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## DOTTORATO DI RICERCA IN " DIRITTO DELL'UNIONE EUROPEA "

CICLO XXVI

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### Common Commercial Policy of the European Union: Legal Position and Effects of the WTO Agreement within the Legal Order of the European Union

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Please allow me as the author start in an informal way. I am going to start with a story. Some years ago, more precisely in 2010 I was standing in front of a strong dilemma. '*Having in pocket*' the diploma in International Relations and European Studies from the Institute of International Relations and Comparative Law of the Comenius University in Bratislava I was facing a rebus how to carry on with my interest in European studies. Thus, I plunged into the searching of the possibilities and analyses of the pros and cons of every relevant possibility the European academic space offered to me.

Finally, on the '*final list*' of the possibilities appeared Università degli studi di Ferrara one of the oldest and traditional Italian universities which was attended in the past by prominent scholars like Copernicus or Paracelsus. Since the University of Ferrara offered the PhD program in EU Law with interesting academic and international background, thus I submitted the application form for this PhD study program. At this place, I would like to express my thanks also to the foundation Hlavička of the company SPP that provided me a start up scholarship for the PhD study program.

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## *List of Abbreviations*

<b>AB</b>	Appellate Body
<b>AETR</b>	Accord européen sur les transports routiers
<b>CAP</b>	Common Agricultural Policy
<b>CFI</b>	Court of the First Instance
<b>CFSP</b>	Common Foreign and Security Policy
<b>CJ EU</b>	Court of Justice of the European Union
<b>CET</b>	Common External Tariff
<b>CCT</b>	Common Customs Tariff
<b>CMC</b>	Consejo del Mercado Común
<b>CTP</b>	Common Transport Policy
<b>DSB</b>	Dispute Settlement Body
<b>DSM</b>	Dispute Settlement Mechanism
<b>EC</b>	European Community
<b>ECJ</b>	European Court of Justice
<b>ECSC</b>	European Coal and Steel Community
<b>EEC</b>	European Economic Community
<b>EPC</b>	European Political Community
<b>EU</b>	European Union
<b>EURATOM</b>	European Atomic Energy Community
<b>GA</b>	General Advocate
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GCM</b>	Grupo Mercado Común
<b>HA</b>	High Authority
<b>ICITO</b>	Interim Commission for International Trade Organization
<b>ITO</b>	International Trade Organization
<b>JHA</b>	Justice and Home Affairs
<b>MERCOSUL</b>	Mercado Comun do Sul
<b>MERCOSUR</b>	Mercado Común del Sur
<b>MFN</b>	Most favored nation
<b>RTA</b>	Regional trade agreement
<b>SEA</b>	Single European Act
<b>TEC</b>	Treaty on European Community
<b>TFEU</b>	Treaty on Functioning of the European Union
<b>TEU</b>	Treaty on European Union
<b>TPRB</b>	Trade Policy Review Body
<b>USA</b>	United States of America
<b>WTO</b>	World Trade Organization

# 1 Introduction to the Research Issues

## Summary

1.1 Preface 1.2 Research Hypotheses 1.3 Dissertation Methodology and Methods 1.4 Dissertation Terminology 1.5 Chapter Summary

## 1.1 Preface

*“In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of the international law, including respect for the principles of the United Nations Charter.”<sup>1</sup>*

The EU since its primordial genesis as ECSC was established as entity considering economic goals. In the moving times of post-war era, the key challenge posed on diplomatic élites remained the formation of international system effectively hindering the possible military conflicts on the European continent.<sup>2</sup> Post-second world war era as referred above was marked by the multiplicity of the international organizations and thus fostering the cooperative approach between the states promoting thus peaceful relations between them.

Common control of strategic raw materials, coal and steel gave an initial impetus and principal idea for creating a community, being proud holder of the denomination - European Coal and Steel Community.<sup>3</sup> However, the rules, as they were stipulated by the ECSC Treaty,<sup>4</sup> did not govern exclusively the internal

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<sup>1</sup>Treaty on the Functioning of the European Union (Consolidated version 2012), article 3 (5), OJ 326, 26.10.2012.

