

European Court of Justice, 14 December 2000, Dior v Tuk and Assco v Layher



LITIGATION – DIRECT EFFECT

Jurisdiction

- [The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs is thus not restricted solely to situations covered by trade-mark law.](#)

Since Article 50 of TRIPs constitutes a procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law, that obligation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation. Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation. The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs is thus not restricted solely to situations covered by trade-mark law.

Direct effect

- [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.](#)

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 with the field of trade marks, it follows from the judgment in *Hermès*, in particular paragraph 28 thereof, that 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.

[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.](#)

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.

Interpretation

- [That Article 50 of TRIPs leaves to the Contracting Parties the task of specifying whether the right to sue under general provisions of national law concerning wrongful acts, is to be classified as an 'intellectual property right' within the meaning of Article 50\(1\) of TRIPs.](#)

That Article 50 of TRIPs leaves to the Contracting Parties, within the framework of their own legal systems, 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.

Source: curia.europa.eu

European Court of Justice, 14 December 2000

(G.C. Rodríguez Iglesias, C. Gulmann, A. La Pergola, M. Wathelet, V. Skouris, D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and F. Macken)

JUDGMENT OF THE COURT

14 December 2000 (1)

(Agreement establishing the World Trade Organisation - TRIPs Agreement - Article 177 of the EC Treaty (now Article 234 EC) - Jurisdiction of the Court of Justice - Article 50 of the TRIPs Agreement - Provisional measures - Interpretation - Direct effect)

In Joined Cases C-300/98 and C-392/98,

REFERENCES to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arrondissementsrechtbank 's-Gravenhage (Netherlands) (C-300/98) and the Hoge Raad der Nederlanden (Netherlands) (C-392/98) for preliminary rulings in the proceedings pending before those courts between Parfums Christian Dior SA

and

Tuk Consultancy BV (C-300/98)

and between

Assco Gerüste GmbH,

Rob van Dijk, trading as Assco Holland Steigers Plet-tac Nederland,

and

Wilhelm Layher GmbH & Co. KG,

Layher BV (C-392/98)

on the interpretation of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, as set out in Annex 1 C to the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward (Rapporteur), J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and F. Macken, Judges,

Advocate General: G. Cosmas,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Tuk Consultancy BV, by K.T.M. Stöpetie and M. van Empel, of the Amsterdam Bar (Case C-300/98),
- Assco Gerüste GmbH and Mr Van Dijk, by G. van der Wal, of the Brussels Bar (Case C-392/98),
- the Netherlands Government, by M.A. Fierstra, Head of the European Law Department in the Ministry of Foreign Affairs, acting as Agent (Case C-392/98),
- the French Government, by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and S. Seam, Foreign Affairs Secretary in the same directorate, acting as Agents (Case C-392/98),
- the Portuguese Government, by L.I. Fernandes, Director of the Legal Service in the Directorate-General for the European Communities of the Ministry of Foreign Affairs, and T. Moreira and M.J. Palma, Assistant Director-General and Lawyer respectively in the Directorate-General for International Economic Relations, acting as Agents (Case C-300/98),
- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, D. Anderson, Barrister (Case C-300/98), and M. Hoskins, Barrister (Case C-392/98),
- the Council of the European Union, by J. Huber and G. Houttuin, Legal Advisers, acting as Agents (Cases C-300/98 and C-392/98),
- the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, acting as Agent (Cases C-300/98 and C-392/98),

having regard to the Report for the Hearing,

after hearing the oral observations of Assco Gerüste GmbH and Mr Van Dijk, represented by G. van der Wal and G.A. Zonnekeyn, of the Brussels Bar; the Netherlands Government, represented by M.A. Fierstra; the Danish Government, represented by J. Molde, Head of Division in the Ministry of Foreign Affairs, acting as Agent; the Spanish Government, represented by N. Díaz Abad, Abogado del Estado, acting as Agent; the French Government, represented by S. Seam; the United Kingdom Government, represented by J.E. Collins and M. Hoskins; the Council, represented by G. Houttuin; and the Commission, represented by H. van Vliet, of its Legal Service, acting as Agent, at the hearing on 23 May 2000,

after hearing the [Opinion of the Advocate General](#) at the sitting on 11 July 2000,

gives the following

Judgment

1. The Arrondissementsrechtbank 's-Gravenhage (District Court, The Hague), by judgment of 25 June 1998, received at the Court on 29 July 1998 (C-300/98), and the Hoge Raad der Nederlanden (Supreme Court of the

Netherlands), by judgment of 30 October 1998, received at the Court on 5 November 1998 (C-392/98), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) one and three questions respectively on the interpretation of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter 'TRIPs'), as set out in Annex 1 C to the Agreement establishing the World Trade Organisation (hereinafter 'the WTO Agreement'), approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994 (OJ 1994 L 336, p. 1).

2. In Case C-300/98, the question submitted was raised in proceedings between the companies Parfums Christian Dior SA (hereinafter 'Dior') and Tuk Consultancy BV (hereinafter 'Tuk').

3. In Case C-392/98, the questions were raised in proceedings brought by Assco Gerüste GmbH and Mr Van Dijk (hereinafter jointly referred to as 'Assco') against Wilhelm Layher GmbH & Co. KG (hereinafter 'Layher Germany') and its subsidiary Layher BV (hereinafter 'Layher Netherlands').

Relevant provisions

4. The 11th recital in the preamble to Decision 94/800 states:

'Whereas, by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.

5. The first indent of Article 1(1) of that decision provides:

'The following multilateral agreements and acts are hereby approved on behalf of the European Community with regard to that portion of them which falls within the competence of the European Community:

- the Agreement establishing the World Trade Organisation, and also the Agreements in Annexes 1, 2 and 3 to that Agreement'.

6. Article 50 of TRIPs states:

'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 clearance;
- (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 a 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. The Final Act embodying the results of the Uruguay Round of multilateral trade negotiations and, subject to conclusion, the WTO Agreement were signed in Marrakesh (Morocco) on 15 April 1994 by the representatives of the Community and of the Member States.

8. Until 1 January 1975, protection against straightforward copying of products was afforded in the Netherlands by the general law, in particular the law relating to wrongful acts. These included Article 1401 of the Burgerlijk Wetboek (hereinafter 'the Civil Code'), replaced from 1 January 1992 by Article 162 of Book 6 of the Civil Code (hereinafter 'Article 6:162 of the Civil Code').

9. Until 1 January 1992, Article 1401 of the Civil Code provided:

'Where a wrongful act causes damage to another person, the person through whose fault the damage occurred shall be obliged to make it good.'

10. Since 1 January 1992, Article 6:162 of the Civil Code has provided, so far as relevant in the present case:

'1. Any person who commits a wrongful act in relation to another person which is attributable to him shall be required to make good the damage suffered by that other person as a result of the said act.

2. Any infringement of a right and any act or omission contrary to a legal obligation or to the requirements of unwritten law in social and economic life shall be considered to be a wrongful act, without prejudice in each case to the existence of a ground of justification.

3. A wrongful act may be attributed to its perpetrator if it is due to his fault or to a circumstance for which he

must answer by virtue of the law or views held by society.'

11. Article 289(1) of the Wetboek van Burgerlijke Rechtsvordering (hereinafter 'the Code of Civil Procedure') provides:

'In all cases where, having regard to the interests of the parties, an immediate interim measure is necessary as a matter of urgency, the application may be made at a hearing before the President on such working days as he shall fix for that purpose.'

12. In accordance with Article 290(2) of the Code of Civil Procedure, the parties may appear before the President under his 'voluntary jurisdiction' to grant interim measures. The applicant must then be legally represented at the hearing; the defendant may appear in person or be legally represented.

13. Under Article 292 of the Code of Civil Procedure, interim decisions are without prejudice to the decision in the substantive proceedings.

14. Finally, under Article 295 of the Code of Civil Procedure, an appeal against an interim decision may be brought before the Gerechtshof (Court of Appeal) within 14 days following its delivery.

Main proceedings

Case C-300/98

15. Dior is the proprietor of the trade marks for the perfumery products Tendre Poison, Eau Sauvage and Dolce Vita (hereinafter 'the Dior trade marks'), which have been the subject of various international registrations, in particular for Benelux. It markets its products in the European Community through a selective distribution system. Dior products carry prestige, and enjoy a luxury image.

16. Tuk sold and supplied perfume bearing the Dior trade marks to, amongst others, Digros B.V., a company established in Hoofddorp (Netherlands).

17. In the proceedings before the Dutch court, Dior submitted that Tuk had infringed the Dior trade marks by selling perfume bearing those marks, since the perfume had not been put on the market in the European Economic Area (hereinafter 'the EEA') by Dior or with its consent.

18. In the main proceedings Tuk showed that it had acquired some of the products concerned in the Netherlands, and therefore within the EEA. However, it appears that some of the perfume which it supplied to Digros BV came from outside the EEA.

19. The Arrondissementsrechtbank 's-Gravenhage considered that the main proceedings raised the issue of the direct effect of Article 50(6) of TRIPs, which entered into force in the Netherlands on 1 January 1996. It therefore decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'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?'

Case C-392/98

20. Layher Germany designs and manufactures various types of scaffolding, including one known as the 'All-

roundsteiger'. Layher Netherlands is the exclusive importer of the Allroundsteiger for the Netherlands.

21. Layher Germany patented its product in both Germany and the Netherlands. The patent expired on 16 October 1994 in Germany and on 7 August 1995 in the Netherlands.

22. Assco Gerüste GmbH manufactures a type of scaffolding known as the 'Assco Rondosteiger'. That product, whose interlocking assembly and measurement system is identical to that of Layher Germany's Allroundsteiger, is marketed in the Netherlands by Mr Van Dijk, who trades under the name of Assco Holland Steigers Plettaac Nederland.

23. On 14 March 1996 Layher Germany and Layher Netherlands applied to the President of the Rechtbank te Utrecht (Utrecht District Court, Netherlands) for interim measures prohibiting Assco from importing into the Netherlands, selling, offering for sale or otherwise trading in the Assco Rondsteiger as then manufactured.

24. The basis of their application was that Assco was acting wrongfully towards them in marketing a type of scaffolding which was a straightforward imitation of the Allroundsteiger. It appears that, under Netherlands law, the provisions of national law cited in paragraphs 10 and 11 above can be invoked to prevent wrongful copying of an industrial design.

25. The President of the Rechtbank te Utrecht granted the application. He also ruled that the period referred to in Article 50(6) of TRIPs was to be one year.

26. Assco appealed against that decision to the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal, Netherlands). By judgment of 9 January 1997 the Gerechtshof in substance upheld the interim decision, setting it aside only in so far as it fixed the applicable period under Article 50(6) of TRIPs.

27. Assco appealed on a point of law to the Hoge Raad der Nederlanden, which decided to stay proceedings and to refer the following three questions to the Court of Justice for a preliminary ruling:

'(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 where 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 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?'

28. The questions submitted by the two national courts raise three points, concerning respectively:

- the jurisdiction of the Court of Justice to interpret Article 50 of TRIPs and the conditions for exercising that jurisdiction (the first question in Case C-392/98);

- whether Article 50(6) of TRIPs has direct effect (the only question in Case C-300/98 and the second question in Case C-392/98); and

- the interpretation of the term 'intellectual property right' in Article 50(1) of TRIPs (the third question in Case C-392/98).

