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From GATT to the WTO: The Internal Struggle for External Competences in the EU

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Abstract

Despite the rise of 'mixity', the Commission is nonetheless the key European player in the WTO, even regarding issues that are not exclusive EC competences. While established integration theories struggle to explain this phenomenon, this article argues that the external institutional context should be brought into the analysis.

Introduction

There are numerous examples to show that the role of the European Communities (EC) in the international system has long been controversial. For example, frustrated by 11 years of non-recognition of the European Community (EC) by the Council for Mutual Economic Assistance (CMEA), the European Parliament stated back in 1987 that, in order to develop relations between the two organizations, the CMEA should 'clearly recognize the existence of the EC under international law as well as its competence to act in economic and trade matters' (European Parliament, 1987, p. 73).

The Parliament's insistence on the EC's competence in trade matters is understandable. After all, under the provisions of the common commercial policy (CCP), the EC has enjoyed exclusive competence over international trade issues where trade in goods is concerned since shortly after the Treaty of Rome. However, even in this core area of EC competences, the EC has not always had it easy establishing or defending its authority. Both externally and internally, the EC's international performance has not been without problems. As late as

1988 the French representative to the General Agreement on Tariffs and Trade (GATT) objected to an American request for the establishment of a dispute settlement panel against the EC on oilseeds, even though the representative of the European Commission (as spokesperson for the EC) had consented.[1]

This blatant challenge to a clear Community competence shows the truth in Weiler's statement that 'the foreign policy domain is notoriously the most jealously guarded area of national sovereignty' (Weiler, 1980, p. 156). Focusing on external relations can therefore be very instructive for studying the European integration process. After all, a shift in the balance of power between the EC and its Member States is all the more informative if it takes place in an area as sensitive and closely guarded by the Member States as foreign policy (Weiler, 1980, p. 156). This article explores the disagreements between the Member States and the European Commission over competence in a very specific foreign policy: international trade policy. It looks at the position of the Commission in the international trade regime and more particularly at the Commission's role within the World Trade Organization (WTO).

Section I of the article examines the Commission's role with regard to issues that concern trade-related aspects of intellectual property rights (TRIPS) within the WTO. Despite having been denied exclusive competence over this issue area, it turns out that the Commission is involved in WTO disputes regarding these issues more often and more intensely than could be expected, even though the conditions under which this happens seem less than favourable. The question then is, why the Commission succeeds in gaining power and influence in this case, despite these seemingly adverse conditions. This question becomes even more pertinent when one takes into account that this pro-active role of the Commission on the international stage also has repercussions for the balance of power *within* the EC. Section II then explores possible explanations for this puzzle. Attention is paid to how the two proto-theories of European integration (intergovernmentalism and neofunctionalism) would tackle this puzzle. The principal–agent approach that has been applied – rather successfully – to the study of the EU in recent years is also discussed. It is claimed that the TRIPS case cannot be explained fully by any of these theories. The reason for this, or so it is argued, is that these approaches to a large extent ignore the external context. The hypothesis is then put forward that the institutional framework of the international organization can influence the scope of the Commission's discretion. The WTO's strongly legalistic approach to dispute settlement plays to the advantage of the Commission in that it enjoys more leeway for drifting from the preferences of the Member States. In such an environment, the Commission can make full use of its experience and expertise because of which the

[1] In the end the GATT Council ignored the protest of the French representative and the French Prime Minister consequently apologized the next day (see Petersmann, 1996, p. 265).

incentive for the Member States to rely on the Commission increases greatly. In short, the participation of the Commission in the strongly institutionalized setting of the WTO reinforces the powers of the Commission, both internally – *vis-à-vis* the Member States – as well as internationally.

I. A Puzzle: The Commission, the Member States and TRIPS

From GATT to WTO

With the conclusion of the Uruguay Round of multilateral trade negotiations in 1994, provisions were made for the creation of the World Trade Organization. So almost half a decade after the scuppering of the proposed International Trade Organization by the US Congress, the Bretton Woods system finally got an international trade organization to complement the IMF and the World Bank (Jackson, 1998; Paemen, 1995). Until 1995, the GATT had fulfilled this function. However, there were some problems with the GATT. For example, the diplomatic origins of the agreement were still noticeable in the intergovernmental approach to dispute settlement. Even though the GATT had evolved substantially towards a more legal approach to dispute settlement (Hudec, 1993), the consensus requirement for the creation of panels and for the adoption of panel reports still enabled individual parties to a dispute to prevent a decision from being taken. This changed with the creation of the WTO. The dispute settlement mechanism that is included in the Marrakesh agreement (establishing the WTO) is among the most highly legalized ones to be found in existing international agreements. It provides for a panel and an appeal procedure (the judges being independent experts in the field rather than diplomats from the Member States' missions), there are strict timeframes for the different stages of the procedure, and – most importantly – dispute settlement reports are adopted unless there is a consensus *against* doing so (negative consensus). These are all fundamental changes from how the GATT system operated.

