffirmed for the new WTO law in ECJ, Case C-149/96, Portugal v. Council, 1999 ECR I-8395.

of exclusive Community competence (Section III *supra*). The need to proceed by way of a mixed agreement based on joint competences forces the Community and the Member States to negotiate and conclude an agreement in close cooperation.

As of February 1, 2003, the Nice Treaty introduced a few amendments to Arts. 133 and 300 of the EC Treaty. The Commission, in the framework of ongoing negotiations, is now required to report regularly to the special committee set up by the Council. However, the broadening of the scope of exclusive Community competence concerning intellectual property and services,[39] limiting the need for mixed agreements, seems most important to assess the remaining power of the Member States. With the objective of compensating for this loss of influence, Art. 133(5)(2) of the Nice version of the EC Treaty also requires unanimity on the Council for issues where internal legislation would only require a qualified majority, such as in the field of harmonization (Art. 95), provided that the Community has not yet adopted such internal legislation.

This last rule would be given up under Article 188c(4)(2) of the Draft Treaty on the Functioning of the European Union, which is supposed to replace Art. 133 of the EC Treaty. By referring to trade in services, as well as foreign direct investment, the new provision would align the voting rule on the Council to the rules on internal legislation.[40] In addition, the Draft Treaty would make consultation with the European Parliament mandatory for all international trade agreements; even approval by the European Parliament would be required for agreements that cover fields for which the ordinary legislative procedure (former co-decision procedure) would apply to respective internal legislation.[41] In particular, this latter rule would seems to be relevant for IP-related agreements that obligate the EU to change its IP directives adopted pursuant to Art. 95 of the EC Treaty.

V. Effect of International Trade Agreements on the Internal Community Legal Order

The effect of international agreements on the internal Community legal order constitutes one of the most disputed issues of European law. The ECJ's

[39] *Cf.* the end of Section II *supra.*

[40] This citation refers to the Draft adopted by the Representatives of the Governments of the Member States of October 5, 2007, *available at* http://www.consilium.europa.eu/uedocs/ cmsUpload/ cg00001re01en.pdf (last visited October 29, 2007).

[41] Art. 188n(6)(b) and Art. 188n(5)(a)(v) of the Draft Treaty on the Functioning of the European Union.

repeated rejection of direct effect of GATT and WTO law has especially attracted major criticism.

The following analysis is not meant to reopen discussion on the issues at stake, which are well-known in the legal community. It will instead try to draw as accurate a picture as possible of the current legal status of WTO law in the European Community and evaluate it as the basis for further analysis.

First, the analysis will explain that international trade agreements concluded by the Community have to be considered to be part of the Community's internal legal order. This first issue has to be separated from the issue of the effects of such agreements on the internal legal order. Second, the analysis will expand on the ECJ's effects doctrine, which, also in legal writing, is frequently reduced to the issue of direct application. To put it correctly, the issue is not whether such agreements are directly applicable or not, but rather what kind of effects they do produce and which they do not produce.

A. Community Agreements as Part of the Community Legal Order

Agreements of any kind concluded by the Community in conformity with the law of the European Community, under Art. 133 EC and Art. 300 of the EC Treaty in particular, are part of the internal legal order of the Community. As indicated earlier in this analysis, this principle was accepted for the Ankara Association Agreement by the ECJ in its *Demirel* decision.[42] The same principle was also acknowledged by the Court for GATT law from the very beginning, starting with the *International Fruit* decision, in which the Court affirmed that the Community is bound by the GATT of 1947.[43] Shortly thereafter, the Court accepted this principle explicitly in the *Haegeman* decision of 1974, according to which an agreement concluded by the Community constitutes an integral part of the Community legal order.[44]

The binding effect of an international agreement is laid down in Art. 300(7) of the EC Treaty, explaining that agreements concluded by the Community shall be binding on the institutions of the Community and the Member States. Hence, the EC Treaty follows a monist theory.[45] Article 300(7) further contains the principle of the primacy of such agreements over secondary Community legislation. Therefore, in principle, secondary law – regulations and

[42] *See supra* note 14.

[43] Joint Cases 21-24/72, International Fruit, 1972 Slg. 1219, para. 10-18.

[44] Haegeman, 1974 ECR 449.

[45] *See* Thomas Oppermann, Europarecht, 2nd ed., C.H. Beck Verlag Munich, 1999, para. 1719.

directives adopted by the Community legislature – has to conform to such agreements.

However, at least in the interpretation of the Court, Art. 300(7) does not explain the effects of such agreements within the internal Community legal order. As to the present state of the law, as accepted by the ECJ, a number of different legal effects may be distinguished, namely direct effect, indirect effect, and of the obligation to apply national law in conformity with such agreements. These effects will be discussed in the following three subsections, respectively.