Admissibility of the reference for a preliminary ruling in Case C-300/98

29. The Council and the Commission, supported at the hearing by the Netherlands Government, have contested the admissibility of the reference in Case C-300/98 on the ground that the order for reference does not indicate why an answer to the question submitted is necessary in order to enable the national court to give judgment.

30. It appears, however, that in the main proceedings the national court, which was called upon to order interim measures pursuant to national law, found, first, that Article 50(6) of TRIPs imposes limits on the lifetime of such measures and, second, that those limits do not appear in the provisions of national law concerning the grant of interim measures. Its question is therefore designed to ascertain whether, under those conditions, it is required, when delivering judgment, to comply with the time-limits imposed by Article 50(6) of TRIPs. Besides, its question is in essence identical to the second question in Case C-392/98, whose admissibility is not disputed.

31. In those circumstances, the questions submitted in both cases should be answered. It is appropriate to deal with them in the order indicated in paragraph 28 above.

Jurisdiction of the Court to interpret Article 50 of TRIPs

32. The first question asked by the national court in Case C-392/98 is designed to ascertain whether the scope of the [judgment in Case C-53/96 Hermès v FHT \[1998\] ECR I-3603](#), relating to the jurisdiction of the Court of Justice to interpret Article 50 of TRIPs, is restricted solely to situations covered by trade-mark law.

33. TRIPs, which is set out in Annex 1 C to the WTO Agreement, was concluded by the Community and its Member States under joint competence (see Opinion 1/94 of 15 November 1994 [1994] ECR I-5267, paragraph 105). It follows that where a case is brought before the Court in accordance with the provisions of the Treaty, in particular Article 177 thereof, the Court has jurisdiction to define the obligations which the Community has thereby assumed and, for that purpose, to interpret TRIPs.

34. In particular, the Court has jurisdiction to interpret Article 50 of TRIPs in order to meet the needs of the courts of the Member States when they are called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under Community legislation falling within the scope of TRIPs (see Hermès, paragraphs 28 and 29).

35. Likewise, where a provision such as Article 50 of TRIPs can apply both to situations falling within the scope of national law and to situations falling within that of Community law, as is the case in the field of

trade marks, the Court has jurisdiction to interpret it in order to forestall future differences of interpretation (see *Hermès*, paragraphs 32 and 33).

36. In that regard, the Member States and the Community institutions have an obligation of close cooperation in fulfilling the commitments undertaken by them under joint competence when they concluded the WTO Agreement, including TRIPs (see, to that effect, Opinion 1/94, cited above, paragraph 108).

37. Since Article 50 of TRIPs constitutes a procedural provision which should be applied in the same way in every situation falling within its scope and is capable of applying both to situations covered by national law and to situations covered by Community law, that obligation requires the judicial bodies of the Member States and the Community, for practical and legal reasons, to give it a uniform interpretation.

38. Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation.

39. The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs is thus not restricted solely to situations covered by trade-mark law.

40. The answer to the first question in Case C-392/98 must therefore be 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 177 thereof, the Court of Justice has jurisdiction to interpret Article 50 of TRIPs.

Direct effect of Article 50(6) of TRIPs

41. By the second question in Case C-392/98 and the only question in Case C-300/98, the national courts seek in essence to ascertain whether, and to what extent, the procedural requirements of Article 50(6) of TRIPs have entered the sphere of Community law so that, whether on application by the parties or of their own motion, the national courts are required to apply them.

42. It is settled case-law that a provision of an agreement entered into by the Community with non-member countries must be regarded as being directly applicable when, regard being had to the wording, purpose and nature of the agreement, it may be concluded that the provision contains a clear, precise and unconditional obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in that regard, Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, paragraph 14, and Case C-162/96 *Racke v Hauptzollamt Mainz* [1998] ECR I-3655, paragraph 31).

43. The Court has already held that, having regard to their nature and structure, the WTO Agreement and the annexes thereto are not in principle among the rules in the light of which the Court is to review measures of the Community institutions pursuant to the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) (see

Case C-149/96 Portugal v Council [1999] ECR I-8395, paragraph 47).

44. For the same reasons as those set out by the Court in paragraphs 42 to 46 of the judgment in *Portugal v Council*, the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.

45. However, the finding that the provisions of TRIPs do not have direct effect in that sense does not fully resolve the problem raised by the national courts.

46. Article 50(6) of TRIPs is a procedural provision intended to be applied by Community and national courts in accordance with obligations assumed both by the Community and by the Member States.

47. In a field to which TRIPs applies and in respect of which the Community has already legislated, as is the case with the field of trade marks, it follows from the judgment in *Hermès*, in particular paragraph 28 thereof, that 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.

48. 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.

49. The answer to the second question in Case C-392/98 and the only question in Case C-300/98 must therefore be that:

- in a field to which TRIPs applies and in respect of which the Community has already legislated, 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, but

- 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.

Interpretation of the term 'intellectual property right'

50. The third question in Case C-392/98 is designed to ascertain 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.

51. Thus defined, the question falls into two parts. The first issue is whether an industrial design, such as that in question in the main proceedings, falls within the scope of TRIPs. If it does, it must then be determined whether the right to sue under general provisions of national law, such as those relied on in the main proceedings, in order to protect a design against copying constitutes an intellectual property 'right' within the meaning of Article 50 of TRIPs.

52. As regards the first issue, the national court has correctly pointed out that, according to Article 1(2) of TRIPs, the term 'intellectual property' in Article 50 refers to all categories of intellectual property that are the subject of Sections 1 to 7 of Part II of that agreement. Section 4 concerns 'industrial designs'.

53. Article 25 sets out the conditions for protection of an industrial design under TRIPs. Article 26 concerns the nature of the protection, possible exceptions and the duration of the protection.

54. It is for the national court to determine whether the industrial design at issue in the main proceedings satisfies the requirements laid down in Article 25.

55. As to the second issue, TRIPs contains no express definition of what constitutes an 'intellectual property right' for the purpose of that agreement. It is therefore necessary to interpret this term, which appears many times in the preamble and in the main body of TRIPs, in its context and in the light of its objectives and purpose.

56. According to the first recital in its preamble, the objectives of TRIPs are to 'reduce distortions and impediments to international trade, ... taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade'. In the second recital, the Contracting Parties recognise the need for new rules and disciplines concerning:

'...

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;

'...'

57. In the third and fourth recitals, the Contracting Parties recognise 'the need for a multilateral framework of principles, rules and disciplines dealing with interna-

tional trade in counterfeit goods' and the fact that 'intellectual property rights are private rights'.

58. Article 1(1), concerning the 'nature and scope of obligations', provides that members are to be free to determine the appropriate method of implementing the provisions of TRIPs within their own legal system and practice.

59. Article 62, which constitutes Part IV of TRIPs, entitled 'Acquisition and maintenance of intellectual property rights and related inter partes procedures', provides in the first and second paragraphs that the Contracting Parties may make the acquisition or maintenance of intellectual property rights conditional on compliance with reasonable procedures and formalities, including procedures for grant or registration. Such procedures are not, however, an essential requirement for the acquisition or maintenance of an intellectual property right within the meaning of TRIPs.

60. It is apparent from the foregoing provisions as a whole that TRIPs leaves to the Contracting Parties, within the framework of their own legal systems and in particular their rules of private law, the task of specifying in detail the interests which will be protected under TRIPs as 'intellectual property rights' and the method of protection, provided always, first, that the protection is effective, particularly in preventing trade in counterfeit goods and, second, that it does not lead to distortions of or impediments to international trade.

61. Legal proceedings to prevent alleged copying of an industrial design may serve to prevent trade in counterfeit goods and may also impede international trade.

62. It follows that a 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 may qualify as an 'intellectual property right' within the meaning of Article 50(1) of TRIPs.

63. It follows from all of the foregoing considerations that the answer to the third question in Case C-392/98 must be that Article 50 of TRIPs leaves to the Contracting Parties, within the framework of their own legal systems, 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.

Costs

64. The costs incurred by the Netherlands, Danish, Spanish, French, Portuguese and United Kingdom Governments and by the Council and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decisions on costs are a matter for those courts.

On those grounds,

THE COURT

in answer to the questions referred to it by the Arrondissementsrechtbank 's-Gravenhage by judgment of 25

June 1998 and the Hoge Raad der Nederlanden by judgment of 30 October 1998, hereby rules:

1. 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 the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), as set out in Annex 1 C to the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994, and a case is brought before the Court of Justice in accordance with the provisions of the EC Treaty, in particular Article 177 thereof (now Article 234 EC), the Court of Justice has jurisdiction to interpret Article 50 of the TRIPs Agreement.

2. In a field to which the TRIPs Agreement applies and in respect of which the Community has already legislated, 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 the TRIPs Agreement.

In a field in 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 the TRIPs Agreement or that it should oblige the courts to apply that rule of their own motion.

3. Article 50 of the TRIPs Agreement leaves to the Contracting Parties, within the framework of their own legal systems, 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 the TRIPs Agreement.

OPINION OF ADVOCATE GENERAL COSMAS

delivered on 11 July 2000 (1)

Joined Cases C-300/98

Parfums Christian Dior SA

v

Tuk Consultancy BV

(Reference for a preliminary ruling from the Arrondissementsrechtbank 's-Gravenhage)

and C-392/98

Assco Gerüste GmbH and R. van Dijk

v

Wilhelm Layher GmbH & Co. KG and Layher BV
(Reference for a preliminary ruling from the Hoge Raad der Nederlanden)

(Interpretation of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) annexed to the Agreement establishing the World Trade Organisation (WTO) - Jurisdiction of the Court of Justice - Rights other than trade-mark rights - Community competence not exercised - Direct effect)

I - Introduction

1. In the references for a preliminary ruling made in the present case pursuant to Article 177 of the EC Treaty (now Article 234 EC), the Arrondissementsrechtbank 's-Gravenhage (District Court, The Hague, the Netherlands) and the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) have submitted questions on the interpretation of Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter 'TRIPs') which constitutes Annex 1 C to the Agreement establishing the World Trade Organisation (hereinafter 'the WTO'), approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994. (2) In particular, the Court is asked to rule on the meaning of 'intellectual property right' referred to in Article 50(1) of TRIPs. However, before giving that interpretation, it is asked to rule whether it has jurisdiction in the present case to interpret Article 50 of TRIPs and whether Article 50(6) of TRIPs has direct effect.

II - Legal background

A - Provisions of TRIPs

2. The Agreement establishing the WTO and the TRIPs Agreement concluded within its framework are familiar to the Court as a result of previous cases in which questions have been raised concerning the interpretation of their provisions. (3)

3. In so far as material, Article 50 of TRIPs, whose interpretation the national courts seek, provides:

'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 clearance;

(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 a demonstrable risk of evidence being destroyed.

...

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 af-

ter the notification of the measures, whether these measures shall be modified, revoked or confirmed.

...

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.

...'

B - Community provisions

4. In order to ensure the smooth functioning of the internal market, Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (4) approximated the design protection laws of the Member States.

5. The fifth recital in the preamble to the directive states: '... it is unnecessary to undertake a full-scale approximation of the design laws of the Member States, and it will be sufficient if approximation is limited to those national provisions of law which most directly affect the functioning of the internal market; ... provisions on sanctions, remedies and enforcement should be left to the national law ...'.

