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THE TRIPS AGREEMENT AND THE ECJ: A NEW DAWN?
Some Comments About Joined Cases C-300/98 and C-392/98,
Parfums Dior and Assco Gerüste.
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Gaëlle Bontinck*
This paper seeks to analyze the recent judgment of the European Court of Justice ("ECJ") inJoined Cases C-300 and C-300/98, Parfums Dior and Asso Gereiste, in the light of theprevious case-law of the Court relating to international agreements. In particular, this case notewill focus on the possibilities of further evolution of the case-law as regards the jurisdiction ofthe Court to interpret provisions of TRIPs, and the issue of direct effect.

It will be argued that Parfums Dior could represent a new dawn for the jurisdictionof the Court under Article 234 EC, which could lead to an obligation for the courts of theMember States to refer questions relating to the interpretation of the TRIPs Agreement to theECJ. However, a similar progressive step may be less realistic with respect to the direct effect ofTRIPs under Community law because the Court has consistently refused to recognize the directeffect of the WTO Agreements. It will be argued that even if national courts were to recognizethe direct effect of TRIPs as a matter of national law, it would not prevent the Court from‘taking it back’ in the future, once TRIPs will fall under the exclusive competence of theEuropean Community. This case study reveals that the possibility of the Court reasserting theabsence of direct effect of TRIPs as a matter of Community law could be effectuated withoutoverly negative consequences for the level of protection of individual rights within theCommunity.
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1. Introduction

“In many respects, TRIPs represents a new challenge to the law of the European Union, in particular that concerning the EU’s external relationships and the relationships of EU law, international convention law and the legal systems of the individual EU Member States”. In a judgment of December 14, 2000, the European Court of Justice provided yet another illustration of this statement. This case offers an interesting opportunity to analyze the possible developments that might take place within European Community law, regarding the WTO Agreements, and questions relating to the jurisdiction of the Court and the direct effect of the TRIPs Agreement in particular.

The District Court of The Hague and the Supreme Court of the Netherlands had referred one and three questions respectively concerning the interpretation of Article 50 of the TRIPs Agreement under Article 234 of the EC Treaty. Article 50 lays down some procedural provisions relating to provisional measures granted in order to protect intellectual property rights.

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3 Hereinafter “the ECJ” or “the Court”.


5 It seems necessary to clarify from the outset the terminology that we will use in this part of the paper. Even if some authors argue in favor of a distinction between the concepts of direct effect and direct applicability – see e.g. developments of Kees Jan Kuijlik, The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Rights?, [1996] Nexed Editions, at pp.79-156 – it must be acknowledged that this distinction is not always very clear and that the ECJ uses both concepts interchangeably “without a strict analytical definition for each one”, e.g. Carlos D. Esposito, The Role of the European Court of Justice in the Direct Applicability and Direct Effect of WTO Law, with a Dantesque Metaphor, [1998] Berk.eley J. Int’l L. (16) 138, 141.

As an analysis of the semantics of the Court would go beyond the object of this paper, the terms direct effect and direct applicability will be considered as equivalent, both referring to the aptitude for provisions of an international agreement to be relied on by an individual in front of a court, implying that this norm grants rights to individuals. However, we admit that the concept of direct effect as used in connection with international agreements might be different than the one used in internal Community law.


7 For the content of Article 50 of TRIPs, see Appendix.
The national proceedings of Case C-300/98, Parfums Dior, involved an action by Dior SA, proprietor of different trade marks for perfumery products, against Tuk BV. Dior alleged that Tuk had infringed its trade mark rights by selling perfumes bearing those marks when they had not been put on the market in the European Economic Area.\(^8\) The District Court considered that the proceedings raised the question of the direct effect of Article 50(6) of TRIPs and made a preliminary reference to the ECJ: “Is Article 50(6) of the TRIPs Agreement to be interpreted as having direct effect in the sense that the legal consequences set out therein take effect even in the absence of any corresponding provision of national law?\(^7\)"

Case C-392/98 involved an action by Layher Germany and Layher Netherlands against Assco Gerüste.\(^10\) Layher Germany designs and manufactures the Allroundsteiger, a type of scaffolding patented in both Germany and the Netherlands, but whose patents expired respectively on 16 October 1994 and 7 August 1995. Layher Netherlands is the exclusive importer of the Allroundsteiger for the Netherlands. Assco also manufactures scaffolding, including one known as the Rondosteiger, also marketed in the Netherlands, and whose interlocking and measurements system is identical to that of the Allroundsteiger. Layher applied to the President of the Utrecht District Court for interim measures prohibiting Assco from importing into the Netherlands, selling, offering for sale or otherwise trading in the Rondosteiger as then manufactured. Layher alleged Assco was wrongfully copying an industrial design. The application for interim measures was granted and the President of the District Court ruled that the reasonable period referred to in Article 50(6) of TRIPs – a period during which an action on the merits should be initiated, and during which time the interim measures granted according to Article 50 can have effect – was to be one year.\(^11\) The interim decision was upheld on appeal, apart from the specified period.

Assco appealed to the Supreme Court of the Netherlands. The Dutch Court sought a preliminary ruling from the ECJ on three questions: “(1) Does the jurisdiction of the Court of Justice to interpret Article 50 of the TRIPs Agreement also extend to the provisions of that Article when they do not concern provisional measures to prevent infringement of trade mark rights? (2) Does Article 50 of the TRIPs Agreement, in particular Article 50(6), have direct effect? (3) Where an action lies under national civil law against the copying of an industrial design, on the basis of the general rules concerning wrongful acts, and in particular those relating

\(^8\) The claim of Dior was related to the principle of Community-wide exhaustion of intellectual property rights, established in relation to trade marks by Case 16/74 Centrafarm v Winthrop, [1974] ECR 1183. Had Dior put (or given its consent to put) its perfumes on the market in the European Economic Area, the principle of exhaustion would have precluded Dior, other than in exceptional circumstances, to oppose the use of the trade mark by others in subsequent transactions anywhere in the Community. Dior alleged that it did not put the products on the market within the EEA, therefore the principle of exhaustion could not be opposed to it and as a result Tuk was infringing its trade mark.

\(^9\) Parfums Dior, supra note 2 at para. 19.

\(^10\) Hereinafter respectively “Layher” and “Assco”.

\(^11\) Article 50(6) provides that interim measures shall cease to have effect if proceedings leading to a decision on the merits of the case are not initiated “within a reasonable period, to be determined by the judicial authority ordering the measures where a Member’s law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer”.
to unlawful competition, must the protection thus afforded to the holder of the right be regarded as an intellectual property right within the meaning of Article 50(1) of the TRIPs Agreement?”

A common element may be deduced from both cases, concerning the economic liberties of the intellectual property rights’ holders. These could be fundamentally affected by a decision as to whether TRIPs is recognized as having direct effect or not, and, as a threshold matter, as to whether the Court could even accept its jurisdiction. Both issues are not a foregone conclusion.

(ii) The Ruling of the Court

As to the national court’s query over its jurisdiction, the ECJ ruled that “where the judicial authorities of the Member States are called upon to order provisional measures for the protection of intellectual property rights falling within the scope of TRIPs and a case is brought before the Court of Justice in accordance with the provisions of the Treaty, in particular Article [234] thereof, the Court of Justice has jurisdiction to interpret Article 50 of TRIPs.”

On the question of direct effect, the Court held that the provisions of TRIPs “are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law”. However, “in a field to which TRIPs applies and in respect of which the Community has already legislated, as is the case in the field of trade marks … the judicial authorities of the Member States are required by virtue of Community law, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling within such a field, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs.” On the other hand, in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.”

With respect to the substantive interpretation of Article 50 of TRIPs, the Court held that it “leaves the Contracting Parties, within the framework of their own legal system, the task of specifying whether the right to sue under general provisions of national law concerning wrongful acts, in particular unlawful competition, in order to protect an industrial design against copying, is to be classified as an ‘intellectual property right within the meaning of Article 50(1) of TRIPs’”.

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12 Parfums Dior, supra note 2 at para. 27.
13 Id. at para. 40.
14 Id. at para. 44.
17 Id. at para. 63.
(iii) Focus of the Analysis

The complexity of the situation originated with the Court's initial statement in relation to TRIPs, in its *Opinion 1/94*. The Commission sought the opinion of the ECJ on the competence of the European Community to conclude the Agreement establishing the WTO, and in particular the GATS and the TRIPs. The ECJ concluded that the Community institutions and its Member States were jointly competent to conclude the TRIPs Agreement.\(^\text{18}\)

Hitherto, the exact delimitation of the respective competences of the Community and the Member States with respect to TRIPs has been widely discussed in the literature, as were the possible consequences of this joint competence,\(^\text{19}\) and of TRIPs generally in the European legal order. A close analysis of *Parfums Dior* will try to put these issues into a new perspective.