B. The Doctrine of Direct Effect

Direct effect, as it was developed by the ECJ in its famous *van Gend en Loos* judgment of 1962,[46] refers to the acknowledgment of individual rights on the basis of provisions of Community law which may be invoked against the law of the Member States. In this context, the doctrine of direct effect confers rights under Community law to individuals to enforce Community law in domestic legal systems, especially before the courts of the Member States. In this sense, direct effect, which cannot be found in the wording of the EEC Treaty, contributes enormously to the supranational construction of Community law.

With respect to the application of international agreements, the doctrine of direct effect refers to the issue of whether private parties may directly rely on individual provisions of such agreements before the domestic courts of the Member States and Community courts.

According to the ECJ, the issue of whether an international agreement may be directly invoked by private parties remains an issue to be decided by each party to the agreement separately, unless the agreement itself, *interpreted in light of its subject matter and its purpose*, specifies the means of execution.[47]

In the case of the former GATT of 1947, starting with the *International Fruit* case, the Court held that, in light of the specific subject matter and the purpose of the agreement, the principle of reciprocity of mutual concessions referred to in the Preamble of GATT, the flexibility of GATT, including the application of exceptions, and, in particular, the political nature of the dispute settlement regime, excluded direct effect.[48]

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[46] Rs. 26/62, van Gend en Loos, 1962 ECR 1.

[47] Case 104/81, Kupferberg, 1982 ECR 3641, para. 18.

[48] International Fruit, *supra* note 43 at para. 19-27. *See also* Case C-465/93, Atlanta Fruchthandelsgesellschaft, 1995 ECR I-3799; Case C-469/93, Chiquita Italia, 1995 ECR I-4533.

This rejection of the direct effect of the former GATT has attracted considerable criticism.[49] This criticism was reinforced for the WTO legal system as the successor to the GATT system of 1947, especially on the basis of the reformed dispute settlement system replacing the former power-oriented approach with a rule-oriented approach; the authors claimed that the ECJ should now revise its position for the new WTO law.[50] However, the Court, when the first case relating to WTO law came before it in 1999, maintained its earlier position with respect to the new WTO agreements, although the Court stated its willingness to look closer at the revised dispute settlement procedure.[51] In addition, the Court also referred to the lack of reciprocity on the level of internal enforcement. Given the fact that the most important trading partners, the United States in particular,[52] did not accept the principle of direct effect, the Court was afraid of "disuniform application" of WTO rules, depriving the legislative and executive bodies of the Community of any scope for manuever enjoyed by their counterparts of other trading nations.[53]

On the case law, *see* Bebr, Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg, [1983] 20 Common Mkt. L. Rev. 35 (1983); *Cheyne*, International Agreements and the European Community Legal System, Eur. L. Rev. 581 (1994).

[49] *See especially* Petersmann, Application of GATT by the Court of Justice of the European Communities, 20 Common Mkt. L. Rev. 397 (1983).

[50] *See, e.g.*, P. Mengozzi, Les droits des citoyens de l'Union européenne et l'applicabilité directe des accords de Marrakech (The Rights of the Citizens of the European Union and Direct Application of the Marrakesh Agreements), 4 Revue du Marché Unique Européen (Review of the Single European Market) 165 (1994)**;** Ernst-Ulrich Petersmann, The Foreign Policy Constitution of the European Union: A Kantian Perspective, in: Festschrift für Mestmäcker, 1996, 433; *Petersmann*, Darf die EG das Völkerrecht ignorieren? (May the EC Ignore Public International Law?), [1997] Zeitschrift für Europäisches Wirtschaftsrecht (EuZW) (Review of European Economic Law) 651. As to a more cautious approach, see Josef Drexl, Unmittelbare Anwendbarkeit des WTO-Rechts in der globalen Privatrechtsgesellschaft (Direct Applicability of WTO Law in the Private Law Community, in Großfeld, Sack, Möllers, Drexl & Heinemann (eds.), Festschrift für Wolfgang Fikentscher (Commerative Edition for Wolfgang Fikentscher), Tübingen, 1998, 822 (arguing for direct effect on the basis of the existing global private law society); for even with more hesitation *Drexl*, WTO und Privatrecht (The WTO and Private Law), in Claus Ott & Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtschaftsräumen (Harmonisation and Diversity of the Private Law in the Transnational Economy), Tübingen, 2002, 333.

[51] Case C-149/96, Portugal v. Council, 1999 ECR I-8395, para. 36-41.

[52] Regarding the legal situation in the U.S., *see* Drexl, s*upra* note 20, at 39.