<sup>2</sup>Some authors speak about a moral and economic collapse of Europe and urgent need for normalization of the life of Europeans, in V.KARAS, A.KRÁLIK, *Právo Európskej únie*, Prague, 2012, p.4.

<sup>3</sup>It goes without saying that the general trend of the post second world war era was marked by significant rise of international organizations and their role they shall play in international relations in E. TINO, *L'Unione Europea e le organizzazioni economiche regionali dei Paesi in via di sviluppo: sistemi giurisdizionali a confronto*, Ferrara, Dissertation thesis, 2012, p.15 ff..

<sup>4</sup>Treaty establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.Y.S. 140. Expired 23 July 2002.



market of strategic war raw materials. The scope of the above mentioned Treaty covered much broader subject-matter, significantly expanding the external appearance of the Community also towards third states. In process of creation of the ECSC the creators could have inspired from the GATT Agreement as signed in 1947<sup>5</sup> and from legacy of other historical economic formations.<sup>6</sup>

Original idea of the primary objective integration<sup>7</sup> was subsequently expanded by Rome Treaty establishing EEC<sup>8</sup> and EURATOM,<sup>9</sup> whereby EEC concerned rather general economic integration, whereas the EUROATOM treaty was oriented on the broad subject-matter commodity - atomic energy. The development in commercial direction was shortly supplemented by adopting CCT<sup>10</sup> and subsequently supplemented by the agreements with the former colonies (Yaoundé<sup>11</sup> and Arusha<sup>12</sup> conventions), later on replaced by even more complex Lomé Convention.<sup>13</sup> These agreements contained as the key point the aim

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<sup>5</sup>The General Agreement on Tariffs and Trade (GATT 1947) General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 1947; formed in 1947 and entered into force since 1.1.1948, although originally meant as part of ITO.

<sup>6</sup>Historically, projects of the regional integrational associations, following the economic aims did not appear as brand new idea. In France (1664) was proposed the project of the customs union between the provinces of France, Austria signed free-trade agreements with its neighbors during from 18th – 19th century, the colonial empires used preferential trade agreements, moreover the customs unions were established alongside with the establishment of the new states as USA, Italy or Germany (Zollverein), in M.SCHIFF, L.A.WINTERS, *Regional Integration and Development*, Washington, 2003, p.4.

<sup>7</sup>Thus, one may fully agree with economist Jovanovic and his considerably straightforward idea, characterizing economic integration as “*a process by which the economies of separate states merge in large entities.*“ in M.N. JOVANOVIĆ, *International Economic Integration*, 1992, London, p.8. However, integration in more political way might be grasped in form of objective – oriented approach as projected by Altiero Spinelli defined in case of the EC as: “*The purpose of the EC is to unite progressively the destinies of several nations by the development of a body of laws and institutions common to them all, obliging them to face certain great tasks with a common policy and to adopt a common position and responsibility towards the world outside.*“ in A.SPINELLI, *The European Adventure. Tasks for the Enlarged Community*, London, 1972, p.1.

<sup>8</sup>Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3.

<sup>9</sup>Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167.

<sup>10</sup>Regulation (EEC) No. 950/68 of the Council of 28 June 1968 on the common customs tariff (OJ L 172 of 22.7.1968, p. 1-402).

<sup>11</sup>The notion ‘*Yaoundé conventions*’ comprises: Convention of Yaoundé I between the European Community and its Member States and the Associated African and Malgache Countries, 1963, OJ 93, 11.6.1964, p. 1431, Convention of Yaoundé II between the European Community and its Member States and the Associated African and Malgache Countries, 1969 (OJ L 282, 28.12.1970).

<sup>12</sup>Agreement Establishing an Association Between the European Economic Community and the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya, 24.09.1969, OJ 282/80 (1970); Council Decision No. 70/595, OJ L 282/83 (1970).