6. In addition, the seventh recital states: '... this Directive does not exclude the application to designs of national or Community legislation providing for protection other than that conferred by registration or publication as design, such as legislation relating to unregistered design rights, trade marks, patents and utility models, unfair competition or civil liability'.

7. Finally, Article 16 of the directive provides:

'The provisions of this Directive shall be without prejudice to any provisions of Community law or the law of the Member State concerned relating to unregistered design rights, trade marks or other distinctive signs, patents and utility models, typefaces, civil liability or unfair competition.'

III - Facts and questions submitted for a preliminary ruling

A - Case C-300/98

8. Parfums Christian Dior SA (hereinafter 'Dior') holds the trade marks for Tendre Poison, Eau Sauvage and Dolce Vita perfumes, by virtue of international registrations which were effected, including for Benelux, on the basis of the data submitted in each case.

9. Dior distributes its products within the European Community via an exclusive system of selected sales outlets. Dior products have a reputation for being prestigious, luxury products; that is also reflected in the advertising for those products.

10. Tuk Consultancy BV (hereinafter 'Tuk') sold and supplied perfumes bearing the Dior marks to inter alia Digros BV which is established in Hoofddorp.

11. In the main proceedings, which are interlocutory proceedings, Dior claimed that Tuk should cease selling any products bearing the Dior trade mark which

have not been put into circulation in the European Economic Area (hereinafter 'the EEA') either by or with the consent of Dior, with a penalty for non-compliance; it also made other related claims.

12. As noted in the order for reference, Dior submitted that Tuk had infringed its trade-mark rights by selling perfume bearing the Dior trade mark, since the perfumes in question had not been put on the market within the EEA by, or with the consent of, Dior. By producing a chartered accountant's report, Tuk demonstrated that it obtained the perfumes at issue in the Netherlands and, therefore, within the EEA. The mere fact that Tuk bought the perfumes in the Netherlands did not however mean that those perfumes had been put on the market in the EEA by, or with the consent of, Dior. Finally, the parties argued at length as to who should bear the burden of proving whether the perfumes at issue were put on the market by Dior within or outside the EEA.

13. In a provisional ruling, the President of the referring court considered first of all that, in a case such as the present one, a distinction should be drawn between, on the one hand, the question whether Tuk is infringing Dior's trade-mark rights (which it is not at liberty to do) and, on the other, the question whether Tuk is breaching Dior's exclusive distribution system (which it is quite at liberty to do). Then, referring to the principle of exhaustion of rights within the Community, he considered how far a participant in commercial transactions must go in order to avoid selling goods which, although put on the market with the consent of the trade-mark holder, have not been put onto the market in the EEA with his consent. Finally, the President of the referring court concluded that, in view of the fact that the origin of the perfumes was established in the present case, that it had been demonstrated to the satisfaction of the court that the perfumes at issue were purchased within the EEA and supplied to Tuk from within the EEA, and that Tuk could not tell from the goods themselves that they were intended for the market outside the EEA, no general prohibition should be imposed on Tuk for the time being; however, there was no reason not to grant the injunction prohibiting Tuk from selling Dior products - bearing the Tendre Poison, Eau Sauvage and Dolce Vita trade marks - unless it purchased and obtained them from suppliers established within the EEA, who confirmed to it in writing that they had obtained the goods in question from within the EEA.

14. Next, the President referred of his own motion to Article 50(6) of TRIPs, observing that the question whether that article had direct effect was at issue. He noted that in *Hermès* (5) the Court of Justice had ruled that the measure taken in interlocutory proceedings in the Netherlands constituted a 'provisional measure' within the meaning of Article 50(6) of TRIPs, but the Court did not address the question of the direct effect of that provision. For that reason, the President of the national court considered that a question should be submitted to the Court of Justice for a preliminary ruling pursuant to Article 177 of the Treaty, before he gave final judgment.

15. In light of the above and after declaring that the apportionment of costs should be decided on at the time of the final judgment, the President of the referring court, ruling in the interlocutory proceedings:

- ordered Tuk not to sell any Dior products bearing the Tendre Poison, Eau Sauvage and Dolce Vita trade marks, in so far as it did not obtain them from independent suppliers which confirmed to it in writing that they had obtained those products from within the EEA;
- ordered Tuk to demonstrate, on a mere request to do so by Dior's legal adviser, that those conditions had been satisfied, either by sending the aforementioned statements from its suppliers to the adviser in confidentiality (if the adviser agreed to confidentiality) or by producing a statement in that regard from a chartered accountant (if Dior was prepared to bear the related costs);
- declared the judgment to be provisionally enforceable;
- asked the Court of Justice of the European Communities to rule, under Article 177 of the Treaty, on the following question:

'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?'

B - Case C-392/98

16. Wilhelm Layher GmbH & Co. KG (hereinafter 'Layher Germany') designs and manufactures scaffolding including that known as the 'Allroundsteiger'. (6) Layher Netherlands (hereinafter, together with Layher Germany, 'Layher'), a subsidiary of Layher Germany, is the exclusive importer of Allroundsteiger scaffolding for the Netherlands.

17. In 1974 the German patent office granted a patent to Eberhard Layher for the assembly system of Allroundsteiger scaffolding. The patent expired on 16 October 1994. On 8 August 1975, Eberhard Layher applied in the Netherlands for a patent on 'a scaffolding system' ('steigersysteem') claiming a right of priority on the basis of the German patent. The Netherlands patent issued following this application expired on 7 August 1995.

18. Mr Van Dijk, who trades under the name 'Assco Holland Steigers Plettac Nederland', markets in the Netherlands a scaffolding system manufactured by Assco Gerüste GmbH (hereinafter 'Assco Germany' or, together with Assco Holland Steigers Plettac Nederland, 'Assco') known as the 'Assco Rondosteiger'. The assembly system and dimensions of the latter are identical to those of Layher's Allroundsteiger scaffolding.

19. When Layher Germany realised that the Assco Rondosteiger was basically an identical copy of Layher's Allroundsteiger, it brought an action against Assco Germany and two of its directors before the Landgericht Köln (Cologne Regional Court) seeking, in essence, an injunction prohibiting them from offering for sale or marketing within Germany scaffolding and/or scaffolding components equipped, in short, with the same assembly system as that of Layher. By judgment of 27 June 1996, the Landgericht granted that

application; on appeal the judgment was upheld by a decision formulated in slightly different terms.

20. Layher wanted to obtain a similar judicial ruling in the Netherlands. Accordingly, in interlocutory proceedings before the President of the Rechtbank te Utrecht (Utrecht District Court) it requested an injunction prohibiting Assco, with the imposition of a periodic penalty payment in the event of non-compliance, from importing into the Netherlands or selling, offering for sale or marketing in any way whatsoever within the Netherlands the Assco Rondosteiger, in the form in which it was then manufactured, or its components.

21. Layher based its application on the fact that Assco was acting wrongfully towards it by marketing a scaffolding system which was an exact copy of the Allroundsteiger. It should be noted that, as indicated in the order for reference, under Netherlands law protection of an industrial design not protected by an exclusive right under the uniform Benelux Law on designs (7) may be based on the general provisions of the Burgerlijk Wetboek (Netherlands Civil Code) on wrongful acts (Article 1401 et seq. of the Civil Code until 1 January 1992; thereafter, Articles 6 and 162 et seq. of the Civil Code).

22. The President of the Rechtbank, in essence, granted the above application. In so doing he ruled that, in so far as might be necessary, the period referred to in Article 50(6) of TRIPs was one year.

23. Assco appealed against the above decision to the Gerechtshof te Amsterdam (Amsterdam Regional Court of Appeal) contesting inter alia the ruling of the President of the Rechtbank that a period of one year was to be considered reasonable within the meaning of Article 50(6) of TRIPs. Layher countered that the interlocutory proceedings in question could not be considered a 'provisional measure' within the meaning of that provision. The Gerechtshof considered that plea to be a cross-appeal, which it held well-founded. Ruling on the main appeal and the cross-appeal, it set aside the decision made by the President of the Rechtbank in so far as it set at one year the period referred to in Article 50(6) and, ruling on the main appeal, upheld the remainder of the President's decision.

24. Assco appealed on a point of law against that ruling to the Hoge Raad der Nederlanden which, in order to decide the appeal, stayed proceedings and submitted the following questions to the Court for a preliminary ruling:

'(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 where 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 to unfair 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?"

IV - Reply to the questions submitted for a preliminary ruling

25. I will analyse the substantive matters raised in the questions submitted for a preliminary ruling by the national courts (B) after first examining whether the question submitted for a preliminary ruling in Case C-300/98 is admissible (A).

A - The admissibility of the question submitted for a preliminary ruling in Case C-300/98

26. As regards the relevance of questions submitted for a preliminary ruling, the Court has ruled that 'it has 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'. (8)

27. In this connection, it should be noted 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'. (9)

28. As the Council and the Commission note in their written observations, it appears that the question submitted for a preliminary ruling by the national court in Case C-300/98 is not objectively required in order to settle the dispute in that action. Moreover, the order for reference does not explain how the Court's reply to the question submitted for a preliminary ruling may affect the decision in the interlocutory proceedings at issue.

29. The order for reference relates to judicial proceedings which are concerned with trade-mark law, but it cannot in any way be inferred that those proceedings may be connected with questions as to the interpretation and direct effect of Article 50(6) of TRIPs. In particular, it is not apparent from the information supplied by the national court that any question was raised in the course of the proceedings with regard to defining the period of time within which the defendant company could request the setting aside of the provisional measures adopted. Moreover, the order for reference makes it clear that the question was submitted for a preliminary ruling by the referring court of its own motion without any prior request or submissions by the parties in that regard. Finally, in view of the fact that, in the interlocutory proceedings in the main case, the national court has already examined the forms of order sought by Dior and given a final ruling on their substance, declaring its judgment provisionally enforceable, while at the same time ruling that costs should be apportioned at the time of the (formal) final judgment, there is nothing to indicate whether and precisely how the reply to the question referred for a preliminary ruling could affect the decision of the national court. In other words, the Court is lacking all the factual and legal details required to enable it to give a useful reply to the question referred for a preliminary ruling.

30. In light of the above, I consider that the request submitted by the Arrondissementsrechtbank 's-Gravenhage for a preliminary ruling in Case C-300/98 is inadmissible.

B - The substance of the questions submitted for a preliminary ruling

(a) The jurisdiction of the Court of Justice to interpret Article 50 of TRIPs when that article is applied to areas where no Community competence has been exercised (first question in Case C-392/98)

31. In the first question referred for a preliminary ruling in Case C-392/98, the national court essentially asks whether the Court of Justice has jurisdiction to interpret Article 50 of TRIPs where the provisions of that article are to be applied not to provisional measures designed to prevent the infringement of a trade mark but to provisional measures which, as is the case in the main proceedings, are designed to protect an industrial design from copying on the basis of general rules concerning wrongful acts, particularly those relating to unfair competition. As I shall examine below, the Court is required in essence to rule whether it is legitimate and proper for it to accept jurisdiction to interpret the provisions of multilateral international agreements, such as TRIPs, where those provisions are applied to areas in which no Community competence has yet been exercised. This is a complex question in which the general problem of the interrelationship of international, Community and national legal orders meets the regulation of institutional relations between the Court and the other Community institutions and national authorities.