[53] Portugal v. Council, *supra* note 51, para. 45-46. Actually, the final recital to Decision 94/800 leading to the conclusion of the WTO Agreements tried to exclude direct effect by arguing that "by its nature, the Agreement establishing the World Trade Organisation (…) is not susceptible to being directly invoked in the Community or Member States courts." This formula was introduced

It may be argued that the ECJ, in rejecting direct effect of WTO law, was trying to protect the Community's discretion to violate international trade law. A more cautious argument might be that such discretion is necessary as long as WTO law has not established a balanced legal system for international economic law that can accommodate the broad range of different policy issues (competition, health, consumer protection, protection of the environment, etc.) that are taken into account by the Community legal system.[54]

Nevertheless, rejection of direct effect may not be equivocated with the complete absence of effect for WTO law within the internal Community legal order. Such effects are accepted under a doctrine of indirect effect and in the context of an obligation of domestic courts to apply domestic law of the Member States in conformity with WTO law.

C. The Doctrine of Indirect Effect

Despite the rejection of the doctrine of direct effect of WTO law, the ECJ does not exclude a reliance on WTO law for private parties in all instances. There are important exceptions, exemplified by the two decisions of the Court in *Fediol* and *Nakajima*.

In the *Fediol* case,[55] the ECJ accepted a right of private parties to compel the Community to take trade measures under Regulation 2641/84, the so-called New Commercial Policy Instrument, provided that they can argue a violation of international trade law, and of GATT rules in particular, by third countries. According to the Court, individuals can rely on sufficiently clear provisions of GATT insofar as secondary Community law refers to international law for the assessment of an illicit commercial practice.[56]

In the *Fediol* case, the Court's holding did not really collide with the general rejection of the direct effect concept. The entitlement of private parties was derived from the Regulation, referring to the standards of international law *indirectly*, rather than deriving them *directly* from GATT law.

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because of the Community's fear that the Agreement might only be directly effective in the EC. S*ee* Mengozzi, *supra* note 50, at 169 (criticizing this attitude as a reciprocity of "negative equality of internal enforcement" (*égalité negative d'exécution interne*).

54 *Cf.* Josef Drexl, WTO und Privatrecht, *supra* note 50.

55 Case 70/87, Fediol v. Commission, 1989 ECR 1781; *see* Petersmann, Gerichtlicher Rechtsschutz im Verfahren der EG-Kommission gegen „unerlaubte Handelspraktiken" (Juidcial Protection in Proceedings of the EC Commission against Illicit Trade Practices), Recht der internationalen Wirtschaft (RIW) (Review of the Law of the International Economy), 1990, 279.

56 Fediol v. Commission, *supra* note 55, para. 19-22.

While, in the *Fediol* case, this *indirect* effect of GATT law was accepted in order to support Community trade interests against a violation of international trade law by third states, in the *Nakajima* case,[57] the Court accepted in principle the idea that a private party may refer to GATT rules in order to challenge the legality of secondary Community law. This argument was heard by the Court from an importer of goods who claimed a contradiction between the New Basic Antidumping Regulation 3651/88 and the GATT Antidumping Code of 1979, although the Commission argued that the Antidumping Code did not have any direct effect. However, the Court did not find any violation of the Code.

In the *Nakajima* case, the importer, as the private party concerned, did not directly rely on the provisions of the Antidumping Code in order to derive from it certain individual rights. It only challenged the validity of secondary law in the light of the Antidumping Code, the Code being an integral part of Community law. The Court distinguished this kind of reliance on GATT law from direct effect. In legal writing, this distinction was dubbed "indirect effect."[58]

In the *Nakajima* case, the Court was not very explicit on whether such indirect effect of GATT rules has to be accepted generally in relation to all acts of secondary Community law. The Court only referred to the recitals of the Basic Antidumping Regulation, according to which the Regulation, had the objective of implementing Art. VI of the GATT and the Antidumping Code.[59] Obviously, a broad application of the *Nakajima* ruling would have come close to supporting the principle of direct effect since private parties predominantly seek protection from Community rules that allegedly violate GATT and WTO rules. Actually, the direct effect of Community law in the domestic legal systems of the Member States is typically invoked in order to evade the application of domestic legal rules.[60] This is why, from the outset, the distinction between direct and indirect effect remains a rather flawed concept.

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[57] Case 69/89, Nakajima All Presicion Co. v. Council, 1991 ECR I-2069; *see also* Wenig, Neueste Entwicklungen im Antidumpingrecht der Europäischen Gemeinschaften (Newest Developments in the Antidumping Law of the European Community), Europäische Zeitschrift für Wirtschaftsrecht (EuZW) (European Journal for Economic Law), 1991, 439.

[58] P. Eeckhout, The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems, 34 Common Mkt. L. Rev. 11 (1997), at 40 *et seq*.