This paper will try to demonstrate that, even if the ruling of the Court seems *a priori* trivial, a closer analysis may reveal that it gives rise to particularly interesting issues related to two core topics of the ECJ's case-law: the jurisdiction of the Court under Article 234 and the relationship between international agreements and the Community and Member States laws. Indeed, the TRIPs Agreement, which 'extended' the previous GATT 1947 to the field of intellectual property rights, offers an excellent context in which to analyze these complex problems.

The analysis will focus on two subject-matters developed by the Court in the case under study. The first part of the paper will concentrate on the jurisdiction of the Court, whether the competence of the Court to answer such references was really as obvious as the Court assumed. Specifically, it will examine the admissibility of the reference under Article 234 EC in Case C-300/98 and the jurisdiction of the Court to interpret the provisions of an international agreement for the conclusion of which the Community has been considered only "jointly competent" with the Member States. The second half of this case study will be centered

\(^{18}\) More precisely, the Court held that the Community and its Member States were jointly competent to conclude TRIPs and stressed the necessity to ensure close cooperation between the Member States and the Community institutions, *inter alia* in the fulfillment of the commitments entered into. The Court found the connection between intellectual property and trade in goods not sufficient to bring intellectual property rights within the common commercial policy of the Community. Therefore, TRIPs could not fall under the exclusive competence of the Community. Moreover, if the Community were to be recognized as having exclusive competence to enter into TRIPs, it would make it possible at the same time to achieve harmonization within the Community and thereby to bypass the internal procedural constraints to which the institutions are subject when they act in order to harmonize internal legislations. Likewise, the theory of implied external powers did not lead to the conclusion that the Community had exclusive competence to conclude TRIPs since the harmonization achieved within the Community in certain areas covered by TRIPs is only partial and in other areas has not yet been envisaged, even if the Community could exercise its powers, in so far as intellectual property rights “directly affect the establishment and functioning of the common market”, as provided for in Article 94 EC, giving the scope in which the approximation of laws can take place. See *Opinion 1/94* of the Court of 15 November 1994, [1994] ECR I-5276.

on the Court’s treatment of the direct effect of TRIPs, and what could be the eventual outcome of this dicta, especially on the level of protection of individual rights under Community law.

2. The Debatable Jurisdiction Of The Court

The analysis undertaken by the Court of its competence and the subsequent result attained give rise to a possible critique, relating to both the grounds for the admissibility of the reference in Case C-300/98, and the ability for the Court to give a preliminary ruling in Case C-392/98, considering that the Court held that the reference concerned measures adopted for the protection of intellectual property rights in a field in which the Community had not yet legislated and which “do[es] not fall within the scope of Community law”.20

a. Admissibility Of The Reference Under Article 234

Preliminary rulings to the ECJ are governed by Article 234 EC, which states: “[t]he Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community […]. Where such a question is raised before any court or tribunal of a Member State, that Court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”21 Article 234 has been supplemented by numerous cases of the Court.22

(i) Arguments of the Court

The issue of admissibility of the reference under Article 234 was brought up directly in Case C-300/98 (Parfums Dior). The sole question referred by the District Court was whether Article 50(6) of TRIPs was to be construed as having direct effect. The Council and the Commission, supported by the Netherlands Government, argued that the reference was inadmissible, on the ground that the order for reference did not indicate why an answer to the question submitted was necessary in order to enable the referring court to give judgment.23 Advocate General Cosmas lent his support to this argument, underlying that the main

proceedings, even if related to trade marks, presented no link with the questions of interpretation and direct effect of Article 50(6) of TRIPs: it was not apparent from the reference that the issue of the time-period during which the defendant can ask for the suppression of the interim measures granted would arise. Moreover, he pointed out that the question had been referred by the District Court to the ECJ on its own motion, without request or comment from the parties. Finally, he mentioned that the interim measure action had already been substantially ruled upon and that the decision was provisionally enforceable, even if the costs would be ruled upon with the formal announcement of the decision. Hence he did not see if and how an answer to the reference could help the national court to give judgment.24

The Advocate General concluded that the Court was deprived of all the factual and legal elements of the case that were necessary for the Court to be able to provide a useful answer to this reference. He relied on both Corsica Ferries,25 where the Court held that “it [had] no jurisdiction to rule on questions submitted by a national court if those questions bear no relation to the facts or the subject-matter of the main action and hence are not objectively required in order to settle the dispute in that action”,26 as well as Sunino and Data,27 where the Court held that “in order to reach an interpretation of Community law which will be of use to the national court, it is essential that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based”.28

Notwithstanding the well-argued opinion of the Advocate General, the Court disposed of the matter quite summarily. It deduced from the fact that Article 50(6) of TRIPs imposes limits on the life-time of interim measures and that no such limit appears in national law that the question referred by the Dutch Court was designed to ascertain whether it was required to comply with the time-limits imposed by Article 50(6) of TRIPs. The Court further observed that the question referred in Case C-300/98 “[was] in essence identical to the second question in Case C-392/98, whose admissibility [was] not disputed”, to conclude that “[i]n those circumstances, the questions submitted in both cases should be answered”.29

(ii) Comments

The brevity of reasoning by the Court provokes queries as to why a more developed and maybe more convincing line of reasoning was not developed. The significance of the question referred, as well as the collective opposition of all the others actors involved in the proceedings – the Council, the Commission, the Dutch Government, and the Advocate General – maybe should have forced the Court to better defend its position in favor of the admissibility

24 Opinion of Advocate General Cosmas, supra note 23 at 28-29.
26 At para. 14.
28 At para. 4.
of the reference. It had enough case-law at its disposal to easily develop a still concise but more
persuasive argumentation, for instance by relying expressly on its previous case-law.

Still, in the Court's favor, it can first be acknowledged that the opinion of the
Advocate General did not lead to a compelling result either. Even if it is assumed that Cosmas
had convincingly referred to the case-law supporting the necessity for the Court to have some
knowledge of the legal context surrounding the reference and the factual circumstances of the
main proceedings, his argument relating to the absence of request of, or prior observations on,
the reference on the part of the parties\textsuperscript{30} cannot be accepted. It is settled case-law that “the fact
that the parties to the main action failed to raise a point of Community law before the national
court does not preclude the latter from bringing the matter before the Court of Justice. In
providing that [a] reference for a preliminary ruling may be submitted to the Court where ‘a
question is raised before any Court or tribunal of a Member State’, the second and third
paragraphs of Article [234] of the Treaty are not intended to restrict this procedure exclusively to
cases where one or [the] other of the parties to the main action has taken the initiative of raising
a point concerning the interpretation or the validity of Community law, but also extend to cases
where a question of this kind is raised by the national court or tribunal itself which considers that
a decision thereon by the Court of Justice is ‘necessary to enable it to give judgment’.”\textsuperscript{31} It is also
part of the jurisprudence constante of the ECJ that “it is solely for the national court before which
the dispute has been brought, and which must assume the responsibility for the subsequent
judicial decision, to determine in light of the particular circumstances of the case both the need
for a preliminary ruling in order to enable it to deliver judgment and the relevance of the
question which it submits to the Court”\textsuperscript{32}

Hence, Cosmas seems to have overlooked the basic principle governing
preliminary references i.e. the prevailing discretion of the national court to refer a question.\textsuperscript{33} Had
he started from this principle, instead of starting with the limitations put by the Court on the
principle, his opinion might have been more persuasive and even might have encouraged the
Court to more thoroughly justify its admissibility ruling, by referring explicitly to its relevant
case-law.

\textsuperscript{30} Opinion of Advocate General Cosmas, supra note 23 at para.29.

\textsuperscript{31} Judgment of the Court of 16 June 1981, Maria Salonia v Giorgio Poidomani and Franca Baglieri, nee Giglio, Case 126/80, [1981] ECR 1563 at para. 7. Similarly, Judgment of the Court of 6 October 1982, Srl CILFITT and Lanificio di Gavardo SpA v Ministry of Health, Case 283/81, [1982] ECR 3415 at para. 9, where the Court holds that “a national court or tribunal may … refer a matter to the Court of Justice of its own motion”.