32. First of all, it should be noted that TRIPs is a mixed agreement for the conclusion of which the Community and the Member States were jointly competent. That was expressly held by the Court in Opinion 1/94 (10) in which it refused to accept exclusive Community competence under Article 113 of the EC Treaty (now, after amendment, Article 133 EC) on the grounds that, apart from those of its provisions which concern the prohibition of the release into free circulation of counterfeit goods, TRIPs does not fall within the scope of the common commercial policy. (11) At the same time, the Court noted in Opinion 1/94, first, that the harmonisation achieved within the Community in certain areas covered by TRIPs is only partial and that, in other areas, no harmonisation has been envisaged (12) and, second, that the Community institutions have not hitherto exercised their powers in the field of the 'enforcement of intellectual property rights', except in Regulation No 3842/86 laying down measures to prohibit the release for free circulation of counterfeit goods. (13) In other words, those powers are still potential as far as the Community institutions are concerned and actual as far as national bodies are concerned.

33. In Case C-392/98 the requested interpretation of Article 50 of TRIPs in respect of provisional measures to protect against the copying of an industrial design which are adopted in accordance with civil law on the basis of general rules relating to wrongful acts, particularly those relating to unfair competition, relates to an

area in which the Community has not yet in fact exercised its (potential) power internally; in other words, an area which in principle remains within the competence of the Member States.

34. Directive 98/71 (14) which entered into force (on 17 November 1998) (15) after the facts in the main proceedings occurred, (16) does not in any event contain provisions relating to the adoption of provisional measures such as the provisions introduced by Article 50 of TRIPs. As indicated in the fifth recital in the preamble to that directive (17) and as the Council accurately notes in its written observations, the subject-matter of Article 50 of TRIPs is not covered by the harmonisation of the law on designs so that its practical implementation remains in principle within the competence of the Member States.

Moreover, protection against the copying of an industrial design which is afforded in accordance with civil law on the basis of general rules relating to wrongful acts, particularly those relating to unfair competition, falls outside the scope of Directive 98/71. In particular, it follows from the seventh recital in the preamble to that directive (18) and Article 16 thereof (19) that protection of designs by means of provisions relating to civil liability and unfair competition does not fall within the scope of the harmonisation of national legislation introduced by that directive.

35. As Community law now stands, it therefore appears that the Community is not to be regarded as party to provisions of TRIPs, such as those of Article 50, when they concern provisional measures to protect against the copying of an industrial design that are adopted in accordance with civil law and on the basis of general rules relating to wrongful acts, particularly those relating to unfair competition. (20) No provision of Community law appears to be affected by the interpretation and application of Article 50 of TRIPs in the instant case.

36. In view of the above findings, can it be accepted that the Court has jurisdiction to interpret provisions of mixed agreements, such as Article 50 of TRIPs, where those provisions are applied to areas in which no Community competence has yet been exercised?

37. Following a large number of cases in which the Court interpreted provisions of mixed agreements without making it clear whether its jurisdiction was based on the fact that the provisions in question definitely fell within the Community's competence or on the fact that its jurisdiction extends to all the provisions of mixed agreements, (21) the question was raised directly by Advocate General Darmon in *Demirel*, (22) a case concerning the interpretation of provisions of the association agreement between the EEC and Turkey in which certain governments had objected that the Court lacked jurisdiction in respect of provisions relating to the free movement of workers since they considered those provisions to fall within the specific competence of the Member States. In particular, Advocate General Darmon stated that the Court's case-law 'is quite plain as regards the Community character of the obligation imposed on Member States to comply with the external

agreements concluded by the Community and as regards the role assigned to the Court, within the framework of its jurisdiction, of interpreting their provisions with a view to their uniform application. The case-law does not, however, lay down any criteria for determining jurisdiction, nor does it expressly exclude the possibility that a provision inserted in a mixed agreement might, by reason of its inherent nature or an express reserve contained therein, lie outside the Court's interpretative jurisdiction'. (23)

38. In its judgment in *Demirel*, the Court accepted interpretative jurisdiction, relying on the particular nature of association agreements. (24) However, it is in no way clear that the criterion based on the subject-matter of the agreement and on the prospect of accession to the Community, which establish the particular institutional nature of association agreements, can serve as a basis for formulating a general theory - a possibility which Advocate General Darmon moreover expressly sought to avoid in his Opinion in *Demirel* (25) - or be transposed to multilateral agreements such as TRIPs. (26)

39. The inappropriateness of such a transposition was also essentially recognised by Advocate General Tesouro who returned to the question in his Opinion in *Hermès*; (27) arguing that it is lawful to grant the Court jurisdiction in respect of TRIPs provisions relating to areas for which the Member States retain competence, he restricted himself to certain arguments derived from the case-law in *Demirel* which related to not recognising the Court's interpretative jurisdiction where the Member States retain exclusive competence and to Community responsibility for all the provisions of mixed agreements.

40. However, the Court failed to deal definitively with the matter in *Hermès* either, as a result of which the Hoge Raad der Nederlanden was obliged in the present case to submit the relevant question for a preliminary ruling. Specifically, in order to establish its jurisdiction, the Court relied, first, on the fact that Article 99 of Council Regulation No 40/94 of 20 December 1993, (28) concerning the safeguarding of rights arising from a Community trade mark, authorises the adoption of 'provisional, including protective, measures', (29) meaning that Community competence has essentially been exercised and, second, on previous case-law to the effect that where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply. (30) Reliance on that case-law essentially allowed the Court to find that Community competence had been exercised in the case in question; consequently, contrary to the arguments of Assco and the United Kingdom in their written observations on the above points of the judgment in *Hermès*, it cannot be concluded that the Court ruled that it has unlimited jurisdiction to interpret Article 50 of TRIPs and, therefore, also has interpretative jurisdiction in the

present case. (31) However, on the basis of the grounds of the judgment in *Hermès*, it equally cannot be stated with certainty - even by reasoning a contrario - that the Court disclaimed all interpretative jurisdiction in areas not concerned with protection of the Community trade mark and, in more general terms, relating to (potential) Community powers not yet exercised.

41. Since, therefore, in the circumstances of the present case, the question whether the Court has interpretative jurisdiction has not been settled in the case-law, three fundamental aspects of the matter should be examined in order to decide that question: (aa) the institutional balance between Community and national authorities; (ab) the institutional balance between the Court and the other Community institutions; and (ac) the issue of the uniform application of TRIPs. The analysis of those aspects appears in the end to exclude in the present case the Court's having interpretative jurisdiction, while justifying a finding that certain obligations are owed by national courts (ad).

(aa) The institutional balance between Community and national authorities

42. Extending the Court's interpretative jurisdiction to TRIPs provisions relating to areas in which no Community competence has yet been exercised appears to encroach upon the competence of national authorities. Given that, for those specific areas, Community competence is only potential and, therefore, the Member States may still introduce their own rules, if the Court were to give a centralised and binding interpretation of the provisions in question with regard to all the areas covered by the relevant rule, an interpretation which would doubtless also determine the way in which those provisions are applied, that would constitute a manifest breach of the current division of powers between Community and national authorities. Indeed, there appears to be no justification at all for requiring the national courts or even national administrative authorities - when applying the provisions of agreements to which essentially only the Member State, and not the Community, is party - to apply the Court's interpretation rather than their own or, possibly, that of a WTO body.

43. Nevertheless, I consider that that contradiction between the extension of the Court's interpretative jurisdiction and the existing division of powers between the Community and the Member States is plain at first sight only. In reality, it must be acknowledged that the contradiction exists only in areas where the Member States have exclusive competence. (32) However, as noted in Opinion 1/94 of the Court, in the case of TRIPs neither the Community nor the Member States have exclusive competence. Their shared competence, which justifies classifying TRIPs as a mixed agreement, relates to areas which, even if they come within the competence of the Member States, are not unrelated to Community law. Moreover, the competence of the Member States is provisional and the Community institutions may at any time convert their potential competence into actual competence.

44. It would be contrary to the requirement of effective application of Community law and the need to avoid future discrepancies or conflicts in interpretation between national and Community provisions to take the view that there is no Community interest in those areas which still come within the competence of the Member States. That Community interest could not, of course, justify, in the context of mixed international agreements, Community law having a 'gravitating effect', which would completely undermine national law, as that would abolish the existing division of powers between Community and national authorities. However, the Community interest is sufficient, first, to justify seeking a common position on the part of the Community institutions and national authorities with regard to the question of interpretation of mixed international agreements and, second, to weaken the idea that recognising the Court's ability to determine that common interpretative position by replying to questions submitted for a preliminary ruling would infringe the competence of the Member States.

45. It follows from the above that observance of the institutional balance between Community and national authorities does not appear to be an insurmountable obstacle in the search for a common interpretation by means of recourse to the Court's interpretations provided under Article 177 of the Treaty. On the other hand, as I will analyse below, such recourse appears to conflict above all with the institutional balance which exists between the Court and the other Community institutions.

(ab) The institutional balance between the Court and the other Community institutions

46. When the Court was asked to give its opinion on whether the conclusion of TRIPs came within the Community's exclusive competence in the field of commercial policy under Article 113 of the EC Treaty, it explicitly indicated its intention to find that any abuse of procedure as regards action taken by the Community institutions infringes Community law. In particular, in response to the Commission's argument to the effect that, since TRIPs lays down rules in fields where there are no Community harmonisation measures, conclusion of that agreement would make it possible at the same time to achieve harmonisation within the Community and thereby to contribute to the establishment and functioning of the common market, the Court, acting as the indisputable guarantor of the institutional/constitutional balance imposed by the Treaty, stated as follows: 'It should be noted here that, at the level of internal legislation, the Community is competent, in the field of intellectual property, to harmonise national laws pursuant to Articles 100 and 100a and may use Article 235 as the basis for creating new rights superimposed on national rights, as it did in [the regulation] on the Community trade mark ... Those measures are subject to voting rules (unanimity in the case of Articles 100 and 235) or rules of procedure (consultation of the Parliament in the case of Articles 100 and 235, the joint decision-making procedure in the case of Article 100a) which are different from those applicable under Article

113. If the Community were to be recognised as having exclusive competence to enter into agreements with non-member countries to harmonise the protection of intellectual property and, at the same time, to achieve harmonisation at Community level, the Community institutions would be able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.' (33)

47. I consider that the Court would not accord to itself that which it refused the other Community institutions. That is to say, it would not itself venture to place constraints, at least at the level of interpretation, on the future harmonisation of the fields in question, when the (potential) competence to give opinions and make decisions in respect of that harmonisation belongs to other Community institutions, namely the Council, the Commission and the European Parliament, which are obliged to operate within the procedural framework laid down by the Treaty.