Another major shift from the GATT to the WTO has to do with the issues that are being dealt with. Until the Tokyo Round (1973–9), the GATT had focused predominantly on tariff barriers. In the Tokyo Round, non-tariff barriers were seriously dealt with for the first time, but with only limited success. The Uruguay Round negotiations (1986–94) went much further and their agenda also included several 'new' trade issues: trade-related investment measures, trade in services and trade-related aspects of intellectual property. The agreements reached on these issues are annexed to the Marrakesh agreement establishing the WTO and are binding on all WTO members (unlike the plurilateral agreements that mushroomed during the Tokyo Round).

In this article, it will be argued that these two events (the strengthening of the institutional framework of the WTO and the increase of the scope of the organization) have had an important impact on the balance of power within the EC when it comes to trade policy. The strengthened institutional framework of the dispute settlement system has enabled the Commission to play an important role in disputes regarding new trade issues. This, in turn, has paved the way for gradual adjustments to Art. 133, the core article of the common commercial policy (CCP), also to incorporate issue areas such as services, intellectual property and investment. These are changes the Commission was advocating even before the Uruguay Round was concluded, but which it failed to get accepted by the Member States. As a result of the Commission's strengthened position in the new dispute settlement system, however, it could gradually achieve these aims. The following paragraphs give a more detailed sketch of the EC's internal developments and the context in which these were taking place.

The European Context

Within the EC, the conclusion of the Uruguay Round led to a confrontation between the Commission, on the one hand, and the Council (most Member States at least) on the other. The dispute was about who was responsible for signing what. The Commission claimed that everything that was covered under the WTO agreement (including TRIPS) fell under Art. 133 TEC. The CCP is one of the strongholds of the EC's external policy and the EC has exclusive competence over issues falling within the scope of Art. 133, which puts the Commission in a central position. It is not therefore surprising to see the Commission so eager to have the new issues included under the CCP. Most Member States, on the other hand, disagreed with the Commission's broad interpretation of Art. 133 to include trade-related aspects of intellectual property rights and trade in services. According to the Council, these issues fell outside the scope of the CCP and thus outside the scope of the EC's exclusive competence. The solution to this deadlock was to ask the European Court of Justice for an opinion, a procedure provided for in Art. 300(6) TEC. The fact that no fewer than eight Member States, including the three big ones (Germany, France and the UK), filed separate briefs to the Court supporting the position of the Council is a telling sign of how strongly the Member States felt about this issue and of the degree of resistance to the Commission's interpretation.

The Court, in its infamous opinion 1/94, largely sided with the Council and the Member States (see Bourgeois, 1995; Hilf, 1995). It confirmed that the European Community (EC) has exclusive competence with regard to trade in goods and also for cross-border services. But it denied the EC exclusive competence over other types of trade in services and for most trade-related

aspects of intellectual property rights. It ruled that the EC and the Member States have shared competence to conclude the services agreement – except for cross-border services, which are covered by Art. 133 – and that the EC and its Member States are jointly competent for concluding the TRIPS agreement, except for the fight against counterfeit goods, which also falls under the CCP (see opinion 1/94). The result was that, because the EC did not have exclusive competence over all the issues involved, the WTO charter was signed as a 'mixed' agreement (i.e. by both the EC and the Member States; for an extensive discussion of 'mixity', see O'Keeffe and Schermers, 1983).

Some scholars feared that 'Opinion 1/94 is likely to have negative effects … on the status of the EC within the WTO' (Bourgeois, 1995, p. 786), with one prominent observer even describing opinion 1/94 as a 'programmed disaster' (Pescatore, 1999). This gloominess is quite understandable in the light of the events of the mid-1990s. First of all, the Commission went too far for the Member States (definitely for France) in negotiating the Blair House agreement on agriculture in November 1992. This agreement between the EC and the US was negotiated by an autonomous Commission, largely independent of Member States' control. The outcome, however, proved to be unacceptable to France, which rallied enough Member States around its position to force the Commission to renegotiate the agreement (see Paemen and Bensch, 1995; Van den Bossche, 1997). The result was 'a turning point in the delegation of negotiating authority to the supranational representatives, seriously calling into question the informal flirtation with majority rule and increased autonomy of the negotiators that had started to prevail' (Meunier and Nicolaïdis, 1999).

Secondly, the Commission had overplayed its hand in promoting the Maastricht Treaty and was therefore held partly responsible for creating the atmosphere in which a Danish 'no', an extremely narrow French 'yes' and a German challenge to Maastricht's constitutionality were possible. In other words, the Commission was not exactly at the height of its popularity: not with the Member States, nor with general European popular opinion (the percentage of people with a favourable impression of the Commission was down from 56 per cent in 1990 to 47 per cent in 1992; see *Eurobarometers* 33 and 37). On top of all this came the Court's ruling in opinion 1/94, which can hardly be read as an endorsement for the Commission.

Finally, it has already been pointed out that as many as eight Member States, as well as the European Parliament, submitted observations to the Court. All of them, even the Parliament, were arguing against the Commission's interpretation (that TRIPS and GATS did fall within the scope of Art. 133). Taking all these elements together, the logical expectation should be – and was, witnessing the quote from Bourgeois – that the Commission would not really play a role of great significance with regard to these new issues, like TRIPS.