[59] Nakajima All Presicion Co. v. Council, *supra* note 57, para. 28 and 30.

[60] This was also the situation in the early and very fundamental *van Gend en Loos* case; *see supra* note 46.

The *Nakajima* ruling received more precision in the decision of the ECJ in Germany's action for annulment of the Community Banana Regulation.[61] Whereas Germany tried to rely on *Nakajima*, with the objective of testing the legality of the Regulation in light of GATT law, the Court interpreted the *Nakajima* ruling in a very narrow sense. According to the Court's understanding, GATT law can only be applied by Courts in the European Union in two situations: when Community legislation directly refers to precise provisions of GATT (the situation in *Fediol*); or Community legislation is adopted with the intention of implementing obligations under GATT (the situation in *Nakajima*).[62] Based on this narrow reading, it was possible to distinguish the Banana case from *Nakajima*. Whereas the recitals to the Basic Antidumping Regulation in *Nakajima* mentioned the objectives of bringing Community law in line with GATT rules, such reference was not included in the Banana Regulation.

According to this narrow reading, which was affirmed later for WTO law,[63] the GATT is only binding in the internal Community legal order if and insofar as the Community legislature accepts such an effect. Consequently, Community institutions can dispose of the binding nature of international trade law, a conclusion that seems to run contrary to the clear wording of Art. 300(7) of the EC Treaty, according to which international agreements concluded by the Community are binding on Community institutions.[64]

In the more recent judgment in *British American Tobacco*,[65] the ECJ narrowed even more the scope of the indirect effect rule devised in *Nakajima*. In this case, British American Tobacco and other tobacco companies unsuccessfully challenged the validity of the Tobacco Labelling Directive,[66] prohibiting, among other things, the use of trademarks for tobacco products, including the term "mild," in light of Art. 20 of the TRIPs Agreement, according to which the use of a trademark in the course of trade shall not be

[61] *See* Germany v. Council, *supra* note 38.

[62] *Id.*, para. 111.

[63] Case C-149/96, Portugal v. Council, 1999 ECR I-8395, para. 49.

[64] See the critique by G. M. Berrisch, Zum "Bananen"-Urteil des EuGH vom 5.10.1994 – Rs. C-280/93, Deutschland / Rat der Europäischen Gemeinschaft (On the Banana Judgment of the ECJ of October 5, 1994 – Case C-280/93, Germany v. Council of the European Community), [1994] Europarecht (EuR) (European Law), 1994, 461, at 469.

[65] Case C-491/01, British American Tobacco, 2002 ECR I-11453.

[66] Directive 2001/37/EC of the European Parliament and the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, O.J. EC 2001 (L 194) 26.

unjustifiably encumbered. The Court, relying on the concept that WTO law is not directly applicable, and almost in contradiction to the *Nakajima* rule, started with the idea that "the lawfulness of a Community measure cannot be assessed in the light of instruments of international law which, like the WTO Agreement and the TRIPs Agreement (…), are not in principle, having regard to their nature and structure, among the rules in light of which the Court is to review the lawfulness of measures adopted by the Community institutions."[67]

The Court simply added that the conditions for the two exceptions, going back to *Fediol* and *Nakajima*, were not satisfied in the case of the challenged Directive.[68] This finding should not be considered to be a surprise. Up until now, there has not been a single case in which the Court annulled an act of Community legislation based on the doctrine of indirect effect. On the other hand, the Community had changed its own Community Trademark Regulation after adoption of the WTO Agreement, including TRIPs, with the clear expression of its intent "to ensure that all relevant Community legislation is in full compliance with the TRIPs Agreement."[69]

The only conclusion that may be drawn from *British American Tobacco* is that even the expression of the clear intent to implement obligations of WTO law is not sufficient to protect individuals against later legislation that does not repeat such intent. It is not unlikely that the Court was totally unaware of the preamble in the above-mentioned Regulation amending the Community Trademark Regulation. However, such failure does not change the interpretation of the judgment. The Court of Justice does not only allow the Community legislature to change its mind; the legislature is even allowed to hide its disrespect for international law. However, perhaps the situation is even worse -- maybe the Community legislature, in adopting the Tobacco Product Directive, was not at all aware of a possible conflict of the Directive with TRIPs standards and, therefore, did not make any conscious decision at all as to whether international law should or should not be respected. This shows that judicial monitoring is especially needed to prevent the Community lawmakers from

[67] British American Tobacco, *supra* note 65, para. 154.