48. Indeed, given the binding nature, for the Community institutions, of interpretations given in reply to questions submitted for a preliminary ruling and the unavoidable impact that the interpretation of a provision has on its application, (34) it must be acknowledged that extending the Court's interpretative jurisdiction to TRIPs provisions which relate to areas where (potential) Community competence has not yet been exercised amounts to substituting the Court's powers for the competence of the other Community institutions to harmonise national legislation in the field of intellectual property in accordance with the provisions of the Treaty. That substitution is certainly not limited merely to the fact that the Court will interpret the provisions in question. It can be detected principally in the point in time at which the Court's interpretative jurisdiction is exercised and not in the scope of that jurisdiction. (35) In particular, it lies in the fact that the above interpretation will take place not in the context of the (direct or incidental) interpretation or the (direct or incidental) review of the validity of the measures which the competent Community institutions have taken or of their failure to adopt measures, but even before any legislative initiative on the part of the above institutions. Where such an initiative has been taken by those institutions, the interpretation of its legal basis by the Court when exercising its powers of review or its jurisdiction under Article 177 of the Treaty - interpretation which clearly leaves the Court room for exercising a law-creating role - is completely justified and logically expected given that it follows inevitably from the Court's jurisdiction. That law-creating role is inherent in the Court's general institutional role provided that it does not slip towards a clear substitution of the discretionary power of the competent legislative bodies. On the other hand, it is in no way inherent in that institutional role for the Court to take a legislative initiative with regard to harmonising national legislation. Interpreting the contested provision of TRIPs would amount to such an initiative in the instant case. Given that, following the conclusion of that agreement, any exercise of Community competence in relation to harmonising national

legislation in the field of intellectual property is at the same time an act implementing that agreement (to the extent of course that it falls within the agreement's scope), the interpretation referred to above would in practice constrain - at least so far as concerns its compatibility with the international rules flowing from TRIPs (36) - not only the outcome of the dispute pending before the national court, but also the future exercise of the (hitherto potential) Community competence. (37)

49. It could of course be argued that the interpretation of a provision in a mixed international agreement does not always affect the way in which that provision is applied and implemented by the competent Community institutions. To support that argument it is not necessary to rely on some theoretical distinction - of doubtful validity in any event - between the interpretation and the application of a rule of law. It is sufficient to refer to the case where interpretation of the contested provision leads to the conclusion that that provision may have direct effect and, therefore, its application does not require any Community or national implementing measure. At first sight, in such a case the interpretation of the provision does not affect the way in which it is applied because, in reality, there is actually no question of application in the sense of exercising a discretionary power or, in other words, because the Court's interpretation is limited to the heart of the meaning of the contested provision, which cannot be altered however the competent Community institutions apply the provision.

50. However, the above argument is not entirely persuasive and therefore cannot in the instant case justify extending the Court's interpretative jurisdiction. In particular, in the final analysis the institutional imbalance entailed in any acceptance of the Court's interpretative jurisdiction does not depend on the reply to the question as to whether or not the contested provision is to be interpreted as having direct effect.

First, if the reply is in the negative and, as a consequence, the application of that provision requires implementing measures on the part of Community and national bodies, the Court is not released from its obligation to interpret, (38) when all those problems referred to above concerning substitution of the competence of the Community legislative institutions rearise. In that case, the only solution consistent with the Treaty would be for the Court to adopt the wholly paradoxical and contradictory position that the Court has jurisdiction to interpret the contested provision only in order to declare that it does not have direct effect.

Second, if it is considered that the contested provision does have direct effect and that it may be applied in conformity with the interpretation given to it by the Court without the need for implementing measures on the part of Community and national bodies, the interpretation in conjunction with the direct effect would amount to an internal harmonisation of national legislation in respect of the issues governed by that provision which concern the main proceedings. However, inasmuch as such harmonisation would be achieved on the

basis of a provision of an international agreement of the Community without observing the rules as to competence and procedure laid down by the Treaty, that would amount to an abuse of procedure expressly precluded by the Court in Opinion 1/94. (39)

51. In light of the above, it becomes apparent that, in the context of Article 177 of the Treaty, to extend the Court's interpretative jurisdiction to TRIPs provisions relating to areas in which the (potential) Community competence has not yet been exercised would constitute pursuit of a policy of judge-made law in conflict with the constitutional logic of the Treaty and would be difficult to justify on grounds of expediency.

(ac) The issue of the uniform interpretation of TRIPs

52. The main objections that could be raised against restricting the Court's interpretative jurisdiction solely to TRIPs provisions relating to areas in which Community competence has already been exercised are connected with the often invoked need for all the provisions of mixed international agreements to be interpreted uniformly.

53. As stated for example by Advocate General Tesauro in his Opinion in *Hermès*, the view that the Court has jurisdiction to interpret only the provisions that are within the Community's competence to conclude an agreement and not those that remain within the competence of the Member States 'proves to be fraught with problems, if only because provisions of one and the same agreement may be interconnected, in the sense that it may not be easy to establish precisely whether a given provision falls within the Community preserve (too) or solely within the domestic preserve. Nor can the possibility be ruled out that a given national interpretation may affect the application of Community provisions and/or the functioning of the system as a whole.' (40)

54. In this connection, the Commission notes in its written observations in Case C-392/98 that, if it were found that the Court's jurisdiction to interpret Article 50 of TRIPs is restricted solely to cases where the provisional protection of a trade-mark right is in question, that would mean that the agreement would have to be interpreted uniformly within the Community as regards provisional measures in respect of certain, but not all, intellectual property rights. According to the Commission, such a situation would not be acceptable. First of all, given the close link between the substance of an intellectual property right and its judicial protection, it would be incomprehensible that there should be uniform interpretation of the substance of the right, but divergent interpretations of the measures for its protection. (41) Moreover, it would be equally unacceptable, vis-à-vis the Community's trading partners, for the interpretation of the provisions relating to judicial protection, and particularly provisional protection measures, to vary for certain intellectual property rights but remain the same for others. It should not be forgotten that it is most often measures of judicial protection and, above all, provisional measures which give rise to trade disputes with non-member States and which

therefore require, by definition, uniform application. Finally, the Commission observes that the WTO Agreement constitutes a uniform whole and intellectual property rights are not detached from the rest of the agreement. The authorities which negotiated and concluded that agreement declared that the provisions of the whole agreement and its annexes cannot have direct effect. According to the Commission, it would be particularly paradoxical and would have serious repercussions if, as a result of the possibility of different interpretations being adopted, national courts and the Court of Justice reached different conclusions in respect of the above declaration by the Contracting Parties.

55. Finally, the view is expressed that the Court must have jurisdiction to give preliminary rulings on all the provisions of mixed agreements so as to ensure their uniform interpretation and, consequently, their uniform application within the Community, particularly bearing in mind the Community's interest in not being held responsible for infringements committed by the Member States. That view is based, first, on the observation that, in the context of TRIPs, and in the absence of any clause concerning competence, the Community and the Member States, which are referred to in equal terms as original members, constitute vis-à-vis the other Contracting Parties a single Contracting Party or at least Contracting Parties bearing equal responsibility for any infringements of the agreement. Consequently, the internal division of their powers is of importance only within the Community itself. Second, the above view is based on the assumption that the Community is responsible vis-à-vis every party to a mixed agreement so that it might be held responsible for infringing the relevant provisions of an agreement irrespective of who has committed the infringement. (42)

56. I consider that all the above objections, while not being without interest, tend to oversimplify the questions raised in the case, whether examined separately or together, concerning the need for a coherent system in interpreting the provisions of TRIPs, the requirement that those provisions be applied uniformly within the Community and the demand for unity of representation of the Community at international level which creeps into the arguments advanced in connection with the Community's international responsibility. That simplistic approach to the questions at issue does not appear capable of forcing acceptance of the view that the Court has interpretative jurisdiction in respect of all TRIPs provisions, that is to say even those relating to areas in which no Community competence has yet been exercised.

57. First, as regards the demand for uniform application justified by the need for a coherent system in interpreting the provisions of agreements annexed to the WTO Agreement, and in particular of TRIPs, it is to be noted first of all that the possibility that different interpretations may exist is not necessarily indicative of an incoherent system. (43) In other words, it is in no way contradictory that the meaning of a provision should vary depending on the matter to which it is ap-

plied (in the present case, an intellectual property right), the body interpreting it (in the present case, the Court or the national courts) and the relevant legal framework (in the present case, Community or national).

58. It is also to be noted that the legal system created by the WTO agreements does not yet appear to reflect completely the idea of uniform and settled interpretation and application of the provisions of those agreements. In this connection, it is not without interest that, as the Court observed in its recent judgment in *Portugal v Council* with respect to the mechanism for resolving disputes, the system resulting from the WTO agreements accords considerable importance to negotiation between the Contracting Parties. (44) In other words, the specific system within which any interpretation of TRIPs is carried out is not yet completely subject to the concept of an effective centrally imposed uniform interpretation which would resolve any disputes at the institutional level, but is still inspired by the desire to promote friendly settlements, that is to say to accept coordination of the different interpretations and applications of the provisions of the agreements. In so far as the scope of the options available to, and obligations imposed on, the Contracting Parties by the agreement at issue is thus determined by negotiation, it would not be appropriate to seek to fix, by judicial decision, an a priori uniform interpretation of the agreement's provisions.

59. Second, I consider that the argument to the effect that, because provisions of the same agreement may well be connected, it may not be easy to determine precisely whether a specific provision (also) falls within the Community sphere or merely within the national sphere, is not capable of establishing jurisdiction for the Court to interpret all the provisions of a mixed international agreement. As the Court itself pointed out in Opinion 1/94, 'resolution of the issue of the allocation of competence cannot depend on problems which may possibly arise in administration of the agreements'. (45)

60. Third, the argument concerning the risk that the Court and the national courts may adopt different views in relation to the question of the direct effect of TRIPs provisions also does not seem to add anything of crucial importance to the matter at issue. In addition to the considerations set out above with regard to the institutional balance between the Court and the other Community institutions, (46) it should be noted that, despite its profound political importance, from a legal point of view the question of direct effect is no different from any other question of interpretation.

61. Fourth, it must be accepted that, although the uniform application of international agreements within the Community is a legitimate objective which, in any event, concerns Community law, (47) such application cannot be an absolute requirement. No matter how 'monistic' the view of reciprocal relations between international and Community law, it is not self-evident that the application of the former within the Community can claim an ever greater degree of uniformity than that possessed by the law in force in the Community

which, having regard to the division of powers between Community and national bodies in accordance with the area at issue, may be either exclusively Community or exclusively national law or simultaneously Community and national law. Moreover, neither the nature of the international legal order created to date by the WTO Agreement nor the current stage of development of European integration could justify the admission and uniform application in Community territory of provisions of agreements concluded within the framework of the WTO in a manner similar to the way in which Community law is admitted and applied in Community Member States with a federal structure.

62. Fifth, even if the field of the Community's international relations provides an appropriate political and legal platform for testing and developing the process of European integration, it is doubtful whether that field can become an obligatory one for resolving issues raised by the dynamics of integration.

63. In that regard, while the Court has recognised the need for unity of international representation and the absolute legitimacy of the concern to ensure unity of action in external matters and to avoid weakening the Community's negotiating power, it has nevertheless not held that that concern could reverse the internal (intra-Community) division of powers between the Community and national authorities. (48)

64. Moreover, underlying the very acceptance of the existence of a mixed agreement are the principles concerned with extending internal powers outside the Community and parallelism of internal and external powers, principles which establish the primacy of observance of the internal (intra-Community) division of powers over the need to ensure unity in the international representation of the Community. Indeed, should that primacy not be accepted, there would be no ground for concluding international agreements other than those for which the Community has exclusive competence.