WTO Dispute Settlement and TRIPS: The Commission as the Central Actor

In practice, however, the Commission does play an important role in the WTO in disputes concerning these new issues. This article focuses on TRIPS issues since they are the substance of most of the disputes over the 'new' issues. At a very general level, one could point out that none of the Member States has initiated a TRIPS dispute (or, for that matter, any other dispute). Hence, all offensive WTO disputes on intellectual property rights concerning the EC and/or (some of) the Member States have been initiated by 'the European Communities and their Member States'. The implication of this joint action is that there is a clear need for co-ordination of positions and expertise, favouring the Commission.

Also, the decision-making process of the EC puts the Commission in a stronger position. For 'spontaneous' disputes, initiated through the procedure described in Art. 133, the 'Community method' of decision-making applies and the Commission has a monopoly on the initiative: it has to make a proposal to the Council, which then has to decide. For disputes initiated through the trade barriers regulation, the Commission's position is even stronger (for a comparison of the Commission's role in the two procedures, see Billiet, 2005). Under this procedure, it is the Commission that has to decide whether or not to initiate proceedings in the WTO. This decision holds unless a Member State asks to refer it to the Council within ten days. If the Council has not made a ruling after 30 days, the Commission's decision applies. These strict timeframes play to the advantage of the party having the initiative, i.e. the Commission. On top of that, the Member States have an incentive to defend their interests through the EC because of the better chances for a big country of enforcing compliance. Together, that means that the Commission is in a rather strong position since the Member States have an incentive to act through the EC, but there they are dependent on the Commission for obtaining their national objectives.

The primacy of the Commission in offensive TRIPS disputes can be illustrated by looking at specific disputes, for example, the dispute initiated by the EC against the US concerning Section 211 of the Omnibus Appropriations Act of 1998 (WT/DS176). Section 211 basically forbids the renewal or registration in the US of a trademark that was previously abandoned by a trademark owner whose business and assets have been confiscated under Cuban law, or the recognition of and enforcement by American courts of such rights. The legal basis for the complaint is certain provisions relating to intellectual property rights, in particular 'the TRIPS agreement, notably its Art. 2 in conjunction with the Paris Convention, Article 3, Article 4, Articles 15 to 21, Article 41, Article 42 and Article 62' (WTO, 1999). Nonetheless, the request for consultations 'by the European Communities and their Member States' (WTO, 1999)

was circulated by the permanent delegation of the European Commission in Geneva, *not* by the permanent delegation of one, some, or all of the Member States. So while it could have been expected that the Member States for whom (or for whose industry) the stakes are highest would take the lead in specific disputes, this is not the case in formal WTO proceedings. There is no 'enhanced co-operation'-like situation where a smaller group of interested or affected Member States takes action rather than the Community as a whole. Also all the subsequent communications concerning this dispute (the request for establishment of a panel and the notification of appeal) stem from the Commission's delegation. Moreover, Commission officials are actively involved in dealing with the case at hand.

Since TRIPS are a mixed competence, the phrase 'the European Communities and their Member States' has to be used. But apart from that, there is no indication of the Member States actually playing a leading role. On the contrary, officials in DG Trade confirm that the Commission's delegation was firmly in charge.[2] In interviews, they stated that national officials and experts were hardly involved in the Section 211 dispute. They also confirmed that the decision to appeal the panel decision in this case was taken by the Commission. While this decision was first circulated in draft form to the 133 committee, this serves only to take the political temperature and identify fundamental objections that some Member States might have at an early stage. The officials interviewed stressed that the importance of this should not be exaggerated in that the impact on the Commission's position is usually fairly limited. The presence of any fundamental objections, if they do not constitute a blocking minority of course, far from forcing the Commission into revising its position, usually serves as an indicator that more time should be spent in making the rationale behind that decision and the argumentation more explicit so as to convince a qualified majority of Member States.

The same applies to the other TRIPS disputes that were initiated by the EC and their Member States such as WT/DS114 against Canada regarding patent protection of pharmaceutical products, WT/DS186 against the US regarding Section 337 of the Tariff Act of 1930, or WT/DS160 against the US regarding Section 110(5) of the US Copyright Act (for an informative discussion of the legal aspects of some of these cases and of the effect of 'mixity' on the EC's position in the WTO, see Heliskosi, 1999). This last dispute is particularly interesting given that it was initiated through the trade barriers regulation based on a complaint by the Irish Music Rights Organization (supported by the *Groupement Européen des sociétés d'auteurs et compositeurs*). So the interests

[2] Interviews with Commission officials from DG Trade and the Legal Service were conducted between August 2004 and July 2005.

are very much concentrated in a particular Member State. However, it is the Commission and not the Member State involved that plays the leading role.

This is in line with the experience of DG Trade officials and officials from the Commission's legal service dealing with WTO disputes. They find that there is no real difference in how disputes that concern mixed competences and those concerning exclusive competences are dealt with. In both cases, Commission officials are the primary actors.