[68] *Id.*, para. 155 et seq. Most interestingly, the Court refrained from citing *Fediol* and *Nakajima*. Instead, the Court cited later decisions, namely the decision in Portugal v. Council, *supra* note 38, and Case C-301/97, Netherlands v. Council, 2001 ECR-8853, para. 54; Joined Cases C-27 and 122/00, Omega Air, 2002 ECR, I-2569, para. 94. Likewise, the latter two of those three decisions did not refer to *Fediol* and *Nakajima* either. This abstention may be justified by the fact that *Fediol* and *Nakajima* related to former GATT law and not to present WTO law. However, the failure to cite *Fediol* and *Nakajima* veils the original context of the doctrine of indirect effect.

[69] Preamble of Council Regulation (EC) No. 3288/94 of 22 December 1994, O.J. EC 1994 No. (L 349) 83.

unintentional violations of international law that, in light of earlier declarations, the legislature does not want to commit.

D. Applying the Law of the Member States in Conformity With International Trade Agreements

From the preceding analysis we can conclude that the ECJ is extremely reluctant to accept any reliance of individuals on provisions of WTO law. This reluctance contrasts with effective enforcement of WTO standards in relation to the domestic law of the Member States.

In the *Hermès* case of 1998,[70] the Court was confronted with a referral for preliminary ruling[71] by a Dutch court relating to preliminary measures in civil IP infringement proceedings. The case arose from a dispute over an alleged violation of a Benelux trademark. The Dutch court had to decide whether Dutch rules of civil procedure were in conformity with Art. 50(6) of the TRIPs Agreement; it referred the case to the ECJ in order to find out the correct understanding of this provision of TRIPs. Despite the denial of any direct effect, the ECJ affirmed its jurisdiction to decide the case. Although no European harmonization exists on the law of civil procedure, and the case did not involve a Community trademark, the Court relied on the "Community interest that, in order to forestall future differences of interpretation, the provision should be interpreted uniformly" in both cases of its application to national trademarks and Community trademarks.[72]

In this case, the Court obviously created a very strict obligation of national courts to respect the ECJ's interpretation of WTO rules. In this specific case, the national court did not have to deal with a conflict of Community law, but with the conflict of the domestic law of a Member State with WTO law. Accordingly, the ECJ did not tell the Court expressly how to deal with the ECJ's interpretation of TRIPs. However, by referring to uniform interpretation of TRIPs law, it is obvious that the domestic court is required to interpret its national law in conformity with the interpretation of WTO law by the ECJ.

In two later decisions, relating to very similar situations arising from the same Dutch legal background, the ECJ affirmed and even extended the scope of its former findings.

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[70] Rs. C-53/96, Hermès International, 1996 ECR I-3603.

[71] Art. 234 of the EC Treaty.

[72] Hermes International, *supra* note 70, para. 32.

In the *Dior and Assco* case,[73] the ECJ was explicitly asked whether Art. 50(6) of the TRIPs Agreement had to be considered as having direct effect. The Court answered in the negative, rejecting the idea that the provision creates rights that may be invoked by individuals directly before courts in the European Union, but nevertheless held that national courts are required by virtue of Community law to apply their domestic law, as far as possible, in light of the wording and purpose of Article 50 of TRIPs.[74] In its decision, the ECJ decided two referral cases that were quite different. The first one related to a Benelux trademark (*Dior*) and, therefore, was almost identical to the one decided in *Hermès*. The second case (*Assco*) involved general tort law protection for an industrial design as unlawful competition. Although no Community rules on this latter kind of protection exist, the Court held that the national court has to interpret national law in light of the TRIPs Agreement, not solely in the field of trademark law, but whenever TRIPs is applied by a domestic court to any intellectual property right covered by the Agreement.[75] The argument is clear: only the ECJ is in a position to guarantee uniform application of TRIPs in the European Union.[76] Such interpretation may also be affected with regard to IP rights not yet regulated by Community law.

Finally, the *Dior* ruling was confirmed in *Schieving-Nijstad*,[77] the last of the three Dutch referral cases on Art. 50(6) of the TRIPs Agreement. Again, the referring court, the Hoge Raad of the Netherlands, wanted to know whether Art. 50(6) of TRIPs had direct effect. The ECJ repeated its *Dior* judgment, distinguishing between the concept of direct effect and the obligation of Member States' courts to apply their national law "as far as possible in the light of the wording und purpose of Article 50(6) TRIPs."[78]

[73] Joined Cases 300 and 392/98, Parfum Christian Dior and Assco, 2000 ECR I-11307. *See also* Groh & Windisch, Die Europäische Gemeinschaft und TRIPS: Hermès, Dior und die Folgen (The European Community and TRIPS: Hermes, Dior and others), Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil (GRUR Int.) (International Review of Industrial Property and Copyright Law), 2001, 497.

[74] ECJ, n. 73 *supra*, para. 47.

[75] *Id.*, para. 32-40.