65. Sixth, as Community law now stands, apart from being inconsistent with the institutional balance imposed by the Treaty, (49) it would also be inappropriate to guarantee unity in the Community's international representation primarily on the basis of the Court's interpretation of the international agreement at issue in the exercise of its jurisdiction under Article 177 of the Treaty.

66. First of all, the Court itself has held that the necessary unity in the international representation of the Community must be guaranteed by close cooperation between the Member States and the Community institutions both in the process of negotiation and conclusion of a mixed agreement and in the fulfilment of the commitments entered into, and that the above duty to cooperate is all the more imperative in the case of agreements such as those annexed to the WTO Agreement, which are inextricably linked, and in view of the cross-retaliation measures established by the Dispute Settlement Understanding. (50)

67. In that regard, although there is no doubt that the Court is a pivotal institution which, as such, could co-

ordinate the required cooperation between Community and national authorities, it is not evident that the coordination which the Court could guarantee within the framework of the specific areas of jurisdiction hitherto accorded to it and, particularly, its jurisdiction to reply to questions submitted for a preliminary ruling by national courts concerning the interpretation of an international agreement would be the most appropriate form of cooperation for guaranteeing not only unity, but also effectiveness, in the international representation of the Community. Despite the undoubted usefulness of a uniform interpretation of the provisions of the Community's international agreements relating to areas in which the Community has not yet exercised its (potential) competence, the strict and binding nature of the Court's rulings on questions submitted for a preliminary ruling does not appear to be compatible with the flexibility and adaptability required by the coordination of a common Community and Member State position in the context of negotiating, concluding and implementing agreements, such as those annexed to the WTO Agreement which, *inter alia*, are governed by 'the principle of reciprocal and mutually advantageous arrangements'. (51) More specifically, it is far too simplistic to believe that the fragmentary nature of a preliminary ruling on a question which might be raised in the context of a particular dispute before the national courts and is circumscribed by the matters of law and fact set out by the national court can in any event effectively coordinate joint Community and Member State action with a view to the application of an international agreement-based obligation. On the contrary, such a ruling by the Court could even have negative effects and undermine the process of cooperation between the Community and the Member States, particularly if it is taken into account that the ruling is not requested in order to resolve a dispute arising out of prior cooperation between the two sides (the Community and the Member States) but designed to anticipate in law an essentially political procedure that has not yet taken place. In any event, cooperation between Community and national bodies aimed at ensuring unity of international representation for the Community cannot be reduced to the process of cooperation between the Court of Justice and national courts in accordance with Article 177 of the Treaty.

68. In order for the Court to play an effective coordinating role, it would have to operate not as the body primarily responsible for the authoritative interpretation of international agreements within the framework of its cooperation with national courts required by Article 177 of the Treaty, but rather as one of the bodies responsible for the formulation of unity in the international representation of the Community (possibly, as a preliminary consultative body or as an *a posteriori* monitoring and authorising body in respect of negotiations carried out). However, that would presuppose a new conception of the Court's role and, clearly, review of its task of providing opinions under Article 228(6) of the EC Treaty (now, after amendment, Article 300(6) EC). (52) It may be difficult to

achieve those changes in the Court's function by extending its interpretative jurisdiction in reply to questions submitted for a preliminary ruling, particularly having regard to the statement made by the Court itself in *Kleinwort Benson*, (53) namely: 'It cannot be accepted that the replies given by the Court to the courts of the contracting states are to be purely advisory and without binding effect. That would be to alter the function of the Court, as envisaged in the Protocol of 3 June 1971, cited above, namely that of a court whose judgments are binding'. (54)

69. It is therefore apparent that, as Community law now stands, the need for systemically correct interpretation and uniform application of the WTO agreements within the Community in combination with the need to ensure unity in the international representation of the Community could not justify departing from the hitherto dynamic division of powers either between the Community and the Member States or between the Court and the other Community institutions. Moreover, accepting that the Court has primary jurisdiction to reply to questions submitted for a preliminary ruling on the interpretation of provisions of mixed international agreements relating to areas which still remain within the competence of the Member States seems to be an inappropriate means of ensuring effective coordination of the required united international representation.

70. It follows from the above observations that the Court is not to declare that it has jurisdiction to interpret Article 50 of TRIPs in a case, such as the instant case, where the application of that article is concerned with an area in which Community competence has not yet been exercised.

(ad) Obligations owed by national courts

71. Not accepting, in the present case, the Court's interpretative jurisdiction does not mean, however, that the referring court, which retains jurisdiction to interpret, is not subject to restrictions in exercising that jurisdiction. Like all national authorities, national courts are obliged to participate in the development of close cooperation between Community and national authorities to ensure, as indicated above, the necessary unity in the international representation of the Community. (55)

72. In this connection, I consider that it would be useful for the national court if the Court of Justice were to elaborate further on that obligation. Of course, the Court does not have jurisdiction to determine the nature of the relations which are to be developed between the national authorities, particularly between the referring court and other national authorities, in order to define the positions of the Member State on the basis of which the latter will cooperate with the Community authorities. However, it is worthwhile for the Court to provide certain details useful for defining the cooperation which must generally be developed between the national authorities, including the referring court, and the Community institutions.

73. First, the cooperation can only take the form of a procedure for communicating and coordinating joint action between Community and national authorities

within the framework of their respective powers. As Community law now stands, the need for the Community to have unity of international representation cannot take away the albeit restricted autonomy of either party.

74. Next, the above procedure can be based on the experience gained from existing procedures of sincere and open cooperation which give expression to Article 10 EC (formerly Article 5 of the EC Treaty). In particular, it must be accepted that the national authorities can address questions to the competent Community authorities, particularly the Council and the Commission, seeking information and opinions on the interpretation of a provision of a mixed international agreement. The cooperation established between the Commission and national courts in relation to the application of Articles 81 EC and 82 EC (formerly Articles 85 and 86 of the EC Treaty) provides a useful example of establishing a cooperation procedure between Community and national authorities. (56)

75. Finally, particular importance can and must be attached by the national authorities to the existing judgments and opinions of the Court in respect of the international agreements at issue or similar agreements. In other words, while the Court lacks jurisdiction to reply to questions submitted for a preliminary ruling which relate to provisions of mixed international agreements concerning areas which remain within the competence of the Member States, nevertheless national authorities, and therefore national courts, are obliged to give serious consideration to any rulings made by the Court interpreting the same or connected provisions that concerned areas in which Community competence has already been exercised. In particular, when the Court has delivered a judgment interpreting the general system established by an international agreement, it is logical that the national courts should not be able to ignore that judgment. Although they do not have a strict procedural obligation to follow the interpretation adopted by the Court, (57) the obligation on them to cooperate closely with the Community authorities and the fact that the interpretation adopted by the Court is binding on all Community institutions means that they are at least obliged not to deviate from that interpretation without a specific reason. In other words, I consider that the national courts are obliged to give specific and detailed reasons (that is to say having regard to the particular features of the case) for any decision taken by them which deviates from the interpretation adopted by the Court. (58)

76. The foregoing observations relating to the obligation on national courts to cooperate closely with the Community institutions and to contribute to the Community's unity of international representation make it clear that, as Community law now stands, the need for practical harmonisation, first, of observance of the division of powers within the Community between Community and national authorities and, secondly, of a correct, effective and mutual approach to the Community's international obligations can only be based on procedures and obligations falling within an alternative legal framework often marked by a lack of strictness

(soft law). That is neither paradoxical nor contradictory. It is justified by the variable geometry and the still incomplete institutionalisation of the coexistence of national, Community and international legal orders. In the context of that institutionalisation, law and politics exchange characteristics: the former imposes its strict and binding nature on the latter and the latter in turn instils its relativity and flexibility in the former.

(b) The direct effect of Article 50(6) of TRIPs (sole question in Case C-300/98 and second question in Case C-392/98)

77. The question of the direct effect of Article 50(6) of TRIPs is raised, in the present case, only in the event that the Court, contrary to the above arguments, considers that, in Case C-300/98, the reference for a preliminary ruling of the Arrondissementsrechtbank 's-Gravenhage is admissible (59) or that, in Case C-392/98, it has jurisdiction to interpret that provision of TRIPs.

78. If the Court therefore decides that it should rule on this issue, I consider that it must follow the recent decision in *Portugal v Council* (60) in which it essentially acknowledged that the WTO agreements do not have direct effect.

In particular, after examining in that judgment the nature and broad logic of the WTO agreements and, above all, the mechanism for dispute settlement (which also covers TRIPs) (61) and the lack of reciprocity as regards the direct application of the provisions of those agreements, the Court ruled that those provisions are not among the rules in the light of which it reviews the legality of measures adopted by the Community institutions, save for two classic exceptions, namely where the Community intended to implement a particular obligation assumed in the context of the WTO or where the Community measure expressly refers to the precise provisions of the WTO agreements. (62)

Given that, first, the criteria for accepting or excluding the possibility of relying on a provision of an international agreement are identical to the criteria for accepting or excluding the direct effect of the same provision and, second, the two abovementioned exceptions refer solely and exclusively to the possibility of relying on the provision, it must be accepted that the general exclusion, in accordance with the above judgment, of the possibility of reliance on the provisions of the WTO agreements automatically means that all the provisions of TRIPs cannot have direct effect. Consequently, Article 50(6) of TRIPs cannot have direct effect regardless of whether or not it is sufficiently precise, unconditional and does not require the adoption of any subsequent implementing measure. In other words, since the nature and broad logic of the WTO agreements prevent their provisions from having direct effect, (63) analysing the specific content of the TRIPs provision at issue is superfluous.

79. Finally, the general exclusion of direct effect of the above provision should be accompanied by two more specific observations in relation to the particular questions raised by each of the joined cases.

80. First, in Case C-300/98, finding that Article 50(6) of TRIPs does not have direct effect does not mean that it is not to be taken into account by the national court. As Advocate General Tesauro noted in his Opinion (64) and as the Court acknowledged (65) in *Hermès*, (66) regardless of the answer to the question as to the direct effect of a provision of an international agreement, the Court is required to answer questions of interpretation raised by the provision so that the national court can interpret national rules in conformity with it.

81. Second, as regards Case C-392/98, the national court must take account of the Court's judgment in *Portugal v Council*, (67) even if the Court disclaims interpretative jurisdiction and does not rule on the question of the direct effect of the contested provision. In any event, any ruling by the national court which introduces a divergent interpretation should be explained by specific and detailed reasons in accordance with the requirement for close cooperation between Community and national bodies in order to ensure unity in the international representation of the Community. (68)

82. At this point, without wishing to anticipate the exercise of the national court's jurisdiction, it should be noted that the reasons why the Court held, in the abovementioned judgment, that the WTO agreements cannot have direct effect (nature of the mechanism for dispute settlement and lack of reciprocity as regards the direct application of the provisions of those agreements) relate to such general characteristics of the agreements that it would be extremely difficult for the national courts to adopt a different solution, even when ruling on provisions relating to areas in which the Member States remain competent (in the present case, provisions relating to provisional protection against the copying of an industrial design under civil law on the basis of general rules concerning wrongful acts, particularly those relating to unfair competition), without running the risk of infringing their obligation to help ensure unity in the international representation of the Community.

(c) The interpretation of 'intellectual property right' for the purposes of Article 50(6) of TRIPs (third question in Case C-392/98)

83. In the third question submitted for a preliminary ruling by the Hoge Raad der Nederlanden, the Court is asked to determine whether where, as in the main proceedings, 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 to unfair competition, the protection thus afforded to the holder of the right must be regarded as an 'intellectual property right' within the meaning of Article 50(1) of TRIPs.