Also, defensively, there is evidence of a strong Commission position. The US in particular has initiated several TRIPS disputes against individual Member States. With the exception of a TRIPS case against Portugal in 1996, however, all TRIPS cases involved the Commission's delegation. In some cases the US also officially involved the EC by initiating the same dispute against both the specific Member State concerned and the EC. This was the case for a dispute dealing with the enforcement of intellectual property rights for films and television programmes in Greece (cases WT/124 against the EC and WT/125 against Greece). Or for a dispute dealing with an Irish infringement on providing copyright and neighbouring rights (cases WT/82 against Ireland and WT/115 against the EC). In this last case, when the chairman of the Dispute Settlement Body proposed that these cases were considered together, the representative of the EC replied that 'this procedure was also appropriate from the Communities' standpoint as it corresponded to the internal organization of the Communities and their Member States regarding the subject matter under the review, namely the TRIPS Agreement' (WTO, 1998, p. 5). Nowhere in the minutes of this meeting is there a record of the Irish representative taking the floor.

In other cases the US aimed the dispute only against the specific Member State. This was the case in WT/83 and WT/86, dealing with enforcement of intellectual property rights in Denmark and Sweden, respectively. However, even though the request for consultations was directed only to the 'Permanent Mission of Denmark' and the 'Permanent Mission of Sweden', the notification of a mutually agreed solution was distributed by the Permanent Mission of the US and Denmark or Sweden *and* the Permanent Delegation of the European Commission. It is interesting to note that, even though it is the Danish or Swedish parliament that has had to pass or amend national legislation in order to bring that country's rules into line with the TRIPS agreement, the WTO documents consistently refer to 'the European Communities – Denmark' or 'the European Communities – Sweden'. This strongly suggests, and this was again confirmed by officials from DG Trade, that the Member States rely heavily on the Commission and its delegation in Geneva for dealing with WTO disputes. Moreover, when it comes to TRIPS issues and even when the dispute is initiated only against the Member State and concerns national legislation.

The Repercussions of the Competence Question

Contrary to the expectations, the Commission nonetheless plays an important role regarding TRIPS-issues. However, *de facto* power gains could still be reversed by the Council quite easily. That is why it is important to look at the evolution and legislative history of Art. 133 (ex Art. 113). This is done in the next paragraphs. From this overview it will become clear that the Commission has long argued for incorporating services and intellectual property rights into Art. 133, but that the Member States (and the ECJ in opinion 1/94) strongly opposed it. However, despite this opposition the situation has nevertheless changed substantially since the new WTO dispute settlement system became operational and this is reflected in the evolution of Art. 133. The strengthened position of the Commission in the WTO dispute settlement system and the Member States' reliance on the Commission in this setting has paved the way for these *de facto* competence gains to have been cemented in the Treaty and given a more permanent character, becoming *de jure* competences.

The insistence of the Commission that Art. 133 also covers trade in services and trade-related aspects of intellectual property rights is not new. The Commission's position can be traced by looking at its contributions to the Intergovernmental Conference (IGC) that was called at the European Council in Rome in mid-December 1990. In the run-up to Maastricht, the Commission proposed to replace the common commercial policy (then Arts 110–16 EEC) by a common 'external economic policy' (Commission, 1991, p. 92). The Commission interpreted this new concept very broadly in that it would not only cover trade, but also other 'economic and commercial measures involving services, capital, intellectual property, investment, establishment, and competition' (Commission, 1991, p. 92). The primary aim of the Commission was to clearly establish or reinstate its authority as the sole negotiator and thus 'to put an end to constant controversy surrounding the scope of Art. 113' (Commission, 1991, p. 93). [3] In the end, 'the new Article 113 incorporates almost textually Article 113 EEC Treaty adding only a few minor and technical details and is therefore a far cry from what was originally conceived by the Commission' (Maresceau, 1993, p. 12).

As was already discussed, the positions had not substantially shifted two years after Maastricht. The Commission still claimed that services and intellectual property rights fell under the scope of the common commercial policy. The Member States clearly did not agree and the Court's ruling was pretty much a confirmation of what the Member States had already codified in the Maastricht

[3] Apart from the internal bickering over competence, the Commission might also have been uncomfortable with the US strategy of 'divide and rule' as when President Clinton tried to exploit the delicacy of the European balance by approaching Chancellor Kohl and Prime Ministers Major and Balladur directly in the final days of the Uruguay Round (Narbrough, 1993, p. 25).

Treaty. In the IGC negotiations, the Member States redrafted Art. 113 so that the compromise reflected their preferences and the Court had confirmed this situation. It seems therefore that there was not much the Commission could do about this since two of the most obvious ways of changing the situation (treaty change and judicial activism) were thus ruled out.

Yet at the Amsterdam summit in 1997, when the Maastricht Treaty was to be reviewed, the same issue was lying on the table. Again, the Member States found themselves debating what to do with Art. 133 and the new trade issues. In the end, Art. 133 was amended so that the Council could expand the exclusive competence for the new issues with a unanimous vote. The importance of this is that 'this could be done on an ad hoc basis without requiring an IGC' (Meunier and Nicolaïdis, 2001), thereby lowering the barriers for bringing services and intellectual property rights under Art. 133 and thus making this more likely in the future.