\textsuperscript{33} The term “discretion” itself is used by the Court. See Judgment of the Court of 10 March 1981, Irish Creamery Milk Suppliers Association and others v Government of Ireland and others; Martin Doyle and others v An Taoiseach and others, Joined Cases 36 and 71/80, [1981] ECR 735 at para. 7.
The reasoning of the Court is also undermined due to its reliance on a confusing argument: the similarity of the questions referred in both cases.\(^{34}\) This element can difficulty be considered as convincing or even as providing any useful help to a conclusion towards establishing the permissibility of the reference. On the contrary, it seems more persuasive to hold that if the question referred in one case is “in essence identical” to the question referred in a joined case whose admissibility is \textit{a priori} not disputed, this question will be answered in any event. In such circumstances, a ruling of inadmissibility of the first reference will not be detrimental to the referring court, since it will have an answer to its reference and since national courts are, in principle, bound by the interpretation given by the Court in a previous case.\(^{35}\) Hence, such an argument better favors the inadmissibility of the reference.

In any event, the ruling of the Court on the admissibility of the reference might be welcomed, but the importance of the reference and the negative position of the other actors involved in the proceedings deserved a better and higher quality response of the Court. On a broader level, a more thorough development of its reasoning would have helped to reinforce the weight of this precedent, and maybe prevent further criticisms that could be addressed to this ruling. Had the Court asserted its jurisdiction with greater reason, its response to the question of direct effect might have seen more appropriate. This part of the ruling leaves the impression that the Court was keen to express its unambiguous position as regards the question of direct effect of TRIPs.

The extreme willingness of the Court to answer the reference can also be seen from its holding relating to its jurisdiction to interpret Article 50(6) of TRIPs, which can be perceived as the “flip side of the coin.”

\section*{b. Jurisdiction of the Court to interpret Article 50 of TRIPs}

From its express wording, Article 234 appears to be the way for national courts to refer questions of Community law to the ECJ. Here, the references concerned the direct effect of Article 50(6) of TRIPs (in both cases), the jurisdiction of the Court to interpret Article 50 of TRIPs and the notion of intellectual property right under Article 50(1) of TRIPs (in case C-392/98). The possibility for the Court to answer the references implies that Article 50 of TRIPs is in some respect already part of Community law. We shall see that the answer that was given was not as obvious as the Court seems to have considered.

\subsection*{(i) The Judgment of the Court}

A question on the interpretation of Article 50 of TRIPs had already been submitted to the ECJ in \textit{Hermès}.\(^{36}\) However, it only partially resolved the issue of the jurisdiction of the Court to interpret provisions of TRIPs. In \textit{Hermès}, the District Court of Amsterdam referred for a preliminary ruling to the ECJ a question on the interpretation of the notion of “provisional measure” within the meaning of Article 50 of TRIPs, in the context of an action

\begin{itemize}
  \item \textit{Parfums Dior, supra} note 2 at para. 30.
  \item \textit{Supra}, note 15.
\end{itemize}
introduced by Hermès against FHT to protect its copyright and trade mark. The ECJ recalled that the WTO Agreements were concluded by both the Community and the Member States, without allocation of their respective obligations towards the other contracting parties. It recognized that the provisional measures envisaged by Article 50 of TRIPs are those provided for by the domestic law of the Member State concerned. It also noticed that a pre-existing Regulation on a Community trade mark similarly provides for the adoption of provisional measures – also to be provided for by the domestic law of the Member States. The Court then referred to Poulsen, which held that the Community must respect international law in the exercise of its powers and that consequently Community legislation must be interpreted in the light of the relevant rules of international law. It applied this rationale by analogy to the reference in Hermès since the Community is a party to TRIPs, that TRIPs applies to the Community trade mark, and as it is assumed that Community legislation respects the international obligations of the Community as embedded in TRIPs, the national courts referred to in the Regulation, when called upon to apply national rules for ordering provisional measures for the protection of rights arising under a Community trade mark, are required to apply these national rules “as far as possible in the light of the wording and purpose of Article 50” of TRIPs.

The Court concluded that it had “in any event, jurisdiction to interpret Article 50”. It was of no consequence that the main proceedings related to a Benelux rather than a Community trade mark: it had already been previously established that where a provision can apply both to situations falling within the scope of national law and concurrently to situations within the scope of Community law, it is in the Community interest, to forestall future differences of interpretation, that that provision should be interpreted uniformly, whatever the circumstances in which it is to apply. As Article 50 of TRIPs applies to the Community trade mark as well as to national trade marks, the Court concluded it had jurisdiction to rule on the question submitted.

In Parfums Dior, the Court relied on Hermès to ascertain its jurisdiction to rule on the references. The Court quoted its reasoning, mentioned above, on the jurisdiction of the Court to interpret Article 50 of TRIPs. The ECJ then referred to the obligation of close cooperation existing between the Member States and the Community institutions in the fulfillment of the commitments undertaken under joint competence. It took the position that Article 50 of TRIPs “constitutes a procedural provision which should be applied in the same way

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37 Hermès at para. 12-21.
40 At para. 9.
42 Hermès, supra note 15 at para. 32-33.
43 Parfums Dior, supra note 2 at para. 33-35.
44 Id. at para. 36, referring to Opinion 1/94, supra note 18 at para.106-109.
in every situation falling within its scope.” Since it “is capable of applying both to situations covered by national law and to situations covered by Community law”, it “requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation”.\textsuperscript{45} As only the ECJ in the context of Article 234 is in a position to ensure such uniform interpretation, the Court concluded that its jurisdiction to interpret Article 50 of TRIPs is not restricted solely to situations covered by trade mark law.\textsuperscript{46}

(ii) Comments

Although uncontroversial on its face, the reasoning of the Court is nevertheless not safe from critiques. The candid extension of the \textit{Hermès} thinking, “for practical and legal reasons”, might in fact produce major consequences, of which it is not certain that the Court was well aware.

It is true that the position of the Court was totally justified as far as Case C-300/98 is concerned, the main proceedings relating to an action for the protection of a trademark, i.e. the same factual context as in \textit{Hermès}. However, the issue was more problematic as far as Case C-392/98 was concerned. The main proceedings involved an action against the wrongful copying of an industrial design, which is a field in respect of which the Community has not yet exercised its competence and which thereby remains under the competence of the Member States.\textsuperscript{47} The opinion of Advocate General Cosmas demonstrates that it did not go without saying that the Court had jurisdiction to answer this reference.

\textit{a. Problematization of the Question by the Advocate General}

Cosmas analyzed the issue by looking at whether the Court can recognize its jurisdiction to interpret provisions of multilateral international agreements, such as TRIPs, when these provisions apply to fields in which the Community has not yet exercised its competence.\textsuperscript{48} He concluded from \textit{Opinion 1/94} that the Community competences in the field of TRIPs are still only potential for the Community, and actual for the Member States. As the main proceedings in Case C-392/98 involved an action in an area in which the Community has not yet exercised its competence, he concluded that, under these circumstances, the Community cannot be considered a party to TRIPs.\textsuperscript{49} Thus, the question of the jurisdiction of the Court becomes much more sensitive, especially since no element of Community law seems to be affected by the interpretation of Article 50 of TRIPs in the present case.\textsuperscript{50}

Cosmas then undertook a rapid overview of the pre-existing case-law of the Court on the interpretation of mixed agreements and concluded that the case-law relating to association agreements cannot be a decisive basis for a general theory on the jurisdiction of the

\begin{footnotes}
\footnote{\textit{Parfums Dior}, supra note 2 at para. 37.}
\footnote{Id. at para. 40.}
\footnote{Opinion of Advocate General Cosmas, supra note 23 at para. 33.}
\footnote{Id. at para. 31.}
\footnote{Id. at para. 33.}
\footnote{Id. at para. 35-36.}
\end{footnotes}
Court to interpret provisions of international agreements.\textsuperscript{51} Similarly, the reasoning of the Court in \textit{Hermès} did not allow the conclusion that the Court had recognized for itself an “unlimited competence” to interpret Article 50 of TRIPs.

He thus proceeded to analyze \textit{ab initio} the question of the Court’s jurisdiction in a context such as the one of the reference. He considered “three fundamental issues” raised by the possible jurisdiction of the Court in this case: the institutional balance between Community institutions and national authorities; the institutional balance between the Court and the other Community institutions; and the problem of uniform interpretation of TRIPs.

He held the issue of the institutional balance between Community and national authorities was not dispositive. On the issue of the institutional balance between the Court and the other Community institutions, Cosmas referred to \textit{Opinion 1/94} on the necessity not to circumvent internal procedural rules relating to harmonization by adopting an international agreement.\textsuperscript{52} He interpreted that decision as having for consequence that the Court should not grant to itself what it refused to the other Community institutions. By recognizing its jurisdiction to interpret a provision of TRIPs in a field in respect of which the Community has not yet legislated, the Court would determine a binding framework within which the future harmonization of intellectual property rights will have to take place.\textsuperscript{53} Since this interpretation would, by definition, take place before any legislative action has been entered into, it would constrain or even initiate the harmonization process and thereby circumvent the procedural rules specifically laid out in the Treaty, contrary to \textit{Opinion 1/94}.