<sup>13</sup>The notion ‘*Lomé conventions*’ comprises: First Lomé Convention between the European Community and the African, Caribbean and Pacific States (ACP), 1976, OJ L 25, 30.01.1976, Second Lomé Convention between the European Community and the African, Caribbean and Pacific States (ACP), 1980, OJ L 347,

to help developing countries on the way to development.<sup>14</sup> Integral part of the integration was the CCP, enacted for the first time in the ECSC Treaty and over the time developed up to its current enactment in the Lisbon Treaty.

Effective exchange and further development and deepening CCP was in the future backed and further enacted by amending treaties starting with SEA<sup>15</sup>, Maastricht<sup>16</sup>, Amsterdam<sup>17</sup>, Nice<sup>18</sup> and lastly Lisbon Treaty.<sup>19</sup> Actually, after entering into force of Lisbon Treaty commercial relations of the EU became even more significantly linked with external dimension of the meaning among other things that there were more closely related to the concretely formulated goals of the external action of the Union acting on the external scene.

Following mostly economic aims on the side EU appears obvious the forming of the CCP as one of the most important EU policies, being in permanent development that resulted in intricacy of relations not only among the actors in the Union itself, but in the same time to the third parties.

Saying this, one must have in mind Kissinger's request for single phone number<sup>20</sup> of the EU even in the subject-matter of commercial matters, although his appeal had rather diplomatic and foreign policy connotation. Nonetheless, since the EU is the biggest trade block, one may not wonder that his appeal has even more significant importance, also in economic terms.

Alongside with the economic integration of the EU run the integration under the umbrella of the GATT which was transformed after nearly 50 years into

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22.12.1980, third Lomé Convention between the European Community and the African, Caribbean and Pacific States (ACP), 1985, (OJ L 86, 31.03.1986).

<sup>14</sup>R.BALDWIN, C.WYPLOSZ, *The Economics of European integration*, London, 2009, p.462.

<sup>15</sup>The Single European Act, OJ No L 169, 27.06.1987.

<sup>16</sup>Treaty on European Union (Maastricht Treaty) OJ C 191, 29.07.1992.

<sup>17</sup>Treaty of Amsterdam, Official Journal C 340, 10.11.1997.

<sup>18</sup>Treaty of Nice, OJ C 80, 10.3. 2001.

<sup>19</sup>Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12. 2007.

<sup>20</sup>Referring to the famous quotation of Henry Kissinger "Who do I call if I want to call Europe?", quoted e.g. in H.de WAELE, J.J.KUIPERS (eds.), *The European Union's Emerging International Identity*, Leiden, 2013, p.4.

real international organization '*stricto sensu*' – WTO, nevertheless, still having in the foreground the fundamental idea of trade liberalism of the world commerce. The enormous subject-matter and growing importance of the GATT/WTO inevitably came into contentious points in regard to the EU integration as well.

Apparently, the EU in its integration history did not want stay apart from the world trade development what demonstrates clear and active interest in taking part in the GATT/WTO affairs and reflection of the GATT/WTO development as well. Thus the EU demonstrated its willingness to cooperate actively with other commercial blocks and states. On the other hand, also CJ EU/ECJ has been on numerous occasions confronted with the GATT/WTO law and the need to clarify the relation between the EU and WTO legal order.

As it is evident from the brief outline, the appearance of CCP raises several question worth to be discussed and further developed. Since the complex analysis of all risen question would be enough for a book, the author will focalize his research efforts on the verification or rebut of the hypotheses as indicated in detailed way in the Chapter 1.2.

While coming to the '*definitive*' answers on the posed hypotheses, there are several steps to be undertaken in order to come to the right (or at least trustworthy) outcomes. Doing so, there are several issues to be investigated and therefore, the partial conclusions will be presented at the end of every single chapter. Concluding the dissertation, the final and in fact summarizing chapter will provide the conclusive overview on the dissertation reflecting the partial conclusions in the comprehensive way.

Therefore, as to the content of the dissertation, the central points and outcomes will come out from brief analyses of the philosophical and economical patterns of the commercial shape of the EU, moving to the investigation of the EU as a subject of international trade and scope of the competences of the EU in the commercial affairs and the '*tools*' of international trade being at disposal of the EU.