The issue was discussed again at the Nice summit in 2000 and the compromise reached here moved further still in the direction of the Commission's preferred outcome. Art. 133(5) under Nice categorizes trade in services and the commercial aspects of intellectual property rights as exclusive EC competences, although unanimity is still required if the voting rule to adopt internal rules is unanimity or if the EC has not yet exercised its powers internally (for an excellent discussion of the genesis of and difficulties with the Nice amendments of Art. 133, see Cremona, 2001). For all the other aspects of intellectual property rights (other than the 'commercial aspects') the EC and the Member States remain 'jointly' competent. However, Art. 133(7) states that 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may extend the application of paragraphs 1 to 4 to international negotiations and agreements on intellectual property'. So with regard to intellectual property rights, the commercial aspects are now covered under Art. 133 and all other aspects can be transferred by the Council acting unanimously, without the need for an IGC.

The text of the proposed Constitutional Treaty continues in this direction. The situation would not change for trade in services or the commercial aspects of intellectual property rights. However, if the Constitution were ratified, Art. 133 (which would become Art. III-217) would also incorporate foreign direct investment. This is one of the elements of the comprehensive external economic policy proposed by the Commission in 1990. This would therefore continue the trend of the provisions of the CCP gradually moving closer to the Commission's broader interpretation. Interestingly, the explicit inclusion of foreign direct investment into the CCP in the draft Constitutional Treaty came at a time when the Commission was trying very hard to get the issue of investment on to the agenda of the WTO in the framework of the Doha Round.

So again there is a link between developments (and expectations) in the WTO and the way the provisions of the CCP evolve.

To conclude, even though the EC lacks exclusive competence with regard to the new trade issues, the Commission has nonetheless succeeded in playing a central role in the WTO (and most notably in the new dispute settlement understanding, the centrepiece of the new organization), also on TRIPS-related issues. The question that arises then, is why the Commission has been able to become the key player in a field where many Member States tried so hard to push it back and where even the Commission's traditional and natural ally within the EU, the Court, has refused to support it. Or, put differently, how has the Commission been able to gain powers in a hostile environment, faced with stiff resistance and hostility by the Member States (and thus the Council)? This is illustrated by the legislative history of Art. 133 since 1990. Where at first the Commission was clearly rebuffed in its attempts to reform the CCP, there has been a gradual evolution towards a more encompassing approach since the WTO was established. The next section explores how the most important integration theories would approach this puzzle. It will be argued that none of these theories can adequately explain the problem. It then puts forward an alternative approach that complements the 'new institutional' approach, stressing the external institutional constraints rather than focusing on the (internal) relations between the European actors.

II. Explaining the TRIPS Puzzle

This section explores how the mainstream theories of European integration would explain the Commission's role in the TRIPS cases. The supranational (neofunctional) approach will be discussed first, followed by the intergovernmental and the principal–agent ones. Despite their many strengths, none of these approaches can adequately account for the Commission's success in the TRIPS case. The reason, it is argued, is that these theories do not sufficiently take into account the external context, something that cannot be overlooked when studying the external relations. Therefore, it is suggested that the influence of the institutional framework of the international organization be added to the principal–agent analysis, the most complete approach. It will be argued that the strong, highly legalized institutional framework of the WTO's dispute settlement system favours the Commission.

A Supranational Explanation

Given the number of theories in the neofunctional mould and given their varying degrees of sophistication, the following account will inevitably fail

to represent all the nuances of the various approaches. Instead, two main principles for explaining the dynamics of European integration (and hence Commission–Member States relations) that consistently arise in the most important theories are distilled. These are spillover (functional and political) and the autonomous role of the Commission.

Applying the notion of spillover to the TRIPS case, the basic argument would be that the already acquired exclusive competence in trade in goods creates pressure to extend this exclusive competence to the area of intellectual property rights. A facilitating condition for this spillover, supranationalists might argue, is that trade issues are increasingly technical and therefore tend to be dealt with on the lower, technocratic levels of decision-making rather than at the political level. However, although spillover can certainly partly explain the inroads the Commission has made into TRIPS issues, it fails to come up with a convincing answer to the puzzle. After all, if only the spillover effect is taken into account, it is not clear why the Commission is then able to play an important role in issues for which it is not exclusively competent in the WTO (like TRIPS), but not, say, in the OECD, an organization that arguably is much less politicized than the WTO and is concerned with more issues that could be described as 'low politics'. Furthermore, we have seen that the political representatives of the Member States did take a keen interest in what was going on and that they were very eager to keep control over these new issues of services and intellectual property rights. More generally, trade issues increasingly are very political matters. That certainly goes for the TRIPS case since it was politicized from the moment the division of competences between the EU and the Member States was mentioned, thereby transforming a technical discussion into a political one about 'creeping competences' and 'federalization by stealth'.

Another spillover argument could be that the Commission succeeds in gaining influence over TRIPS externally because of increased competences over intellectual property rights internally. However, striking examples of Commission influence such as the cases concerning the enforcement of intellectual property rights against Sweden and Denmark cannot easily be linked to similar internal developments. These cases were initiated by the US in May 1997 and the notification of a mutually agreed solution dates from December 1998 in the Swedish case and June 2001 in the Danish case. For comparison, a directive aiming to harmonize the enforcement of intellectual property rights in the EC was not approved by the Council of Ministers until 29 April 2004 (Directive 2004/48/EC).