The Advocate General then moved to the nexus of his argumentation: the issue of uniform interpretation of TRIPs. After having recalled some of the elements arguing in favor of the recognition of a general jurisdiction of the Court to interpret TRIPs,\textsuperscript{54} he considered them to result from a simplistic approach to the question.\textsuperscript{55}

He argued in favor of a restriction on the interpretative jurisdiction of the Court, so as to conclude that the Court has no competence to answer the questions referred to it by the Dutch Court in Case C-392/98. His main arguments were that there is no absolute necessity for the uniform application of international agreements within the Community, particularly since the

\begin{itemize}
\item \textsuperscript{52} Id. at para. 56.
\item \textsuperscript{54} Such as the difficulty which can arise when it has to be determined precisely whether a provision falls under Community law or only under national competence; the impracticality of interpreting the same provision on provisional measures differently depending on which substantial intellectual property right is at stake; the fact that for the other Contracting Parties to TRIPs the Community and its Member States represent a “unique entity” and that the Community is liable vis-à-vis third parties for all violations of the provisions, whoever infringes the Agreement; see Opinion of Advocate General Cosmas, \textit{supra} note 23 at para. 53-55.
\item \textsuperscript{55} Id. at para. 56.
\end{itemize}
nature of the WTO Agreements does not justify consistent interpretation and application as is the case for Community law, and that in any event the Court is not in the appropriate position to guarantee the “unity of international representation of the Community” vis-à-vis the other Contracting Parties to the WTO Agreements, since a ruling of the Court would not be sufficient to guarantee the coordination of a common action of the Community.

b. Position taken by the Court

Once again, it seems that the Advocate General was much more aware of the complexity of the question at stake than the Court, which, maybe willingly, relied on what may be considered to be obscure “practical and legal reasons” to give a uniform interpretation of Article 50 of TRIPs irrespective of its factual context. We will nevertheless try to determine what these reasons may be, and whether they could lead to any future evolution of the case-law of the Court.

Practical Elements underpinning the Reasoning of the Court

Several elements may be referred to as “practical” reasons that led the Court to recognize its jurisdiction.

First of all, Advocate General Cosmas seems to be mistaken when he tried to make a distinction between Article 50 of TRIPs depending on whether it is to be applied in a national or in a Community context. The consequence would be that the interpretation of a provision of TRIPs would vary depending on who would be responsible for its application, i.e. the Member States or the Community institutions. However, whatever the context, it remains one and the same provision, and the approach defended by Cosmas seems unworkable in practice. Even if it is true that the difficulties of “line-drawing” between Community and Member States competences are not sufficient to ground the jurisdiction of the Court, they represent an impracticality that cannot be ignored. Furthermore, as the notion of joint competences can best be understood from a dynamic perspective, such that the scope of Community competence can be broadened by expanding Community legislation, the institutions which would have to be considered competent to interpret a given provision of TRIPs would vary, both depending on the context in which this provision is to be applied – national or Community law – and on whether Community institutions preempted a new field of intellectual property rights. Such an attitude, which might lead to divergent interpretations over-time could difficultly be justified vis-à-vis the other Contracting Parties to TRIPs.

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56 Id. at para. 61.
57 Id. at para. 65-68.
58 Parfums Dior, supra note 2 at para. 37.
59 Opinion of Advocate General Cosmas, supra note 23 at para. 59.
60 Josef Drexel, supra note 19 at 31-36, esp. 35.
Secondly, there might be a cost to diverging interpretations, and a corresponding benefit from a centralized interpretation: it is preferable from a Community perspective that a dispute procedure started in the framework of the WTO, is directed against an interpretation of a provision by the ECJ rather than by a national court, in order to avoid the fragmentation of the legal obligations of the Member States. Further, it is also plausible that the ECJ is to be preferred to any other Community institution in order to interpret the provisions of TRIPs, even in fields in respect of which the Community has not yet legislated, since the mechanism of Article 234 is available and appropriate for such a purpose. The present case perfectly illustrates this point. Also, it seems that any mechanism whereby another institution would be required to give an interpretation would eventually be answerable to the ECJ, e.g. pursuant to an action under Article 230 EC.

Thirdly, the Court might have recognized its jurisdiction by a desire to promulgate “standards for the rest of the world”. A common attitude of countries with advanced economies within the EU towards the provisions of TRIPs could make it more difficult for countries with a lower level of intellectual property rights protection to justify their own, and potentially conflicting, interpretations of the Agreement.

Finally, the future developments of EU law might represent a fourth practical reason justifying the extension of the scope of Article 234 further than had already been done by Hermès. The Treaty of Nice made use of the provision of Article 133 EC paragraph 5, which envisaged, since the entry into force of the Treaty of Amsterdam, the possibility to extend the scope of Article 133 EC on common commercial policy, falling under the exclusive competence of the Community, to “international negotiations and agreements on [...] intellectual property”. While it is true that the Treaty of Nice was signed only on 26 February 2001, the process of amending the Treaty undertaken at Nice was considered as an example of transparency, as an overview of the evolution of the negotiations and draft versions of the Treaty were available on the Internet, already before the judgment was rendered. The IGC being an event of constitutional importance for the Community, it is logical to imagine that the Court kept itself informed of the evolutions of the negotiations. It might have been aware that TRIPs would eventually, once the Treaty of Nice would have been ratified and entered into force, be part of the common commercial policy and fall under the exclusive competence of the Community. Then, the Court would for sure have jurisdiction to interpret the provisions of TRIPs. In light of these future developments, the Court might have wish to take the initiative of a centralized

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63 Article 230 EC provides generally that the Court of Justice shall review the legality of the acts of the institutions. For further details, see e.g. Paul Craig and Gráinne de Búrca, supra note 22 at 453-489.
64 Armin von Bogdandy, supra note 62 at 668.
66 See Treaty of Nice, Article 2 para.8, amending Article 133 EC as amended by the Treaty of Amsterdam.
interpretation *ab initio*, in order to avoid future difficulties, such as the necessity to reconcile pre-existing divergent national positions.

**Legal Reasons Underpinning the Reasoning of the Court**

Several legal elements can also be identified as having led the Court to recognize its jurisdiction over the interpretation of Article 50 of TRIPs.

Firstly, the Court relied on what has been called “the Dzodzi line of cases”, which originated from the Court’s recognition of its jurisdiction to interpret what appeared formally to be a rule of national law but indeed was a rule of Community law rendered voluntarily applicable in national law by the Member States, or where a national rule assimilated the situation of own nationals otherwise not benefiting from the Community rules to the situation governed by Community law. The Court took the position that it “has jurisdiction to give preliminary rulings on questions concerning Community provisions in situations where the facts of the cases being considered by the national courts [are] outside the scope of Community law but where those provisions had been rendered applicable … by domestic law…”

This argumentation had already been subject to opposition when it was used in *Hermès*. It was said that the Court based its jurisdiction on an “implausible and over-broad ground”, using a jurisprudence allowing it to give a preliminary ruling whenever the interpretation of a legal norm is of possible relevance to EC law.

The critique is understandable, since TRIPs does not reproduce any Community law provision, and has even more force in the case at issue. First of all, a simple assimilation of the *Hermès* reasoning to the *Parfums Dior* situation should not have been done so lightly, especially if we remember that the factual context of Case C-392/98 was slightly different than in *Hermès*. Secondly because in ‘Dzodzi type of reasoning’, the uniformity of interpretation seems

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69 Id. at Annex 1, The Nature of reference in ‘the Dzodzi line of cases’.

70 Leur-Bloem, supra note 41 at para. 27.


72 Armin von Bogdandy, supra note 62 at 666; Steve Peers, supra note 71 at 191, arguing that the ECJ grounded its jurisdiction in *Hermès* on the argument that “all national measures which fall within the scope of Community law must be interpreted in the light of the Community’s international obligations, even when the national measures do not implement or affect Community law”.

73 Saulius Lukas Kaleda, supra note 68 at Annex 7, Relevance of ‘the Dzodzi principle’ to the interpretation of ‘mixed’ international agreements.