Particularity and importance of the linkage between the EU and WTO deserve special approach, starting with *'legislative'* linkage and moving subsequently to the *'judicial'* linkage providing thus solid and full plane reflection of the GATT/WTO legal system in the legal order of the EC/EU being thus a central focus of the dissertation. Finally, the relation WTO/GATT will be tested against the South American commercial block MERCOSUR.

## 1.2 Research Hypotheses

As it has been already outlined in the preface (Chapter 1.1), the issue of CCP is rather complex and the research scope needs to be reduced to certain extent in order to provide more concrete results. In reference to the above mentioned introductory notes contained in the previous subchapter, it appears necessary to target the dissertation on some central points, standing in the foreground of the legal relation between the EU and WTO.

Having in mind prominent and respectful position of the CCP in the legal order of the EU, principal orientation of the dissertation will try to provide adequate explanatory to the following research hypotheses:

1. Which is the current real scope of the CCP in the relationship between the MS and the Union? What is the real playground for the Union and on the other hand of the MS in forming own *'autonomous'* commercial policy? Is it possible to find a complex and self-contained definition of the CCP, or is this issue still rather open-ended?
2. It goes without any doubt that the WTO is *'prima facie'* the most important playground in forming the world trade policies and thus fostering the trade exchange among states. Therefore, it appears obvious that the trade relations between the WTO and the EU shall present high level of mutual respect. However, it remains questionable to which extend shall the EU law and *'acquis communautaire'* be influenced by the WTO law? Does the WTO law represent a binding source of law within the EU legislators and practice of the judges of the CJ

EU? Does (Did) the WTO (GATT) system have the same standard as any other system of international law within the EU legal order?

### 1.3 Dissertation Methodology and Methods

In working on appropriate introductory words to dissertation methodology the author came across the academic writing *Research Methodology: An Introduction* by Wayne Dean Goddard and Stuart Melville. In their writing, the authors in regard to the main point of research allege the following: *“Research is not just a process of gathering information, as is sometimes suggested. Rather is about answering unanswered questions or creating that which does not currently exist. In many ways, research can be seen as a process of expanding the boundaries of our ignorance. The person who believes he/she knows everything reveals not only arrogance, but also profound ignorance.”*<sup>21</sup> Their opinion is the straight-forward definition of conducting the correct research which shall be in Plato’s view complex and approaching the reality but in the same time putting big requirements on the researcher being the *‘true lover of knowledge.’* As he alleges: *“Our true lover of knowledge strives for reality, and will not rest content with each set of particulars which opinions takes from reality, but soars with undimmed and unwearied passion till he grasps the nature of each thing as it is.”*<sup>22</sup>

In order to conduct the research in the appropriate way, the key element is the research methodology, being characterized as a science of studying how the research shall be done in the scientific way.<sup>23</sup> Logically, it is up to the researcher to select the adequate one for the resolution of the research problems and use their as the tools for the problem-solving for the pending problems. The scientific

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<sup>21</sup>W.D.GODDARD, SMELVILLE, *Research Methodology: An Introduction*, Lansdown, 2007, p.1.

<sup>22</sup>Plato, *The Republic*, as reproduced in H.C.MARAIS, *Concepts in the Methodology of the Social Sciences*, Pretoria, 1996, p.3.

<sup>23</sup>R.KUMAR, *Research Methodology*, New Delhi, 2008, p.5.

background of the methodology needs to be turned into methods, as the concrete techniques or procedures of gathering, analyses related to research hypothesizes.<sup>24</sup>

Thus, the methods of the dissertation will vary depending on its chapter, and the stage of its development. Among first methods used may be mentioned the analysis of the current research done on the issues which needed to be covered by the dissertation, projecting in that way the theoretical perspective of the research done in the researched areas. On the basis of the study of available literature and the research done, the key research problems were defined and there were formulated the final hypotheses. It goes without saying that the integral part in this phase of the research is also critical method based on evaluation of the resources and their sound evaluation.