[76] *Id.*, para. 38. See also Groh & Windisch, supra note 72, at 500 *et seq*. (supporting the Court's holding).

[77] Case C-89/99, Schieving-Nijstad vof, 2001 ECR I-5851.

[78] *Id.*, para. 55.

E. The Current State of the Effects Doctrine

In *Schieving-Nijstad*, the ECJ underlined that TRIPs does not create rights upon which individuals may rely "directly" before the courts in the European Union, indicating at the same time that private parties may rely on TRIPs at least "indirectly."[79]

Nevertheless, the case law starting with *Hermès* should not be discussed under the heading of indirect effect (Section 3 *supra*). In *Hermès*, *Dior* and *Schieving-Nijstad*, the ECJ only dealt with the application of "national" rules of the Member States and not of rules of secondary Community legislation.[80] So far, the ECJ has not accepted an obligation to interpret secondary Community law in the light of the WTO Agreements.

Conversely, whether the Court has implicitly rejected such an obligation is not absolutely clear. In *British American Tobacco*, the Court had to decide on the legality of the Tobacco Labelling Directive only, not on its application. In other judgments concerning GATT and WTO law, the Court had to deal with Community legislation in fields of traditional trade, especially relating to agricultural products and textiles, where the Community legislature cares little about the conformity of Community law with international trade law. Nevertheless, there are arguments indicating that the ECJ will not accept a similar obligation regarding the application of Community law. The first argument is a political one: under the *Hermès* case law, the ECJ had the problem of justifying its own jurisdiction outside the scope of application of Community law so as to guarantee uniform application of WTO law throughout the European Union. Within the scope of Community law, the ECJ does not need to justify its jurisdiction by reference to WTO law.

The second argument is a legal one: the Court explained the need to apply domestic law in the light of WTO law as a matter of Community law and not as a matter of public international law. Accordingly, the *Hermès* case law may be seen to conform to judgments like *British American Tobacco*, maintaining the discretion of Community institutions as to whether they want to implement WTO obligations or not. It is for Community law only to decide on the legal status of WTO rules in the internal Community legal order.

From the preceding analysis two different conclusions may be drawn: one from the perspective of the sovereignty of the European Community and the other regarding the sovereignty of the Member States. First, the ECJ fully

[79] *Id.*

[80] *Id.*

protects the sovereign decision of the European Community with respect to WTO law, by rejecting any direct effect of the WTO Agreements in particular. In addition, the Community legislature is free to decide whether there should be a review of secondary legislation or not. The legality of a specific act of secondary legislation cannot be challenged in the light of WTO law, unless the Community legislature clearly expresses its intent to implement or respect WTO law in adopting this very act. Second, on the other hand, the ECJ tries to guarantee respect for WTO law when national law collides with WTO law. The ECJ does so by acknowledging a Community obligation to apply national law in conformity with WTO law. This rule considerably reduces the sovereignty of the Member States even outside the scope of application of Community law. However, national sovereignty of the Member States would be even more reduced if the ECJ accepted a general rule of direct effect of WTO law. It follows from the judgment in the *Assco* case that Member States are free to decide for themselves, based on their national constitutions, whether, outside the scope of Community law, direct effect of WTO law is accepted or not as a matter of national constitutional law.[81]

VI. Assessing the Current Situation of the Member States in Respect of WTO Law

The current situation of the Member States of the European Union with respect to WTO law is a rather ambiguous one. The concept of joint competence does not guarantee a balanced form of cooperation in the formation, conclusion and implementation of international agreements. Joint competence is only needed in fields where the Community has not yet made use of its internal competence for harmonization, especially in the fields of trade in services and intellectual property. Joint competence requires additional conclusion of the agreement by the Member States. Nevertheless, in the course of diplomatic negotiations, the Community, acting through the Commission and the Council, will largely define the common strategy of both the Community and the Member States. Under this procedure, a minority of Member States may be outvoted to the extent that the qualified majority rule applies in the Council.

As to the implementation of WTO rules, Member States remain free outside the sphere of the Common Commercial Policy (Art. 133) and new Art. 133(5) (Nice version of the EC Treaty) to decide on direct effect to the extent that the Community has not yet made use of its internal power of harmonization. However, even in this area, the Member States have to accept a Community obligation to apply their national law in conformity with WTO law as it is interpreted by the ECJ. At the same time, the ECJ does not prevent the Community legislature from not respecting WTO law.

[81] Parfum Christian Dior and Assco, *supra* note 73, para. 48.