84. In view of the proposed reply to the first question submitted for a preliminary ruling by the Hoge Raad der Nederlanden that the Court lacks jurisdiction in the instant case to interpret the contested provision of TRIPs, a reply to the third question is superfluous. (69) However, for reasons of completeness and in the event

that the Court should accept jurisdiction, the following observations may be useful.

85. The term 'intellectual property right' used in Article 50(1)(a) of TRIPs must be interpreted in the light of Article 1(2) which states that 'for the purposes of this Agreement, the term "intellectual property" refers to all categories of intellectual property that are the subject of Sections 1 through 7 of Part II'.

86. In the instant case, the above provision refers essentially to Section 4 ('Industrial designs') of Part II ('Standards concerning the availability, scope and use of intellectual property rights') of TRIPs and, in particular, to Articles 25 and 26 which respectively govern the requirements for, and scope of, the protection of industrial designs.

87. As regards the requirements for protection, Article 25(1), which is of chief interest in the instant case, states that the Contracting Parties are to provide for the protection of independently created industrial designs that are new or original. Under that article, the Contracting Parties may provide, first, that designs are not new or original if they do not significantly differ from known designs or combinations of known design features and, second, that protection is not to extend to designs dictated essentially by technical or functional considerations.

88. Those conditions are the result of a compromise and are designed to cover the different types of protection in force in the territory of the Contracting Parties. (70) It appears that the parties may choose between the criterion of a new design and that of an original design or determine in their discretion the scope of both terms. Furthermore, it could be argued that the term 'independently created' is rather subjective, while the term 'new' is more objective. (71) Finally, in my view the Contracting Parties cannot use criteria in addition to those set out in Article 25(1), inasmuch as reliance on additional criteria could reduce the 'effective and adequate protection of intellectual property rights' sought by TRIPs under the terms of its preamble.

89. As regards the scope of the protection afforded to industrial designs, Article 26 of TRIPs provides: (i) that the owner of a protected industrial design is to have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes; (ii) that the parties may provide limited exceptions to the protection of industrial designs, provided that such exceptions do not unreasonably conflict with the normal exploitation of protected industrial designs and do not unreasonably prejudice the legitimate interests of the owner of the protected design, taking account of the legitimate interests of third parties; and (iii) that the duration of protection available is to amount to at least 10 years.

90. It is to be noted that the term 'owner of a protected industrial design' is not defined more precisely, so that it should logically be regarded as referring to a person entitled to protection the conditions for which are laid

down in Article 25(1). I consider that there are no grounds at all for inferring that use of the term 'owner' justifies the conclusion drawn by the Netherlands Government that only absolute rights in respect of industrial designs are protected, in other words rights vis-à-vis all parties founded on specific rules.

91. Apart from the above terms and the conditions for protection of intellectual property rights in respect of industrial designs, the specific provisions of Articles 25 and 26 of TRIPs make no further reference concerning the method by which the Contracting Parties are to recognise and protect those rights. As for the rest, therefore, it appears that the general provisions in the third sentence of Article 1(1) and in Article 41(5) of TRIPs, which ensure that the Contracting Parties have maximum flexibility in applying the provisions of that agreement, also apply to the rights in question. (72) According to the first provision, the parties are to be free to determine the appropriate method of implementing the provisions of the agreement within their own legal system and practice. According to the second provision, subject to compliance with the provisions laid down in the previous paragraphs of Article 41, (73) Part III of TRIPs ('Enforcement of intellectual property rights') does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the parties' capacity to enforce the law in general. Moreover, nothing in Part III of TRIPs creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general. (74)

92. As regards the protection of intellectual property rights in respect of industrial designs, TRIPs does not appear to preclude application of rules on unfair competition, provided that the requirements under Articles 25, 26 and 41 are met. Furthermore, Article 2(1) of TRIPs provides that 'in respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)'. Article 10 bis of that Convention regulates effective protection against unfair competition.

93. It follows from the foregoing that, provided that the requirements for, and the scope of, protection prescribed by the above provisions are covered under general rules of civil law, the Contracting Parties are not obliged to establish a special system of rules for the protection of industrial designs. Consequently, in a case such as that of the main proceedings, 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 to unfair competition, the protection thus afforded to the holder of the right must be regarded as an 'intellectual property right' within the meaning of Article 50(1) of TRIPs provided that the requirements under Articles 25, 26 and 41 of TRIPs are considered to be met.

94. The precise assessment of the national legal system for the protection of the industrial design at issue in the main proceedings and the reply to the question whether

that national system in fact meets the requirements of TRIPs fall within the jurisdiction of the national court, which is more conversant with national law and can decide whether that system falls within the scope of Articles 25, 26 and 41 of TRIPs as defined above.

95. Moreover, apart from a general reference to the provisions of Netherlands law and the comment to the effect that general rules of civil law relating to wrongful acts, particularly those relating to unfair competition, are involved, the order for reference does not refer in detail to every aspect (interpretation and judicial application) of the national system of protection against the copying of industrial designs applied in the present case so as to enable the Court to provide any further useful interpretation of the conditions and requirements for the protection of rights in respect of industrial designs as provided for by TRIPs. The information and analyses in relation to the national legal framework supplied by the parties in their written observations do not appear capable of filling the lacunae in the order for reference and providing a safe basis for replying to the question submitted for a preliminary ruling since it is not within the Court's jurisdiction to check their accuracy.

96. In any event, it should not be forgotten that, should the national court consider that specific questions concerning the interpretation of TRIPs remain, it may submit a further, more specific, question for a preliminary ruling, simultaneously providing all the factual and legal details necessary for the Court to give a useful reply.

V - Conclusion

97. In light of the above, I propose that the Court reply as follows:

- (1) In Case C-300/98, the request for a preliminary ruling submitted by the Arrondissementsrechtbank 's-Gravenhage is inadmissible.
- (2) In Case C-392/98, the Court lacks jurisdiction to interpret Article 50 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), which constitutes Annex 1 C to the Agreement establishing the World Trade Organisation, approved on behalf of the Community, as regards matters within its competence, by Council Decision 94/800/EC of 22 December 1994, since in the main proceedings that article is applied to an area in which Community competence has not yet been exercised.

1: - Original language: Greek.

2: - OJ 1994 L 336, p. 1.

3: - See, in particular, Case C-53/96 *Hermès* [1998] ECR I-3603 and Case C-149/96 *Portugal v Council* [1999] ECR I-8395.

4: - OJ 1998 L 289, p. 28.

5: - Cited in footnote 3 above.

6: - Allroundsteiger scaffolding consists of a number of separate components which are joined together by means of an assembly system which is fixed to the scaffold tubes.

7: - As regards that Law, see Case 144/81 Keurkoop [1982] ECR 2853.

8: - See, for example, Case C-18/93 Corsica Ferries [1994] ECR I-1783, paragraph 14, Case C-96/94 Centro Servizi Spediporto [1995] ECR I-2883, paragraph 45, Case C-266/96 Corsica Ferries France [1998] ECR I-3949, paragraph 27, and Case C-291/96 Grado and Bashir [1997] ECR I-5531, paragraph 12.

9: - See, for example, the order in Case C-2/96 Sunino and Data [1996] ECR I-1543, paragraph 4.

10: - Opinion on the 'competence of the Community to conclude international agreements concerning services and the protection of intellectual property' (ECR I-5267, paragraph 105).

11: - Paragraph 71. This will remain so as long as the Council, by virtue of Article 133(5) EC (inserted in Article 133 of the EC Treaty by the Treaty of Amsterdam), does not extend application of the common external policy to international agreements concerning services and intellectual property rights.

12: - Specifically, the Court stated: 'There has been only partial harmonisation as regards trade marks, for example: it is apparent from the third recital in the preamble to the First Council Directive (89/104/EEC) ... that it is confined to the approximation of national laws "which most directly affect the functioning of the internal market". In other areas covered by TRIPs, no Community harmonisation measures have been adopted. That is the position as regards the protection of undisclosed technical information, as regards industrial designs, in respect of which proposals have merely been submitted, and as regards patents. With regard to patents, the only acts referred to by the Commission are conventions which are intergovernmental in origin, and not Community acts ...'.

13: - Paragraph 104.

14: - Cited in footnote 4 above.

15: - See Article 20 of the directive.

16: - In that respect, it is sufficient to note that the order for reference was made on 30 October 1998.

17: - See point 5 above.

18: - See point 6 above.

19: - See point 7 above.

20: - As Advocate General Tesouro notes in his Opinion in *Hermès*, cited in footnote 3 above, that conclusion is also supported by Articles 1 and 2 of Decision 94/800, cited in footnote 2 above, which approve the agreements on behalf of the European Community 'with regard to that portion of them which falls within the competence of the European Community' (points 12 and 13).

21: - See, for example, Case 181/73 *Haegeman* [1974] ECR 449, concerning the interpretation of the association agreement between the EEC and Greece, in which the Court relied first of all on a structural and functional criterion according to which such agreements concluded under Articles 228 and 238 of the EEC Treaty must be regarded as acts of the Community institutions within the meaning of subparagraph (b) of the first paragraph of Article 177 of the EEC Treaty, so that their provisions form an integral part of Commu-

nity law and the Court accordingly has jurisdiction to give preliminary rulings concerning their interpretation (paragraphs 3, 5 and 6). See also Case 87/75 *Bresciani* [1976] ECR 129 and Case 65/77 *Razanatsimba* [1977] ECR 2229.

22: - Case 12/86 [1987] ECR 3719.

23: - Point 12.

24: - The Court held: 'Since the agreement in question is an association agreement creating special, privileged links with a non-member country ... the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers does not arise. Furthermore, the jurisdiction of the Court cannot be called in question by virtue of the fact that in the field of freedom of movement for workers, as Community law now stands, it is for the Member States to lay down the rules which are necessary to give effect in their territory to the provisions of the Agreement or the decisions to be adopted by the Association Council. As the Court held in its judgment of 26 October 1982 in Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641, in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for due performance of the agreement' (paragraphs 9, 10 and 11). See also Case C-192/89 *Sevince* [1990] ECR I-3461, paragraphs 8 to 12.

25: - Cited in footnote 22 above, see point 14.

26: - As the Netherlands Government notes in its written observations, TRIPs was not signed by the Community pursuant to Article 238 of the EC Treaty (now Article 310 EC). Decision 94/800 is based on Articles 43, 54, 57 (now, after amendment, Articles 37 EC, 44 EC and 47 EC), 66 (now Article 55 EC), 75, 84(2) (now, after amendment, Articles 71 EC and 80(2) EC), 99 (now Article 93 EC), 100 (now Article 94 EC), 100a (now, after amendment, Article 95 EC) and 235 (now Article 308 EC) of the EC Treaty, in conjunction with the second subparagraph of Article 228(3) thereof (now, after amendment, the second subparagraph of Article 300(3) EC).

the distinction between the WTO agreements and association agreements, see also *Portugal v Council*, cited in footnote 3 above, paragraph 42: 'As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to "entering into reciprocal and mutually advantageous arrangements" and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration within the Community, such as the agreement which the Court was required to interpret in *Kupferberg*.'