Stressing the autonomous role of the Commission looks more promising. Given the proactive role of the Commission in its fight for power and influence, the supranational portrayal of the Commission as more than just a Member

State's stooge gains credibility. This element will return in the principal–agent analysis.

An Intergovernmental Explanation

The chief explanatory variable, from an intergovernmental point of view, is Member State preference.[4] This does not mean that the preferences of all Member States have to be taken into account or reflected in the outcome, but at the very least there has to be a 'grand bargain' between the big three Member States: Germany, France, and the UK (see Moravcsik, 1993). In the TRIPS case, however, it becomes clear from the outset that the intergovernmental approach struggles to come up with an explanation for the Commission's successful *coup* in the area of intellectual property rights. After all, the three big countries (together with five others) actively opposed the Commission's interpretation that trade in services and trade-related aspects of intellectual property rights fell under the exclusive competence of Art. 133. The intergovernmental explanation that the Commission gained these *de facto* competences and powers because the Member States allocated them or did not object to the Commission claiming them, therefore also fails to convince.

Of course it could be argued that Member State preferences can change over time. In this interpretation, the fact that Member States denied these new competences to the Commission does not preclude the possibility of granting these powers at a later stage. Nonetheless, the centrality and importance of opinion 1/94 in the legal literature, together with the intensity with which most of the Member States fought the interpretation of the Commission, indicates that the issues at stake were deemed to be very important to the Member States. It would therefore be rather strange if Member State preferences on such a salient issue changed drastically in the span of only a couple of years.

A 'New Institutional' Approach

The new institutionalism aims to strike a balance between the intergovernmental and the supranational paradigms by accepting the importance of the central concepts of both theories, but trying to avoid the pitfalls. Or, as one of the leading voices of the institutional approach states: 'these [new institutional] contributions [to the study of European integration] offer the promise of overcoming the current impasse of the neofunctionalist/intergovernmentalist debate and generating a new theoretical synthesis combining many of the fundamental

[4] As many game theorists have noted, preference is not necessarily the same as interest (see, for example, Milner, 1997). This article focuses on 'revealed' preferences of the Member States and compares these preferences with the outcome of the legislative process. Hence, even though a stronger role for the Commission could be in the interests of a Member State, that does not mean that the Member State in question also has a preference for such a strengthening of the Commission's position.

insights of both approaches' (Pollack, 1996, p. 40). According to this approach, states are still firmly in control when it comes to the creation and/or changing of institutions, as is illustrated in the EU by the individual countries' veto power for treaty change (and for a new treaty to come into force). However, once created, these institutions will have their own preferences and they will exert influence through various sub-, trans- and supranational channels in order to have these preferences reflected in policy outcomes. The new institutionalism has thus redefined the debate when it comes to European integration. Now it is possible to acknowledge the (initial) primacy of the Member States without having to designate the supranational institutions as irrelevant. Or, alternatively, to point to the impact of the supranational institutions without having to broadcast the obsolescence of the sovereign state. Instead, the focus is on the *limits* of sovereignty and supranationalism, or how actors (be they of an intergovernmental, supranational, or transnational nature) act strategically in response to the limitations with which they are confronted.

By making use of principal–agent analysis, Pollack constructs a methodological toolbox and operationalizes this approach (see Pollack, 1997, 2000). Here, the Member States are the principals that delegate certain functions to the Commission, the agent. However, the Commission, as agent, does not simply implement the Council's directions. It has its own preferences and will exert bureaucratic drift (also somewhat confusingly referred to as 'shirking') to effectuate them. In response or as prevention, the Council sets up control mechanisms to monitor and sanction the Commission.

This approach also runs into some problems when it is applied to the TRIPS case. First of all, higher barriers should mean less scope for agency drift. However, the Commission nonetheless succeeded in exerting bureaucratic drift, even though there was a formidable barrier in the form of a ruling of the Court of Justice. This is also odd because the Member States are supposed to keep a close eye on the Commission (and hence limit its scope for drifting from the preferences of the Member States) when the issues at stake matter a lot to them (as was the case here).

Secondly, if the Commission succeeds in drifting in this case where a majority of the Member States revealed strong preferences against granting more power to the Commission, then why does it not succeed in other cases? In the GATT, for example, the US initiated complaints against France, Belgium and the Netherlands for their tax regimes as retaliation for the EC's complaint against the US 'DISC' legislation (BISD 23S/127, 23S/114 and 23S/137). These disputes, however, were dealt with on a strictly bilateral basis, i.e. between the US and France, Belgium and the Netherlands respectively. The EC plays no role and is not even mentioned once in the panel reports. Whereas this can be shrugged aside as logical given the very limited EC competence

over tax matters, it is nonetheless noteworthy that the EC, with the Commission as main actor, has used the WTO system to initiate disputes attacking the tax regimes of third countries, the desirability and appropriateness of which has been put into question by some observers (see Carney, 1998). Even more striking is the reaction to a situation within the WTO that is very reminiscent (even the parallel) of the DISC dispute and the US reaction to it. After the EC initiated the 'foreign sales corporation dispute' (WT/DS/108), the US reacted by initiating complaints against certain aspects of the tax regimes of Belgium, France, the Netherlands, Ireland and Greece (WT/DS 127–131). These complaints were quickly dropped by the US (there was only one round of consultations) but the interesting point is that – contrary to the GATT tax disputes – it was the Commission rather than the Member States concerned that conducted the consultations with the US (interviews with officials of the Belgian Ministry of Foreign Affairs, the Commission's Legal Service and DG Trade, January 2005).