74 The main proceedings in *Hermès* related to the protection of a trade mark, field in respect of which the Community had already exercised its competence. The main proceedings in *Layher* related to the protection of an industrial design, field not yet covered by Community legislation.
to have been required by definition, whereas in the case of TRIPs, uniform interpretation by the Contracting Parties is only an aspiration, and not the starting point of the reasoning. Moreover, in the Dzodzi hypotheses, the jurisdiction of the Court to interpret the provisions of Community law to which national law referred was certain, whereas in the present case the question of the jurisdiction of the Court to interpret TRIPs should not be considered as an established fact. Finally, Dzodzi and its progeny relied on the prerequisite that the provisions at stake could be applied to situations falling under both Community and national law, whereas in Case C-392/98 there was no exercised competence of the Community relating to the subject-matter of that case. Thus, even if the existence of the Dzodzi precedent has been considered by the Court as being of consequence for its decision regarding its jurisdiction, it can be argued that it is far from being the most legally convincing argument.

Another legal reason that might have led the Court to extend its jurisdiction is the putting into practice of the obligation of cooperation between the Member States and the Community institutions, which it laid down in Opinion 1/94. The Court might have been echoing the lengthy explanations given by the Advocate General on how this cooperation should take place. The obligation of cooperation has been said to result from the requirement of unity in the international representation of the Community and the need to ensure the consistency of the Community’s external action. By accepting its interpretative jurisdiction in the present case, the Court might be wishing to extend the position it took in Opinion 1/94, which has been argued “not [to] provide any leverage to individual Member States at the WTO level”, in order to reinforce the appearance of the Community as a unique party to the Agreements. If the ECJ is to have jurisdiction over the interpretation of TRIPs provision, it is another element weakening the individual position of a Member State in the WTO, and thus at the same time reinforces the international standing of the Community.

Finally, the attitude of the Court can be illuminated by the evolution of the case-law since the origins. As Arnulf has noted, a possibility might present itself where the Court is faced with a case “with which it seems to have no specific power to entertain but where, if it declines jurisdiction, there is a real risk that the law will not be observed in the interpretation and application of the Treaties”. In the present case, the Court might have sought to avoid denying its jurisdiction, in order to prevent future conflicting interpretations of the TRIPs provisions, for which the Community might ultimately be held responsible, and as a result of which the law would not be observed. This would be an illustration of the idea that Article 220 EC, which

75 For all these arguments, see Opinion of Advocate General Cosmas, supra note 23 at footnote 31. On this last point, see however the argument supra on the difficulty of separating the interpretative competence of a provision depending on which entity is to be considered competent in the relevant field.
76 Parfums Dior, supra note 2 at para. 35.
77 Parfums Dior, supra note 2 at para. 36.
78 Opinion of Advocate General Cosmas, supra note 23.
81 Anthony Arnulf, Does the Court of Justice have inherent jurisdiction?, [1990] CMLRev (27) 683, 685.
provides that the Court shall ensure that in the interpretation and application of the Treaty the law is observed, impose[s] upon the Court an “overriding duty to ensure that “the law is observed” in particular cases, notwithstanding the absence of provisions expressly granting it jurisdiction to do so”

\[82\] the law is such a context being the TRIPs Agreement.

c. Prospects deriving from the Reasoning of the Court

The use of these legal and practical reasons not only serves as a ground for the reasoning of the Court, but also seems to help clarifying certain uncertainties that existed previously regarding the notion of joint competences. They might also be indicia of the coming of a new dawn in the case-law of the ECJ as regards Article 234.

First, the Court’s recognition of jurisdiction provides a useful element to help resolve the uncertainties that existed among scholars on the notion of joint competences of the Member States and Community institutions, as established by Opinion 1/94, as regards inter alia TRIPs. The holding of the Court relating to the joint competence for the conclusion of the WTO Agreements has been criticized for being “not totally consistent…” and ambiguous,\[83\] some parts of the opinion even being considered “legally unsound”,\[84\] maybe because it had been inspired by political rather than legal considerations.\[85\] Drexl tried to solve the inconsistencies of Opinion 1/94 by a dynamic understanding of the rules of competence: the scope of exclusive Community competence can be broadened by introducing secondary legislation that completely harmonizes particular intellectual property regimes; meanwhile, the Member States remain competent, but this last part is not a domaine réservé because it may be narrowed by subsequent Community legislation.\[86\] Parfums Dior seems to confirm this approach: as the competence of the Member States over TRIPs could be preempted by the Community at any time, a uniform interpretation of its provisions from the origin is to be welcomed, for all the legal and practical reasons stated above.

More interestingly, it seems that the position adopted by the Court might evolve towards a general obligation for all national courts faced with a question of interpretation of a TRIPs provision to refer it to the ECJ, whether they are to be considered as courts of last instance or not; and even if the wording of Article 234 requires only the courts against whose decisions there is no judicial remedy under national law to refer questions of inter alia interpretation of Community law to the ECJ. The existing case-law already obliged all courts to refer questions relating to the validity of Community acts to the ECJ.\[87\] A ‘new dawn’ or parallel evolution as regards the interpretation of TRIPs provisions could well be envisaged, since the line of reasoning used by the Court – the “practical and legal reasons” – appears broad enough

\[82\] Id. at 684.

\[83\] Josef Drexl, supra note 19 at 32-33.

\[84\] Julio A. Baquero Cruz, supra note 19 at 259.

\[85\] Pierre Pescatore, supra note 80 at 388.

\[86\] Josef Drexl, supra note 19 at 35.

to encompass whatever national court is ruling, whether its decisions are subject to appeal or whether they are final, and no matter which provision of TRIPs is under study.\footnote{It seems relevant to note that on the substance of the case, the Court held that it is for the Contracting Parties to specify whether a certain right is to be classified as an intellectual property right within the meaning of Article 50(1) of TRIPs. First of all, it allows the Court to avoid the danger indicated by Cosmas on the Court originating the harmonization process; and also to reach the same result as a denial of jurisdiction would have allowed: let the Member States determine the meaning of intellectual property right within TRIPs. More subtly it could show that the Court wanted to ascertain its jurisdiction \textit{in view of further developments}, and not because it thought it had a pressing necessity to give its interpretation of the notion of intellectual property right within the meaning of TRIPs.} \footnote{Similarly, see Geert A. Zonnekeyn, Mixed Feelings About the \textit{Hermès} Judgment, [1999] Intl Trade L. & Reg. 5(1) 20, at 23 who concludes, from an analysis of \textit{Hermès}, “that the TRIPs Agreement should be subject to a centralized interpretation by the ECJ.”} \footnote{Judgment of the Court of 5 February 1993, \textit{NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Netherlands Inland Revenue Administration}, Case 26/62, [1963] ECR 3.}\footnote{Id. at para. 10.}

After having admitted its jurisdiction to answer the reference, the Court logically proceeded to answer the first question referred, notably “whether Article 50(6) of TRIPs has direct effect”.\footnote{On the inadequacy of the use of the case-law referring to the direct effect of associations agreements or other bilateral treaties entered into by the Community to solve GATT-WTO issues, see \textit{supra} note 52.} \footnote{Judgment of the Court of 12 December 1972, \textit{International Fruit Company NV and other v Produktschap voor Groenten en Fruit}, Joined Cases 21-24/72, [1972] ECR 1219. More recently: Judgment of the Court of 5 October 1994, \textit{Federal Republic of Germany v Council of the European Union}, Case C-280/93, [1994] ECR I-4973 at para. 106ff.}

3. \textbf{The Possible Direct Effect of Article 50(6) of TRIPs}

The holding of the Court relating to the direct effect of Article 50(6) of TRIPs offers an interesting opportunity to analyze the impact of direct effect in Community law.

\textbf{a. The Position of the Court Towards Direct Effect of International Agreements}

\textit{(i) The Case-law of the ECJ}

Since the first declaration of direct effect by the ECJ, in \textit{Van Gend en Loos},\footnote{Judgment of the Court of 5 February 1993, \textit{NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Netherlands Inland Revenue Administration}, Case 26/62, [1963] ECR 3.} it has been made clear that it was rooted in the very nature and structure of the EC Treaty, a new legal order of international law, and that it was capable of conferring upon individuals rights which become part of their legal heritage.\footnote{Id. at para. 10.} The same concepts were used to deny the direct effect of the GATT 1947 provisions within Community law.\footnote{On the inadequacy of the use of the case-law referring to the direct effect of associations agreements or other bilateral treaties entered into by the Community to solve GATT-WTO issues, see \textit{supra} note 52.} The ECJ had traditionally held, ever since \textit{International Fruit},\footnote{Judgment of the Court of 12 December 1972, \textit{International Fruit Company NV and other v Produktschap voor Groenten en Fruit}, Joined Cases 21-24/72, [1972] ECR 1219. More recently: Judgment of the Court of 5 October 1994, \textit{Federal Republic of Germany v Council of the European Union}, Case C-280/93, [1994] ECR I-4973 at para. 106ff.} given the spirit, general scheme and the terms of the GATT, which is based on the principle of negotiations undertaken on ‘the basis of reciprocal and mutually advantageous arrangements’, and taking special account of the great flexibility its provisions\footnote{Confering a possibility of derogation, providing for measures to be taken when confronted with exceptional difficulties, and the settlement of conflicts to be given ‘sympathetic consideration’ by the Parties.} that it was not capable of conferring on citizens of the Community, as matter of Community law,
rights which they can invoke before the courts. However, this principle was subsequently tempered by the ECJ, when it held that the absence of direct effect as such did not prevent citizens, in proceedings before the Court, to rely on the provisions of GATT in order to obtain a ruling on the legality of the act of an institution of the Community, when the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly referred to specific provisions of GATT.