Upon getting familiar with the introductory research points of departure, the methods vary further. Any chapter will start with introductory, rather general remarks providing basic overview over the key aspects investigated further in the chapter. In fact, in the introduction to any chapters are provided implied sub-hypotheses. At the end of each chapter is synthetic summary of the chapter. Doing so, it had to be used the abstraction and classification method, providing a brief summary and in the same time incorporation of the research results into overall political and legal context using thus to certain extent also deductive method.

Being more concrete about other methods used in the dissertation, there are to be used the analysis, logically, in the foreground with the legal one and on the second and third position placed economic and historical one. The legal analysis is accompanied by legal interpretive methods derived from general theory of law, using grammatical, teleological, systematic, last but not least, historically-legal methods of interpretation of the legal texts for deeper understanding of development and trends in the legal order.

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<sup>24</sup>M.CROTTY, *The Foundation of Social Research: Meaning and Perspective in the Research*, London, 1998, p.3.

## 1.4 Dissertation Terminology

Every single academic opus should operate with appropriate and ideally with certain and univocal definition of the used notions. Certainly, it may happen in numerous occasions that these do not provide exhaustive answer and in several situations would deserve the appropriate analysis of the *'right definition'* deserve more profound discussion, nevertheless, they are as much *'tailor-made'* as possible for the purposes of this dissertation. The author is fully aware of the fact that from the systematic point of view, it would be more suitable to list all definitions used at once; however, at times the complexity of the terms used (as the key notion CCP) merits a more profound discussion and therefore will be defined apart from the original *'list of notions used.'*

It would seem somehow logical to start with the definition of the central point – CCP. Paradoxically, the key notion of the whole dissertation cannot be defined at the very beginning, howbeit it would seem obvious and expected. None the less, there are more than proper reasons to doing so. Especially, as it will be proved subsequently, such a notion deserves special attention being discussed from multilateral point of view what would not be duly possible in case of providing simple definition at very beginning.

The significant economic background of the dissertation justifies the beginning starting with the definition of the notion *'economic.'* The scholars provide broad range of the definitions differing from each other, but one of the simplest ones can be found in the *'Bible'* of introductory texts on economics by Paul Samuelson. According to him: *"The economics the science how the society exploits scarce sources for the production of the goods and how these are distributed between different groups of people."*<sup>25</sup> The basic principles of the Economics can be characterized as scarcity and distribution. First attribute *'scarcity'* relates to the limitation of the sources which are at disposal for the economic subjects. As

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<sup>25</sup>P.SAMUELSON, W.D.NORDHAUS, *Ekonomía*, Bratislava, 2000, p.4.

Wessels states in rather simply way, people want more than can be satisfied with available sources.<sup>26</sup> In providing this explanation adds a simple test of the scarcity.<sup>27</sup> Second one, 'distribution', means that any economic subject cannot really use and rule over all the sources of whatsoever quantity.

As a consequence, the distribution refers to the allocation of the resources between the subjects on the economic market and represents the aspect of the selection of those one who has the goods at disposal and who is deprived of them going out from any reason. Sloman, in searching a definition of economics, understands economics rather in terms of productions of goods and services (meaning the production of goods and services, in quantitative terms how the economics produces in total and also individual terms) and consumption (how much the population as a whole spends and how much saves.<sup>28</sup>

In fact, economics is the science of the daily life, how stated Marshall. Mankiw, paying respect to his statement, following Marshall states that: *"Economists [therefore] study how people make decisions, how much they work, what they buy, how much they save, and how they invest their savings. Economists therefore study how people interact one with other. For instance how the multitude of buyers and seller of a good together determine price at which the good is sold and the quantity it is sold. Finally, economists analyze the forces and trends that affect the economy as a whole, including the growth in average income, the fraction of the population that cannot find work, and the rate at which prices are rising."*<sup>29</sup> The definition going in the same direction presents also prominent Slovak scholar Lisý. In his view: *"Economics is the science dealing with the economic relations at the most general level, describing the*

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<sup>26</sup>W.J.WESSELS, *Economics*, New York, 2006, p.3

<sup>27</sup>Test of Determining Scarcity of a Good: A good is scarce if another unit of the good would benefit someone. An alternative test is, if the price of the good would benefit someone. An alternative test is, if a price of the good is zero (it is free), then the demand for the good exceeds its supply. Wessels immediately gives a simple demonstrative example – a case person considers fresh air to be a free good. In Los Angeles, fresh air is scarce. Reference to W.J.WESSELS, *Economics*, New York, 2006, p.3.