An Alternative Explanation for the TRIPS Puzzle

I argue that the explanation has to be sought in the external context, namely the institutional framework of the international organization. The world trade regime has undergone a transformation from a 'power-based', diplomatic approach within a loose organizational structure (technically speaking, GATT was only a provisional treaty) to a 'rules-based' system that is strongly institutionalized: the WTO (on power-based and rules-based systems, see Jackson, 1998). This article claims that this transformation of the external context has enabled the Commission to gain more leeway *vis-à-vis* the Member States and – ultimately – to gain wider competences than had been possible in the absence of the institutionalization of the trade regime.

Specifically, it has to be noted that the actions of the Commission in the framework of the WTO's dispute settlement mechanism cannot be separated from the context within which they take place. These actions will have repercussions internally (*vis-à-vis* the Member States) as well as externally (with regard to other WTO members). The Commission can then try to exploit these internal and international 'externalities' to gain more or wider competences and acknowledgement.

The external dimension refers to the reaction of other countries to the performance of the Commission, as representative of the EC, in the WTO dispute settlement system. They are forced to acknowledge the Commission as the legitimate EC representative and as an important actor. This will lead to an enhanced legitimization of the EC and in particular of the Commission as its representative, and increased recognition of the EC/Commission as an international actor.

Internally there are several elements that may contribute to the strengthening of the Commission's position. Good representation and/or success in the handling of disputes may lead to an acknowledgement by Member States that the Commission is doing a good job and that it is beneficial for them to be represented by the Commission. From this point of view, the Commission can use its success in dispute settlement in areas of exclusive competence to lay the basis of extending its competences.[5] It can drift further, making use of the dispute settlement provisions, *de facto* acquiring new competences. Thus it can lay the foundations for more easily acquiring these competences *de jure* in a later stage. This line of thought can be backed up by other arguments as well.

First of all the Commission is in a good position in the WTO because the way in which disputes are solved in this organization requires a lot of legal expertise as well as technical knowledge. One of the important roles of the Commission is exactly that of 'technical body'. The Commission either has the in-house expertise and knowledge, or otherwise it can fall back on its vast network of contacts and 'epistemic communities'. Furthermore, its institutional position enables the Commission to act as a repository of Member States' knowledge and expertise. The argument here is quite similar to that put forward in the interpretation of the Single European Act and economic and monetary union. With regard to these policy developments, it has been claimed that the Commission (or an entrepreneurial leader in the Commission) succeeds in pushing through highly controversial political reforms by presenting them as technical matters and thus pulling them away from political bargaining (as, for example, the Delors Committee; see Featherstone and Dyson, 1999).

A different interpretation would be that strong enforcement mechanisms weaken the position of the Commission. The reason for this is that, because cases get more complicated (and the stakes are higher), the Commission needs help from specialists from the Member States and industry. This erodes the monopoly the Commission normally enjoys and thus weakens its position. However, the Commission acts as a repository for specialist knowledge. It still enjoys a monopoly over the co-ordination of the collection and use of information, it is still the hub in the hub-and-spoke model and therefore it will remain the prime and ultimate technical specialist, not just because of its in-house expertise, but also because of its central position as mediator and co-ordinator.

[5] Note that this fits into the concept of spillover. In fact, many elements mentioned in this section seem to fit in a functionalist logic. This might seem strange after the rejection of neofunctionalism as a possible explanation to the TRIPS puzzle. However, this section deals with the dynamics behind the question why the Commission could do better in strongly institutionalized settings, not with the Commission's behaviour independent of the international institutional context. Therefore, this functionalist logic is only relevant once the shortcomings of the 'traditional' integration theories is acknowledged and has been overcome.

Yet another element that props up the Commission's role is the extra clout that comes with Community action. This can refer to a political signal that one or a few Member States want to give (e.g. about their vision where the EU should be heading). Or it can refer to efficiencies generated by Community action. Here, the introduction of the new sanctions mechanism in the WTO is important. In situations where parties can be allowed to retaliate and/or resort to sanctions in order to enforce compliance, the individual Member States have an incentive to be represented by the Commission (as representative of the EC). This is because, firstly, retaliation and/or trade sanctions will be more effective and less harmful for the individual states when initiated by the EC (in economic terms a big country). Secondly, the other country that is party to the dispute will take an EC threat more seriously because the threat of action by the EC is more credible than if it were uttered by, say, France alone. This is certainly true in the relationship with small countries (the costs for the EU of imposing sanctions on a small country are low, but the cost of EU sanctions for the small country is very high).[6] But it also makes sense in EC–US relations since the EC can deal with the US on an equal footing, contrary to the individual Member States. Also, it would be extremely difficult for one Member State to impose sanctions on a third country since that would inevitably have repercussions on the single market.