According to the Appellate Body of the WTO in Desiccated Coconut, "the WTO Agreement is fundamentally different from the GATT system." The position was thus taken that in respect of this arguable change of nature, the ECJ’s case-law refusing direct effect to GATT should be reconsidered. However, the Court refused to amend its case-law despite being offered several opportunities to do so. The ECJ was first able to avoid the issue, as in Hermès, where the question of the direct effect of TRIPs was referred directly to the ECJ, but where it could hold that “although the issue of direct effect of Article 50 of the TRIPs Agreement has been argued, the Court is not required to give a ruling on that question, but only to answer the question of interpretation submitted to it...” It could not ignore the question anymore in Portugal v. Council. The Court confirmed its previous GATT 1947 case-law, maintaining that “having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions.” The Court recognized the existence of a significant difference between the WTO Agreements and GATT 1947, but noted the still considerable importance of the negotiations between the parties. If national courts, through the recognition of direct effect, were refrained from applying rules of law inconsistent with the WTO Agreements, it would deprive the legislative or executive organs of the Contracting Parties of the possibility of entering into negotiated arrangements even on a temporary basis. Moreover, “the most important commercial partners of the Community” have concluded from the subject-matter and

99 See e.g. Frank Romano, International Conventions and Treaties, Global Trademark and Copyright 1998: Protecting intellectual property rights in the International Marketplace, [1998] PLI/Pat 547, 591-592; Josef Drexl supra note 19 at 47.
101 Hermès, supra note 15 at para. 35.
103 Id. at para. 47.
104 Id. at para. 36.
105 Id. at para. 40.
purpose of the WTO Agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law. The Court considered that the lack of reciprocity in that regard, in relation to the WTO Agreements which are based on reciprocal and mutually advantageous arrangements, may lead to disuniform application of the WTO rules. The adoption by the Community judicatures of the role to ensure that those rules comply with Community law would deprive the legislative or executive organs of the Community of the scope for maneuver enjoyed by their counterparts in the Community’s trading partners. The changes from the GATT 1947 to the WTO structure were not considered sufficient by the Court to warrant a reversal of its case-law denying their direct effect.

As far as TRIPs is concerned, the ECJ reaffirmed substantially the same case-law in Parfums Dior, where it referred to paragraphs 42-46 of the judgment in Portugal v Council, and applied them to the provisions of TRIPs. They “are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.” However, the Court found that the absence of direct effect in that sense of the TRIPs provisions could “not fully resolve the problem raised by the national courts”. It then recalled Hermès and the requirement, by virtue of Community law, for the judicial authorities of the Member States, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling in a field to which TRIPs applies and in respect of which the Community has already legislated, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs. The Court then added: “[o]n the other hand, in a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion.”

(ii) Comments

The first part of the holding of the Court – the interpretation in the light of the wording and purpose of Article 50 of TRIPs – seems quite classical, only confirming what had already been held in Hermès. The second part of the statement of the Court is more controversial, even if at first sight it seems trivial, as a simple declaration of a principle similar to the principle of “judicial subsidiarity”, which implies that the procedural autonomy of the national courts implementing Community law has to be respected. It has historically been stated by the Court

106 Id. at para. 43.
107 Id. at para. 46.
109 Portugal v Council, supra note 102 at para. 44.
that Community law “does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting individual rights conferred by Community law.”

It seems that the granting of direct effect to a particular provision can be such a procedure available for the purpose of protecting individual rights. It seems obvious that this principle of procedural autonomy of the Member States must all the more be respected in fields in which the Community has not yet legislated. The Court might just have made this point explicit, illustrating its statement in *Kupferberg* that “Community institutions which have the power to negotiate and conclude an international agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for a decision by the courts having jurisdiction in the matter, and in particular the Court of Justice within the framework of its jurisdiction under the Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community.”

However, it seems possible to argue that the attitude of the Court in *Parfums Dior* has a subtle but significant difference from its classical position. We have seen above that the Court recognized its jurisdiction to interpret the provisions of TRIPs in any circumstances, whether they are to be applied under national law or under Community law, for reasons that seem to be valid for generally all provisions of TRIPs. As a consequence the Court might thus have recognized the necessity for it to interpret all provisions of TRIPs. It is then difficult to see how the reference to *Hermès* can be conclusive.

Also, it has been considered that the question of direct effect is legally not different from any other question of interpretation. However, the Court refuses here to take a general position as regards the direct effect of the TRIPs provisions, leaving it to the Member States when the provisions fall under their field of competences. Thus, the attitude of the Court seems to be in contradiction with its previous recognition of its jurisdiction, and with the following part of the case, in which the Court gave an interpretation of the substance of the provision.

Moreover, it seems that the ECJ is sending mixed signals to the national courts when it holds that they are free to grant direct effect to Article 50(6) of TRIPs, if their national law entitles them to do so. The reasons for the Court to refuse to grant direct effect to the provisions of the WTO Agreements, i.e. the still important place for negotiations between Contracting Parties, the possibility to grant compensation in case the withdrawal of an illegal

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114 At para. 17. Italic from the author.


116 See opinion of Advocate General Cosmas, supra note 23 at para. 60. See also supra, *Kupferberg*.

117 Remember however that the holding of the Court also has for a result that the Member States are free to determine what is an ‘intellectual property right’ within the meaning of Article 50 of TRIPs. See supra note 88.
measure is not immediate, the necessity not to deprive legislative or executive organs of the Contracting Parties of the possibility to enter into negotiated arrangements, the fact that some Community’s trading partners do not recognize the direct effect of the WTO Agreements, are all reasons that can apply mutatis mutandis in the national legal orders of the Member States. They appear to be objective reasons applicable to all TRIPs provisions. The statement of the Court could generate confusion among the national courts as to what attitude they should adopt.\textsuperscript{118}

Finally, the attitude of the Court is even more provocative if we refer to the opinion of the Advocate General, who had tried to remind the Court of the reasons why the Court had refused to give direct effect to the provisions of the WTO Agreements in the first place. They related to general characteristics of these Agreements and he argued that it would be very difficult for national courts to opt for another solution.\textsuperscript{119} Advocate General Cosmas also warned the Court about the dangers of the ECJ and the national courts adopting different conclusions as regards the direct effect of the provisions of TRIPs.\textsuperscript{120} Indeed, “the whole implementation of the WTO law within the European Union would come under extreme strain, if some national courts directly applied it whereas other courts and particularly the Court of Justice maintained” its refusal of the direct effect. For this very reason the ECJ earlier asked Italian courts which applied the GATT directly to change their position,\textsuperscript{121} even if then the provisions at stake where falling under Community law. Nevertheless, the dangers of conflicting positions of national courts as regards direct effect even when TRIPs is to be applied as national law are evident. It is easy to imagine that different positions by the ECJ and among the national courts as regards direct effect of TRIPs could result in a different level of protection of different intellectual property rights throughout the Community, which could lead to distortions of traffic of goods and services and potentially damaging forum shopping. For example, if TRIPs was given direct effect by a national court, then holders of intellectual property rights might prefer to locate their products or resources in that particular country. In turn, they would be more inclined to secure the protection of their intellectual property in that country in the first instance. The ramifications of such variations in direct effect on a national basis could range from jeopardizing the free movement freedoms to the worst case scenario, whereby certain Member States may become intellectual property havens, which could segment the emerging common intellectual property market.

Moreover, the consequences of the dicta of the Court could become even wider, were a national Court to grant direct effect to a provision of TRIPs, when the Treaty of Nice will enter into force and the provisions of TRIPs fall under the exclusive competence of the Community. It is beyond the scope of this paper to analyze what position each of the Member

\textsuperscript{118} The confusion of the national courts might be enhanced if they recall the holding of the Court in \textit{Chiquita} that the features of GATT 1947 – which the Court seems to consider not so different from the current WTO Agreements, “preclude an individual from invoking provisions of the GATT before the national courts of a Member State in order to challenge the application of national provisions.” Judgment of the Court of 12 December 1995, \textit{Amministrazione delle Finanze dello Stato v Chiquita Italia SpA}, Case C-469/93, [1995] ECR I-4533 at para. 29.