<sup>28</sup>J.SLOMAN, *Economics*, Harlow, 2006, p.4.

<sup>29</sup>K.G.MANKIW, *Principles of Economics*, Mason, 2012, p.4.



*mechanism of their operation.*"<sup>30</sup> Although the definition is in its nature right, the author gives preference to the Mankiw one, depicting the very nature of economics in more practical and multilevel level and as fully meaningful for the nature of the dissertation as such.

Problem of the scarcity and distribution of sources relatively determines the shape of world economics as the largest complex of economic relations. The system of world economics can be characterized as the system of reciprocally conjoint, organized and interlinked international economic relations.<sup>31</sup> Or in another view, taking into account also the actors concerned, they constitute the commercial exchanges and the movement of the capital and monetary payments between the private persons and the private and public companies, governments, non-governmental organizations and international organizations.<sup>32</sup> As Éthier adds studies of international economic relations involve the theories, politics, institutions and the legal rules which point and regulate the transactions.<sup>33</sup>

Logically, such large definitions of the international trade relations trade relations contains once again ambiguous relatively broad scale of relations and can be perceived too general and far from exactness, covering countless attributes and nuances of the international trade. However, several attributes of the world trade still exist, mainly international division of labour, world prices, world market, international currency issues, and international institutions providing institutional and rules oriented background for smooth running of international trade.

As it seems from the definition, world economic relations cover broad scale of economic issues which lead inevitably to international economic dependence between the countries.<sup>34</sup> Obviously, the international economic dependence

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<sup>30</sup>J.LISÝ, *Ekonomía (všeobecná ekonomická teória)*, Bratislava, 2003, p.30.

<sup>31</sup>D.ŠÍBL, B.ŠANKOVÁ, *Svetová ekonomika*, Bratislava, 2000, p.10.

<sup>32</sup>D.ÉTHIER, *Introduction aux relations internationales*, Montréal, 2006, p.193.

<sup>33</sup>D.ÉTHIER, *Introduction aux relations internationales*, Montréal, 2006, p.193.

<sup>34</sup>E.g. Gauthier, considers principally seven key attributes (calling them '*Faits Saillants*' – seven tops (author's translation) of international economic relations – 1. extension of the exchange of the goods, service and capital, 2.inequality between the economic powers of the actors, 3. significant different economic

between the states has significant consequence in international division of labour, world market, international economic integration and international institution dealing with trade issues. Certain scholars, as e.g. Šíbl while describing the world trade and economic development keep characterizing it using the terms as interdependency, integration, trans-nationality, scientific-technical progress and dynamism of the changes, the need of conformation and treat of global problems,<sup>35</sup> other ones prefer time-phased approach, speaking about the Bretton Woods system (1945 - 1971), interdependence phase (1971-1989) and actual phase of globalization (lasting from 1989 up to nowadays).<sup>36</sup>

Contemporary economic world is characterized by intense economic exchange significantly crossing traditional borders of the states, making it difficult to make the decisions.<sup>37</sup> It cannot be stated that the international commerce did not exist in the past, but in terms of the volume and intensity is incomparable with the past few decades. In order to provide the reader with concrete numbers and figures, demonstrating the current trends in world trade the

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performance between the nations 4. inter-dependence between the nations 5.inseparability of the production of the world trade,6.speed of the change, 7.vulnerability of the national economies born from the economic integration and the financial instability, in F.GAUTHIER, *Relations Économique Internationales*, Laval, 1992, p.1 ff..

<sup>35</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.13.

<sup>36</sup>J.EDELMAN SPERO, J.A.HART, *The Politics of International Relations*, Boston, 2008, p.1.