27: - Cited in footnote 3 above. See, in particular, point 18 of the Opinion.

28: - OJ 1994 L 11, p. 1.

29: - See *Hermès*, cited in footnote 3 above, paragraph 27.

30: - *Ibid.*, paragraph 32.

31: - The case-law referred to in paragraph 32 of *Hermès* (see Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28, and Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 34) allowed the Court in particular to get round the fact that, from a formal point of view, no specific Community competence had yet been exercised because (see also the assertion in paragraph 30 of *Hermès*) the existing Community provision, namely Article 99 of Regulation No 40/94 concerning the provisional protection of rights deriving from the Community trade mark, despite being closely linked, did not cover exactly the subject-matter of the dispute in the main proceedings, which was the provisional protection not of a Community trade mark but of trade marks whose international registration designated the Benelux countries. Specifically, after noting the substantial connection between the Community and national rules (see paragraph 28: 'It is true that the measures envisaged by Article 99 [of Regulation No 40/94] and the relevant procedural rules are those provided for by the domestic law of the Member State concerned for the purposes of the national trade mark'), the Court referred to the abovementioned case-law to justify the Community interest in a uniform interpretation of a provision of an international agreement which applies to national and Community situations that are so similar in regulatory scope.

I consider that, while it was appropriate for it to be invoked in *Hermès*, on account of the abovementioned particular nature of that case, the above case-law of the Court to the effect that, under Article 177 of the Treaty, it is possible to reply to questions submitted for a preliminary ruling which, while related to the interpretation of a Community rule, are, however, formulated in the context of disputes which do not fall within the scope of Community law (see also Case C-231/89 *Dzodzi* [1990] ECR I-4003 and the other judgments establishing this case-law, referred to in my Opinion in Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551, point 16 et seq.) cannot be applied in the present case.

While the *Dzodzi* case-law is based on the premiss that the national legislature intends to ensure that individuals who come within the scope of national rules are treated in the same manner as the Community legal order treats persons subject to that order (see, in this respect, Case C-346/93 *Kleinwort Benson* [1995] ECR I-615, paragraph 16, a case in which the Court examined whether national law contained a direct and unconditional renvoi to Community law, which would have had the effect of rendering that law applicable within the domestic legal order), in the present case the adoption of Community rules by the national authorities, in other words the harmonisation of the interpretations of Community and national authorities,

constitutes the goal and not the point of departure. Moreover, the Court's jurisdiction to interpret the contested provision of TRIPs in the circumstances in which it applies in the present case is here a matter to be decided rather than an established fact. By contrast, in the *Dzodzi* case-law (see also *Hermès*, cited in footnote 3 above, paragraph 31), that jurisdiction is an established fact.

Moreover, it should be noted that inasmuch as, in the present case, Community competence has not been exercised in respect of the provisional protection of industrial designs, it is not an instance where Article 50 of TRIPs can be applied to situations covered by Community law. In other words, the basic premiss of the above case-law, namely that the contested provision can be applied to both situations coming under national law and situations coming under Community law, is missing. Furthermore, it would be a leap in logic and an unjustifiably broad interpretation of the grounds of the judgment in *Hermès* to find in the present case, as the Commission essentially proposes in its written observations (paragraph 20), that the Community provisions on the Community trade mark, which constitute the sole Community competence exercised for the provisional protection of intellectual property rights, can, by reliance on the abovementioned case-law, compensate for the lack of Community competence exercised in respect of the provisional protection of industrial designs. In the final analysis, in the instant case the Community and national situations to which the contested provision of TRIPs may be applied do not in any way have the particular interrelationship, from a regulatory point of view, possessed by the corresponding situations in *Hermès*.

As regards the inappropriateness of applying the above case-law to the present case, see also the Opinion of Advocate General Tesouro in *Hermès* (footnote 29 of his Opinion).

32: - See also the Opinion of Advocate General Tesouro in *Hermès*, cited in footnote 3 above, point 19.

33: - See Opinion 1/94, cited in footnote 10 above, paragraphs 59 and 60 (emphasis added).

34: - Irrespective of the questions raised by formal determination of the effects of an interpretative ruling made by the Court, determination which is defined by concepts such as *res judicata* and *erga omnes* effect, there is no doubt that, in any event, the operative part of such an interpretative ruling is equivalent to a reformulation of the interpreted provision, which is freed from the doubts initially expressed with respect to its meaning. In this way the Court's interpretation is embodied in the interpreted rule, with which it constitutes an integral conceptual whole, thereby essentially binding any future interpretation which, in the final analysis, may be submitted for review by the Court.

35: - Assessment of an institution's competence does not consist merely in examining its scope, but also in analysing the significance of the point in time at which it is exercised. An ostensibly identical action can often acquire a different institutional significance and role in

accordance with the point in time at which it is carried out.

36: - As regards the requirement that acts of the Community institutions should not be contrary to rules of international law binding the Community, see Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraphs 6 and 7.

37: - The unlawful and paradoxical nature of the above constraint is even more apparent if one considers that, in the case of mixed international agreements, it is essentially the exercise of the Community competence that makes the provision of the international agreement a matter for the Community, having regard to the specific area of application of that agreement, and may accordingly bring it within the scope of the Court's interpretative jurisdiction.

38: - In this respect, see *Hermès*, cited in footnote 3 above, paragraph 35, and the Opinion of Advocate General Tesouro in that case (point 38).

39: - See point 46 above.

40: - Point 20.

41: - The Commission notes that that could occur today in respect of designs, protection of which has already been harmonised within the Community by Directive 98/71, cited in footnote 4 above, without the harmonisation covering provisional protection measures.

42: - For the development of these arguments, see, for example, the Opinion of Advocate General Tesouro in *Hermès*, points 14, 18 and 20.

43: - Logically it is to be expected that the interpretation and application of any legal provision, and therefore also of a provision such as Article 50 of TRIPs, should vary according to the particular area in which it is applied without that necessarily meaning that the provision has not been interpreted consistently with the provisions with which it forms a whole. Moreover, such variation is all the more expected when altering the essential interpretative context results in another body being competent for that interpretation, as is the situation in the present case.

44: - Judgment cited in footnote 3 above, paragraph 36.

45: - See Opinion 1/94, cited in footnote 10 above, paragraph 107.

46: - See points 49 and 50 above.

47: - See, for example, Joined Cases 267/81, 268/81 and 269/81 *SPI and SAMI* [1983] ECR 801, paragraphs 14 and 15, and *Hermès*, cited in footnote 3 above, paragraph 32. See also point 44 above.

48: - See, for example, Opinion 1/94, cited in footnote 10 above, paragraphs 106, 107 and 108.

49: - See point 46 et seq. above.

50: - See, for example, Opinion 1/94, cited in footnote 10 above, paragraphs 108 and 109, and Case C-25/94 *Commission v Council* [1996] ECR I-1469, paragraph 48.

51: - See *Portugal v Council*, cited in footnote 3 above, paragraph 42.

52: - Under the current institutional framework governing its jurisdiction, the Court can contribute to the

formulation of unity in international representation only in a secondary capacity: either by direct judicial review of failures by Community and national bodies to comply with their obligation of close cooperation with a view to ensuring unity in representation or by virtue of its jurisdiction under Article 177 of the Treaty to reply to questions concerning the interpretation of that obligation (see point 72 et seq. below).

Those powers must not be confused with its jurisdiction to interpret directly the provisions of the relevant mixed international agreements. The important point, in the context of the former, is the conduct of the Community and national authorities in respect of their obligation to coordinate their interpretations of the provisions of mixed international agreements and not determination of their specific meaning, which is the subject-matter of the latter.

53: - Cited in footnote 31 above.

54: - Paragraph 24. See also the Opinion of Advocate General Tesouro in that case where he held that 'technical assistance, or in other words a legal advisory role, [is] manifestly outside the system adopted by the 1971 Protocol, just as [it is] outside the machinery of Article 177 of the Treaty' (point 25).

55: - See point 66 above.

56: - See, for example, Commission Notice 93/C 39/05 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ 1993 C 39, p. 6).

57: - Such an obligation could not be based on the requirement to comply with interpretative rulings made under Article 177 of the Treaty. Once it is accepted that the Court lacks jurisdiction to reply to a question submitted for a preliminary ruling by a national court concerning the interpretation of a provision of a mixed international agreement relating to an area which remains within the competence of the Member States, to oblige the referring court, by virtue of Article 177, to comply in any way whatsoever with an existing ruling which has interpreted the contested, or a connected, provision in a different context from that of the main proceedings, would be contrary to settled case-law on the usefulness of the Court's replies to questions submitted for a preliminary ruling. Moreover, since any reliance on Article 177 would essentially impose a binding centralised interpretation, that would be inconsistent with the logic of the Treaty which, as stated above, precludes recognition in the present case of the Court's interpretative jurisdiction.

58: - The fact that the above obligation is not based on Article 177 of the Treaty, but on the obligation of close cooperation between Community and national authorities in order to ensure unity in the international representation of the Community has the following consequences: first, infringement of that obligation constitutes a failure by the Member State to comply with the obligation of close cooperation, provided the other preconditions for such a failure are also met, and therefore must be established under the procedure laid down in Article 226 EC (formerly Article 169 of the EC Treaty); second, nationals of the Member State

cannot rely on the infringement to set aside the corresponding decision by the national court as it is clear that the obligation of close cooperation is directed at the Community institutions and the Member States and cannot have direct effect.

59: - In that case, it must be accepted, having regard to the outcome of *Hermès*, cited in footnote 3 above, that since the main proceedings and therefore the possible application of Article 50(6) of TRIPs relate to the protection of a trade mark, the Court would, in any case, have jurisdiction to examine the direct effect of that provision (see point 40 above).

60: - Cited in footnote 3 above.

61: - See Article 64 of TRIPs and Appendix 1 to the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO Agreement).

62: - Paragraphs 34 to 52.

63: - As regards the criterion for finding direct effect relating to the nature and broad logic of international agreements, see, for example, *Kupferberg*, cited in footnote 24 above, paragraph 23, and Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraphs 105 to 110.

64: - Point 38.

65: - Paragraph 35. See also paragraph 28.

66: - Cited in footnote 3 above.

67: - Cited in footnote 3 above.

68: - See point 75 above.

69: - It should be noted that the reply to the third question is not affected by the reply to the second question which is concerned with whether the contested provision has direct effect. See point 80 above.

70: - On this subject, see D. Gervais, *The TRIPs Agreement: Drafting History and Analysis*, London, Sweet & Maxwell, 1998, p. 140.

71: - See U. Suthersanen, *Design Law in Europe*, London, Sweet & Maxwell, 2000, p. 437, where it is however noted that it is difficult to distinguish between an 'original' design and a design created 'independently'.

72: - See the preamble to TRIPs where it is stated that the parties recognise 'the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base'.

73: - Those paragraphs provide: '1. Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall

not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.'

74: - At this point, it should be noted that the possibility of implementing the provisions of TRIPs by means of general provisions relating to the protection of rights which are in force under the law of the Contracting Parties does not constitute an unduly broad interpretation of the agreement liable to have a disproportionate effect on the legal system of each Contracting Party. Moreover, whether general or specific national rules are concerned, the corresponding protection of intellectual property rights comes within the scope of TRIPs only in so far as the specific terms and conditions laid down by that agreement are met.