\textsuperscript{119} Opinion of Advocate General Cosmas, \textit{supra} note 23 at para. 82.

\textsuperscript{120} Id. at para.60. The same position was adopted by the Commission in \textit{Hermès}; see Geert A. Zonnekeyn, \textit{supra} note 89 at 22.

\textsuperscript{121} Armin von Bogdandy, \textit{supra} note 62 at 669, referring to Judgment of the Court of 16 March 1983, \textit{Società Italiana per l'Odeotto Transalpino (SIOT) v Ministero dello Finanze}, Case 266/81, [1983] ECR 731.
State may take as regards the direct effect of TRIPs. It is sufficient to note that there appears to be a serious potential for detrimental conflict already. Germany has declared in its ratifying enactments that TRIPs will have direct effect.\textsuperscript{122} A judgment of the United Kingdom Patent Office Examiner held that TRIPs could not have direct effect.\textsuperscript{123} It seems difficult to imagine that the Court was not aware of these possible diverging national interpretations. It must be wondered what the Court was trying to achieve, by using such dicta, which recalled the national courts of their possibility to do what it had refused to do itself, i.e. recognize direct effect of certain TRIPs provisions.

Below, we will analyze the eventual consequences of diverging national positions once the provisions of TRIPs will fall under exclusive Community competence, since the question of direct effect has to be answered according to the constitutional rules of the entity that has been accorded external competence under the provisions of the Treaty.\textsuperscript{124}

b. A New Dawn For the Direct Effect of TRIPs?

Had the Court desired to prevent the Member States’ courts to grant direct effect to provisions of TRIPs, it could have easily ruled in favor of the absence of direct effect of the WTO Agreements in general, whether its provisions are to be applied in a national or a Community context. This ruling could have relied on the reasons basing the refusal of direct effect in the previous case-law of the ECJ, and the ‘necessity of uniform interpretation’ of the WTO Agreements. It is thus acceptable to think that the Court does not completely rule out the possibility of direct effect of TRIPs. This part of the paper will consider whether a convincing argument in favor of the direct effect of certain provisions of TRIPs could be made. It will then analyze what consequences such a national attitude could create when the provisions of TRIPs will fall under Community law, which as the case stands at present, does not recognize its direct effect.

(i) Some Arguments in Favor of a Certain Direct Effect of TRIPs

It is beyond the object of this case note to make an overall assessment of the arguments in favor and against the direct effect of the WTO Agreements in general, or TRIPs in particular. The present analysis will be limited to trying to determine whether a convincing argumentation can be elaborated to lead a national court to grant direct effect to TRIPs. This would help show that the Court might eventually be faced with the question of the possible withdrawing of the direct effect, once the ‘directly effective’ provision of TRIPs under national law will fall under Community law.


\textsuperscript{124} Josef Drexl, \textit{supra} note 19 at 23.
The recognition of the direct effect of certain provisions of the WTO Agreements is a very controversial subject. The arguments in favor of the non-recognition of direct effect seem compelling. However, it seems that some peculiarities of TRIPs could argue in favor of the recognition of direct effect. In his opinion in Hermès, Advocate General Tesauro presented convincing arguments in favor of the direct effect of Article 50(6) of TRIPs, relying mainly on the changes in scale and scope of the system as well as the nature and effectiveness of the dispute settlement mechanism. More specifically, TRIPs can also be considered as substantially different from GATT 1994, in that GATT addresses rules on international trade between nations, whereas TRIPs addresses private rights of individuals, as stated in the Preamble to TRIPs, rather than goods. Also, certain obligations of TRIPs mirror the provisions of other international conventions on intellectual property rights which can be relied upon directly before national courts. A sampling of TRIPs provisions which might have direct effect has even been established. These specificities could allow the initial limitation of the recognition of direct effect to certain TRIPs provisions. Such a limitation could facilitate the recognition of direct effect by national courts, which might be more inclined to recognize direct effect if it can be confined to TRIPs and if they can avoid a generalization to other WTO Agreements, such as GATT 1994.

However, the arguments in favor of recognizing the direct effect of, at the very least, certain TRIPs provisions should be counterbalanced. Even if rights protected by TRIPs are individuals rights, so are the ones ultimately protected by the GATT: private businesses are the ones mostly penalized when a Contracting Party decides not to abide by its WTO obligations. It is true however that the relationship between the individual and the provisions of TRIPs seems more intimate than between the individuals and the provisions of GATT. Still, the main argument used by the ECJ to refuse direct effect to provisions of the WTO agreement is the flexible dispute resolution system, which is unrelated to the more or less private nature of the rights concerned. In spite of this objection, there might be a possibility to recognize a certain direct effect to TRIPs.

125 Armin von Bogdandy, supra note 62 at 670, who recalls that “there are strong arguments for and against direct applicability”, and further recognizes that there is “almost unanimous political opposition to the direct application of the WTO law.”
127 Opinion of Advocate General Tesauro in Hermès, supra note 51. He first considered that the fact that the last recital in the preamble to Decision 94/800 by which the Community approved the agreements reached in the Uruguay Round, stating that they are not susceptible to being directly invoked in Community or Member States courts, is not susceptible from preventing the Court from coming to a different conclusion. See para. 23-25.
128 Id. at para. 28ff.
129 At recital 4: “Recognizing that intellectual property rights are private rights”, TRIPs Agreement, supra note 6.
130 Frank Romano, supra note 99 at 591.
132 Mark Miller, supra note 122 at 615-617.
It has been argued that the legal status of judicial decisions within the framework of an international agreement such as the WTO cannot as such be assimilated with the legal status of the agreement itself. Thus, the fact that the TRIPs Agreement as such has no direct effect does not necessarily mean that an adopted report of the Appellate Body of the WTO cannot have direct effect. The ECJ has already recognized that there were certain conditions under which it would be bound by the decisions of another court, independently of whether the agreement creating this Court would have direct effect or not. Also, since the WTO dispute settlement can be considered to be far more ‘juridified’ than the previous dispute settlement system under GATT 1947, it has been argued that the ECJ should consider itself bound by WTO panels or Appellate Body reports adopted by the WTO Dispute Settlement Body. They could be invoked before the ECJ in cases where it has been established that certain Community rules or practices are not in conformity with the WTO law and where the Community has been required to bring them into conformity. A ‘certain’ direct effect of certain TRIPs provisions could be recognized by some national courts in such a specific context, i.e. once they have been the object of a definite report by a WTO panel or the Appellate Body.

However, there are some controversies about the exact meaning of the Dispute Settlement Understanding rules in the WTO. On the one hand, they have been interpreted as giving a choice to conform or not to a final report of a panel or the Appellate Body. Even more, the mere fact that there is a dispute settlement should signal that there is no direct effect. Still, this conclusion seems to be a hasty one. For every rule there is, to a certain extent, a choice of respecting/implementing it or not, and more often than not there will be a dispute settlement procedure that will be engaged in case of non compliance. If this was a sufficient argument to prevent direct effect, then direct effect would not have been ‘discovered’ in the first place. For instance, in the European Union, a Member State can decide not to respect a rule, upon which the Commission might initiate a direct enforcement action against that Member State, as provided for in Article 226 EC. The EC Treaty also provides for the possibility of a Member State not complying with the ruling of the Court. However, the existence of such a mechanism did not prevent the recognition of the direct effect of some Treaty provisions.