Of course, the loss of sovereignty on the side of the Member States can be explained by the supranational character of Community law and the need to construe the Community as a potent and efficient actor in international trade law. As to the working of WTO law, this loss of sovereignty has both advantages and disadvantages for the Member States. The advantages have to be found in the fact that an individual Member State would not be identified as the violator of WTO rules, but rather the European legislature would be. Some Member States may benefit economically from the violation, and the Community as a larger entity may be much stronger in defending the underlying interests. On the other hand, disadvantages for individual States may result when other WTO Members are authorized to suspend WTO concessions at the end of a WTO dispute settlement procedure against the Community as a whole, whereas the benefits of certain violations only accrue to some Member States. For instance, the whole Community was held liable for the violation committed under the EC Banana Regime although some Member States, including Germany, had voted in the Council against the adoption of the violating Regulation. Member States have to accept these consequences, since the Community is construed as a community of solidarity.

VII. Assessing the Situation of Turkey with Respect to WTO Law

The preceding analysis also describes the future situation of Turkey after a possible accession to the European Union.

Under the present regime of the Customs Union, as was noted above,[82] Turkey has partially committed itself to respect Community trade law. Regarding these matters, including intellectual property protection, Turkey has aligned itself with Community standards, and even given up its sovereignty concerning future changes to the Common Customs Tariff.[83]

Since Turkey has not yet acceded to the European Union, the country legally remains a sovereign actor in the field of international trade law, although Turkey is legally bound by Ankara Association law and especially by Decision 1/95.

This peculiar situation gave rise to a most interesting WTO dispute settlement procedure in the complaint by India against Turkey relating to Turkey's obligations under Decision 1/95. In conformity with the requirements of Article XXIV of the GATT, Art. 12(2) of the Decision forces Turkey to apply "substantially the same commercial policy as the Community in the

[82] Section II *supra*.

[83] *See* section II. A. *supra*.

textile sector including the agreements or arrangements on trade in textile and clothing." This obligation caused Turkey to introduce quantitative restrictions on imports of textiles from third countries that did not exist prior to the establishment of the Customs Union.

On the complaint by India, a WTO Panel decided that there was a violation of Art. XXIV(5)(a) of the GATT 1994. The rule exempting customs unions from GATT rules in principle, provided that the customs union does not allow for the adoption of new quantitative restrictions inconsistent with Articles XI and XIII of the GATT 1994 and with Art. 2.4 of the Agreement on Textiles and Clothing (ATC).[84] On Turkey's appeal, the Appellate Body[85] did not follow the Panel in its interpretation of Art. XXIV of the 1994 GATT.[86] Nevertheless, it held that the quantitative restrictions involved violated Art. XI and XIII of the GATT and Art. 2.4 of the ATC.

Most interesting were Turkey's arguments before the Panel relating to non-participation of the European Community in the dispute. India complained only against Turkey, and not the European Community. This caused Turkey to argue that India's claim should be dismissed since Turkey's measures were taken pursuant to Ankara Association law and, therefore, in agreement with the European Community. For good reason, this argument was rejected. Not only did the WTO Dispute Settlement Understanding (DSU) not contain any rules allowing the Panel to extend the dispute to the European Community, the Panel also emphasized that any WTO Member can complain against another Member and, since the Customs Union is not a Member of the WTO itself and as it lacks legal personality,[87] India is free to complain only against Turkey.[88]

In addition, Turkey argued that it cannot be held individually liable for the quantitative restrictions resulting from acts that were performed collectively by the members of the Turkey-EC Customs Union through the institutions created

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[84] Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (May 31, 1999).

[85] Appellate Body Report, WTO Doc. WT/DS34/AB/R (Oct. 22, 1999). The Appellate Body Report was adopted by the Dispute Settlement Board on 19 November 1999 and, thereby, became effective. *See also* James Mathis, WTO, Turkey - Restrictions on Imports of Textile and Clothing Products, 27 Legal Issues of Economic Integration (LIEI) 103 (2000).

[86] This article will not deal with the interpretation of the rules of Art. XXIV GATT on the admissibility of a customs union. However, the Report contributes considerably to a better understanding of that problem. As to the disagreement on the substance of Art. XXIV GATT *see Id*. at 106-110.

[87] *See also* Panel Report, *supra* note 84, n. 9.4.

[88] *Id*., n.9.5.

by the Ankara Association Agreement.[89] The Panel also rejected this argument, stating that the EC Regulation[90] giving rise to the quantitative restrictions at issue is only applicable within the territory of the European Union, whereas a similar system of quantitative restrictions was implemented in Turkey under Turkish law only.[91]

In *obiter dictum*, the Panel pointed out that the same import regime of the Community on textiles was compatible with WTO rules.[92] The explanation for this conclusion is very simple -- it was only Turkey, and not the European Community, that had to change its international trade law by introducing new quantitative restrictions under Decision 1/95.