A good example of the problems that can be caused by the individual action of the Member States is a case where cross-retaliation is allowed. Kuyper notes that cross-retaliation 'demonstrates how "impossible" separate Member State action before panels has become' (Kuyper, 1995, p. 99). Consider the following hypothetical example. Say that a Member State wins a dispute concerning TRIPS provisions, but the defendant does not comply with the ruling and the Member State in question is allowed to resort to retaliation by the WTO. It could very well turn out that retaliation within the TRIPS agreement is not possible. Since cross-retaliation is allowed under WTO rules, this Member State could then retaliate in another issue area. The most likely area would be trade in goods since that still has the broadest WTO coverage. However, in this sector the competence to take retaliatory measures is in the hands of the Community and the Community would probably not be allowed to act (see Kuyper, 1995, for a more extensive discussion). In other words, 'cross-retaliation is not really a serious possibility for Member States and hence the dispute settlement system would lose much of its effectiveness for them' (Kuyper, 1995, p. 100). Whether in an offensive or defensive case, legitimate action by or against one

[6] Paradoxically, the existence of a rules-based system can thus give the smaller country an incentive to compromise and to try and come to a negotiated settlement, unless it is really sure about winning its case and being able to enforce the ruling. However, even then the enforcement can be problematic for small countries.

Member State can have EU-wide repercussions when cross-retaliation affects other sectors (that fall under EC competence).

This example is yet another illustration of how the WTO's legal approach to dispute settlement has an influence on the position of the Commission in the internal division of competences in the EC. That does not mean that other factors, like the preferences of the Member States for example, have suddenly become superfluous. It will have become clear from the discussion of the gradual change in the scope of Art. 133 that the Member States are the principals in the first place, delegating tasks and power to the Commission. However, there are other influencing factors at work as well. As was argued in this article, a good case can be made for attributing the Commission's gain in influence and its central position in WTO TRIPS disputes to the strengthening of the way international trade disputes are settled since the creation of the WTO. The Member States, despite the preferences they might have and the central decision-making role they occupy within the EC, are sometimes overtaken by events on the ground, caused by their reliance on the Commission in the dispute settlement system. This then adds to the pressure for a more formal shift in powers to the benefit of the Commission by transforming its gained *de facto* competences into *de jure* ones.

Furthermore, the WTO gives an advantage to big countries because of the way the dispute settlement system operates. Particularly the loss of veto power (for the establishment of panels or the adoption of panel reports) together with the credible and much used retaliation option, play to the advantage of big countries. Therefore, the Commission – as representative of the EC – benefits. This is strengthened by the credibility of the Commission to take on this role given its position as a (partly) technical body, possessing the necessary expertise either in-house or 'borrowed' from the Member States through its mediation function.

In short, thanks to the strengthened institutional framework that was put into place with the creation of the WTO, the Commission has been able to gain competences it otherwise might not have gained. When it first argued strongly in favour of integrally incorporating services and trade-related aspects of intellectual property rights in the CCP, the Commission was clearly rebuffed by the Member States. Two years later, the Court of Justice upheld this status quo. In the meantime, however, the Commission was increasingly active in TRIPS disputes, the reasons for which have been explained above. The Member States seem to have been overtaken by these events on the ground, continuously being pressured into bringing more and more elements of services and TRIPS under the CCP because of the Commission's *de facto* involvement

in such disputes.[7] The changes to the scope of the CCP that the Commission could not push through during the Uruguay Round, were achieved when the WTO's dispute settlement system was up and running. The example of the Commission's role in the tax cases under GATT and tax-related disputes in the WTO, although less elaborately worked out than the TRIPS case study, also supports the hypothesis that the institutional framework of the WTO has opened a window for the Commission to extend its field of action.

Conclusion

This article looked at how the Commission succeeded in becoming the major European player in the WTO with regard to TRIPS issues, even though the Member States clearly expressed their preference not to give the EC exclusive competence in this field. The explanation has to be sought in the institutional framework of the WTO and particularly its legalized dispute settlement system. This favours the Commission in that it changes the incentive structure of the Member States to be represented by the Commission and in that it attributes more importance to skills the Commission possesses. The impact of these external elements explains why the existing integration theories cannot adequately explain the TRIPS puzzle since these theories tend to focus largely on endogenous factors influencing European integration and thus tend to play down or even ignore the external context. This is true even for the more sophisticated approaches to European integration, such as the principal–agent analysis. This article aims to contribute to the understanding of the European integration process by pointing out that the external institutional framework should be taken into account as well since it can influence the Commission's scope for drifting from the Member States. Complementing the principal–agent approach, the most promising and complete one, with this external dimension would lead to a more inclusive theory (while retaining a sufficient degree of parsimony) and hence to a better understanding of the European integration process, in particular with regard to external competences.

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[7] The uncertainty created by the blurry delineation of competences also generates pressure to codify the factual role of the Commission. Imagine the effects of a WTO Member State challenging the Commission's authority in a TRIPS dispute.

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