On the other hand, it has been argued that the obligation to comply with WTO rules actually follows from the language of the DSU itself. Jackson is of the opinion that an adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice in order to make it consistent with the rules of the WTO Agreement and its annexes. The compensation or retaliation approach is only a fallback in the event of non compliance, while the DSU establishes a preference for an obligation to perform

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133 Geert A. Zonnekeyn, supra note 108 at 97.
134 Id. at 99-100, referring to Opinion 1/91, Draft Agreement relating to the creation of the European Economic Area, [1991] ECR I-6079 at para. 21, 27, 39-40.
135 Geert A. Zonnekeyn supra note 108 at 101.
136 Hereinafter, the “DSU”.
137 Alexander A. Caviedes, supra note 131 at 227.
138 See Article 228 EC.
139 See Van Gend en Loos, supra note 91.
the recommendation.\footnote{John H. Jackson, The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligations, [1997] Amer. J. Int'l L. (91) 60, at 60-61; in response to Judith Hippler Bello, The WTO Dispute Settlement Understanding: Less is More, [1996] Amer. J. Int'l L. (90) 416, who argued that “the WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas” and that “[t]he only truly binding WTO obligation is to maintain the balance of concessions negotiated among members.”} The compensation mechanism could even be perceived as a simple recognition of the binding effect of the report, an acknowledgement of the breach of WTO law.\footnote{Geert A. Zonnekeyn, supra note 108 at 103.} The eventual prevalence of this view could play a determinative role in the recognition of a certain direct effect of certain provisions of TRIPS. For instance, once such provisions have been interpreted in an adopted Appellate Body report and once a national provision has thus been definitely declared incompatible with TRIPS rules. Such a solution would have the advantage of avoiding the main problem raised by a simple and direct recognition of direct effect, which is the need to operate specific performance in order to remedy the breach of the rule. If direct effect is recognized only after a final decision of the Appellate Body has been adopted, it is likely that all flexible remedies have already been exhausted. The order of specific performance, as a remedy by a national court, would in such circumstances not infringe on the margin of maneuver of the non-complying State. Hence one of the essential reasons put forward by the ECJ to refuse direct effect would not be present anymore.

In such a context, and while remembering the specificities of TRIPs for the compliance of which individuals have a greater interest as compared to GATT, it seems that some national courts might recognize the direct effect of certain provisions of TRIPs. In support of this conclusion, we can refer to the Report of the Panel on Sections 301-310 of the US Trade Act of 1974, which states that “whether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute […] The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue.”\footnote{Report of the Panel of 22 December 1999, United States – Sections 301-310 of the Trade Act of 1974, 99/5454, WT/DS152/R, available at http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm.}

In such circumstances, when the TRIPs provisions will fall under Court competence and be subject to Community law, the ECJ will be faced with the issue of whether to ‘take back’ the direct effect that might have been awarded by some national courts to certain TRIPs provisions.

\textit{(ii) The ‘Taking Back’ of the Direct Effect}

It is realistic to consider, when we remember the reasons put forward by the ECJ to refuse direct effect to WTO Agreements, that by the time of the entry into force of the Nice Treaty, the Court will not have changed its position on the absence of direct effect of TRIPs. Given that national courts will most probably grant direct effect to certain TRIPs provisions under national law – as can already be perceived from the attitude of the Dutch courts in \textit{Parfums}
Dior, as well as in Hermès, which show themselves eager to recognize the direct effect of certain TRIPs provisions – the Court might be faced with a situation in which it will have to consider whether it can ‘take’ this direct effect back.

The eventual ‘taking back’ of the direct effect, with a consequent withdrawal of certain rights that were granted to individuals through the recognition of direct effect, as recognized by the Court in Van Gend en Loos,\(^{143}\) might at first sight be considered as a regressive step in the case-law of the Court, which has developed from the simple recognition of direct effect and primacy of Community law to the affirmation of their tangible consequences that can be found in what came to be known as the “second generation” case-law,\(^{144}\) granting individuals the right of access to a judge, equality in access to judicial protection, right to interim measures, possibility for a national court to apply on its own motion a provision of Community law, recovery of sums paid but not due, liability of the Member States for violation of Community law.\(^{145}\) The development of the case-law thus seems to have evolved towards always greater ‘rights’ that could derive from the EC Treaty and that were granted by the courts in order to protect the rights of the individuals. The withdrawal of direct effect could thus be interpreted negatively: as soon as the provisions of TRIPs will fall under Community competence, individuals will no longer be able to rely on them in front of their national courts in order to protect the rights they could derive from these provisions.

However, this \textit{a priori} opinion seems to result from an initial false impression. A closer study of the case-law and its evolution demonstrates that its does not differentiate so abruptly between norms that have direct effect and norms that do not, in order to ‘protect the rights of the individuals’. Most of the progressive case-law of the Court relies on the principle of primacy\(^{146}\) and the notion of ‘obligatory’ effect of the law.\(^{147}\) It is on this obligatory effect that the Court has based its case-law relating to the necessity of interpretation of national provisions “in the light of the wording and purpose”\(^{148}\) of the Community norm at stake, as well as the principle of liability of the Member States for violation of Community law,\(^{149}\) both crucially important means of protection for individual rights. Direct effect proved to be necessary only in cases in which the previous tools were not allowing to reach a satisfactory result, i.e. where only the substitution of the Community norm to the contrary norm of national law was necessary, for instance in a case in which the two norms were so diametrically different that an interpretation ‘in the light of the word and purpose’ did not allow to reach the result that the Community norm purported to impose.\(^{150}\) In such circumstances, the ‘taking back’ of the direct effect would not

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\(^{143}\) See \textit{supra} note 91 and the corresponding developments.

\(^{144}\) Denys Simon, \textit{supra} note 22 at 291.

\(^{145}\) For developments and examples of the case-law, see Denys Simon, \textit{supra} note 22 at 292-306.

\(^{146}\) As established by the ECJ in Judgment of the Court of 15 July 1964, \textit{Flaminio Costa v E.N.E.L}, Case 6/64, [1964] ECR 1141.

\(^{147}\) See Denys Simon, \textit{supra} note 22 at 307.


create a massive difference in the protection of individual rights by the ECJ, compared to the remedies that might have been available in front of a national court, since the supremacy of international norms over Community law has been recognized.

The ECJ has consistently held that the GATT 1947, and now the WTO provisions, are among the norms which have to be respected by the institutions in the exercise of their powers. Even if their invocability in order to control the validity of the act of an institution has not yet been recognized by the Court, it has been argued that, as Hermès has shown, and Parfums Dior confirms, the principle of consistent interpretation is a valuable substitute for direct effect. Moreover, the Court already substantially admitted to control the legality of the act of a Member State in regard of a provision of one of the GATT’s Agreements. It thus seems that the case-law might evolve towards an “interpretation in conformity” with the TRIPs provisions, and not only “as far as possible in light of its wording and purpose”. The taking back of the direct effect would thus be of no dramatic consequence, as ‘indirect effect’ already exists for TRIPs provisions.

Then again, in order not to blur the difference between direct effect of TRIPs, which is denied by the ECJ, and ‘indirect application’ of TRIPs provisions, there is a need for some basis ‘to be interpreted’ in the national/European provisions. Hence, the principle of consistent interpretation has its limits, which could only be overcome by the recognition of direct effect. In the case of non-existent internal provisions relating to a right guaranteed by TRIPs, or in case of a manifest conflict between the norm to be interpreted and the provisions of TRIPs, consistent interpretation will not lead to a satisfying result. However, regarding the consistent and persistent opposition of the ECJ to the direct effect of WTO Agreements, and the possibilities offered by indirect effect, it is highly probable that the mere possibility of being confronted with such a case will not be enough to prevent the Court from ‘taking back’ the direct effect that might have been granted by a national court. Therefore, whilst Parfums Dior appears to take two steps forward regarding Community recognition of the possibility for direct effect of TRIPs under national law, it may signal three steps back for the doctrine of Community direct effect.


151 Poulsen, supra note 39 at para. 9. This obligation is imposed by Article 300 EC, pursuant to which international agreements concluded by the Community are binding both on the Community institutions and the Member States.

152 See for instance Portugal v Council, supra note 102.

153 Geert A. Zonnekeyn, supra note 108 at 47.


155 For instance, see Geert A. Zonnekeyn, supra note 89, at 24. Recall also the Fediol and Nakajima case-law, supra notes 96 and 97.

156 Armin von Bogdandy, supra note 62 at 670.

157 Frédérique Berrod, supra note 51 at 448-450.
4. Conclusion

The recognition of direct effect for certain TRIPs provisions referring to rights of individuals should be a welcomed development and could be a useful tool to develop the acceptance of the world trading system by individuals, as well as to reinforce the protection of intellectual property rights’ holders within the Community. The Court’s recognition of the justiciability of TRIPs provisions is a promising movement in this direction. However, it has not gone so far as to give Community direct effect to the TRIPs provisions. The ECJ seems to be satisfied by the indirect effect of TRIPs for the time being.

In the longer term, much will depend on the manner in which we address the relationship between the individual and the international legal system. From Parfums Dior, it appears that the ECJ has already made its choice: the individual is sufficiently protected under Community law by the existing case-law, but dissatisfied Member States remain free to grant a higher level of protection. Whether the national courts will perceive the exercise of this freedom to be necessary remains to be seen.

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APPENDIX – ARTICLE 50 OF TRIPs

“1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

(a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods, immediately after customs clearances;

(b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant’s right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted inaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Member’s law so permits or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

…”
REFERENCES

Arnull Anthony, Does the Court of Justice have inherent jurisdiction?, [1990] CMLRev (27) 683.