The Report by the Appellate Body ordered Turkey to respect WTO rules by abolishing the quantitative restrictions. Later,[93] Turkey and India agreed that Turkey would comply with the final Report and compensate India. It is obvious that, by doing so, Turkey will violate Decision 1/95. The fact of the matter is that Turkey has entered into two conflicting international obligations, but can only comply with one.

Some other lessons are to be learned from the case:

(1) In contrast to full membership, mere association and the establishment of the Customs Union does not insulate Turkey from liability under WTO rules. On the other hand, if Turkey became a Member State of the EU, Turkey could not be held liable for violations of WTO rules arising from Community trade law measures.

(2) Turkey attracted the complaint by India only because it was held liable for a level of trade protection that was imposed by the European Community as the economically stronger partner of the Customs Union. Actually, Turkey had to introduce quantitative restrictions on imports from third countries in order to convince the European Community to abolish its quotas on imports of textiles from Turkey.[94]

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[89] *Id.*, n. 9.33.

[90] Council Regulation (EEC) 3030/93 of 12 October 1993 on common rules for imports of certain textile products from third countries; O.J. EC 1993 (L 275) 1.

[91] *See also* Panel Report, *supra* note 84, n. 9.36-39.

[92] *Id.*, n. 9.4.

[93] On 6 July 2001.

[94] *See* Astrid-Marina Lohrmann, Der Textil- und Bekleidungssektor in der Türkei und die Auswirkungen der Zollunion mit der Europäischen Union (The Textile and Garment Sector in

From this case study, we can conclude that Turkey, under the new regime of the Customs Union, has only maintained its sovereignty in the field of foreign trade in theory, but actually is worse off than any Member State. This situation is even more dramatic in the field of customs duties. In this respect, the Community would be able to raise duties violating GATT rules with binding effect for Turkey as a matter of public international law.[95] Turkey would have no legal possibility at all to avoid such a Community decision or even participate in the decision-making, but, after its own implementation, could be held liable by any other trading nation under WTO rules.

VIII. Conclusion

The preceding analysis has compared the legal status of Turkey under the current system of the Customs Union with the legal status of a Member State of the European Union in the field of international trade law. The analysis has identified different problems for Turkey and the Member States.

From a formal point of view, Turkey has only partially given up its sovereignty with regard to international trade law, to the extent that it automatically has to adjust its customs tariff to future changes of the Common Customs Tariff of the EC. Other obligations entered into under Decision 1/95 are only the result of a sovereign decision of Turkey to regulate its trade relations by treaty law. However, from a realistic point of view, Turkey had to accept what was offered to it by the Community as the stronger partner. Thereby, Turkey adopted parts of the European trade law, resulting even in violations of WTO law on the Turkish part. Since, from a legal point of view, Turkey remains an independent trading nation after the establishment of the Customs Union, it can be held liable for such violations without being able to rely on the protective shield of the external competence of the European Community.

The situation of the Member States of the European Union is quite different. Their sovereignty as independent trading nations is considerably reduced by the exclusive competence of the European Community within the scope of the Common Commercial Policy and, following the Nice Treaty, within the broader competence of the Community in the field of trade in services and of intellectual property protection. On the other hand, Member States may influence the Community's trade policy through their

Turkey and the Impact of the Customs Union with the Euorpean Union), Zeitschrift für Türkeistudien (Review of the Study of Turkey) 203, at 219 et seq. **(**indicating that the adoption of the Community scheme in the textiles sectors caused higher production costs of the textiles industry in Turkey and a reduction of exports from Turkey to the European Union**)**.

[95] Art. 13(2) of the Decision 1/95; *see also* Section II *supra*.

representatives on the Council. Under the rule of qualified majority, their influence is greatly reduced and may not be compared with the status of an independent trading nation. Procedural participation in the Council may be characterized as an expression of European constitutionalism, replacing national sovereignty by defined procedural rights of the Member States. Nevertheless, judicial protection of such rights is not available with respect to secondary legislation potentially conflicting with international agreements. Against the background of the rejection of direct effect by the ECJ, even Member States may not challenge the legality of secondary legislation in light of WTO law. At the same time, national courts have to apply national law as far as possible to conform to international trade law. On the level of international WTO trade disputes, Community law generally protects Member States from direct complaints by third states, but imposes a form of collective liability on all Member States in the case of a violation of WTO rules.

Of course, the issues discussed in this article will not be decisive for Turkey's evaluation of the arguments in favour and against accession to the European Union. Nevertheless, the analysis of the foreign trade situation highlights the current and future status of Turkey within the legal system of the global economy. Also in this regard, Turkey has to make its choice between a traditional but very formalistic and arguably no longer very helpful concept of sovereignty and a constitutional concept of participation within the European Union.