<sup>37</sup>As J.H.Jackson states: *“The pace of international economic activity and the developing interdependence of national economies is head spinning. Governments increasingly find it difficult to implement worthy policies concerning economic activity because such activity often crosses borders in ways that escape the reach of much of national control.”* In: J.H.JACKSON, *The World Trading System*, Cambridge, 1997, p.1; or in similarly in Krugman’s and Obstfeld’s view *“The study of the world trade has never been so important as today. The nations in the beginning of 21th century are more than ever close to each other via the trade of goods, and services, via the monetary transaction and multilateral investments interconnected between them and in the world trade via which these connection has happened the turbulent development: the decision-makers in politics and economics of one land (inclusive the US) must reflect the changes on the opposite side of the globe and at times rappidly occur.”* in P.KRUGMAN, M.OBSTFELD, *Internationale Wirtschaft: Theorie und Politik der Außenwirtschaft*, Munich, 2009, p.26.

European Commission estimates that 90 % of the world trade<sup>38</sup> will be held outside of Europe whereby China itself will cover one third.<sup>39</sup>

As it was mentioned previously, the world trade is not abstract concept, nevertheless, quite a practical one, build up by the development of the economies, relations between states, international organizations and equally by international economic activities of the companies, falling into international economic relations and economic markets. Thus, in summary the national economies create the system of the world economies.<sup>40</sup>

The involvement of the national economics the openness of the economic in the international trade is directly linked to the openness of the national economics to foreign influences. The active (passive) economic behaviour of the national economics implies its openness towards foreign countries and is determined by the tendencies of the development in the world trade.<sup>41</sup>

The question of the openness of the economics has several connotations, however, for the purposes of the dissertation, seems suitable the approach of Harrison, understanding under the notion of 'openness' the concept, applied to trade policy, which could be synonymous for the idea of neutrality. Neutrality means that the incentives are neutral between saving a unit of foreign exchange through import substitution and earning a unit of foreign exchange through exports.<sup>42</sup> As he further admits, it is possible for a regime to be neutral on average,

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<sup>38</sup>Also Ius and Castellano understand the question of world trade as being twofold, as a discipline studying in the international economics its complexity (in the general terms) without neglecting the aspect of internationality, and in the same time as the system of legal relations, instituted between the parties involved in the exchange, thus meaning that the economic exchange may recline upon particular legal orders, in M.IUS, C.CASTELLANO, *Compendio di diritto del commercio internazionale*, Neapol, 2008, p.1.

<sup>39</sup>Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions, Trade, Growth and World Affairs Trade Policy as a core component of the EU's 2020 strategy, Brussels, 9.11.2010, COM(2010) 612 final, p.4.

<sup>40</sup>R.ŠLOSÁR, D.ORBÁNOVÁ, Z.HROMÁ, A.KOVAĽOVÁ, *Podniková ekonomika*, Bratislava, 1996, p.6 ff..

<sup>41</sup>Ľ.LIPKOVÁ, *Medzinárodné hospodárske vzťahy*, Bratislava, 2006, p.18; To be objective the openness of the economics is not theoretical notion any more, since the autarkic economy in the narrow does not exist anymore.

<sup>42</sup>A.HARISSON, *Openess and Growth: A Time-Series, Cross-Country Analysis for Developing Countries*, in *Journal of Development Economics*, 1996, Volume 48, p.420.

and in the same time intervene in specific sectors.<sup>43</sup> As will be proven in the Chapter II the openness (approaches to the concept of the openness) of the economy has changed over the centuries and prevalent economic approach being applied mostly in the period of that time.

The official playground where the exchanges of the goods are held is the market. The elementary and overwhelming definition of the market can be characterized as a place of the economic exchange of demand and supply.<sup>44</sup> Rather simple definition can be extended moving to the world level in the following way *“The world market is the most developed way of exchange of the goods. It is an area, where the world supply and demand is met.”*<sup>45</sup> The question of the regulation of the trade represents permanent point of discussion to which extend the trade shall be put under the regulation and to which extend this may run freely. In fact the trade regulation has basically the internal and external dimension. Since the regulation of the trade in the form of trade policy represents a conscious and goal oriented approach, this may be defined as complex of the rules, principles and to them linked means through which the state (entity) centrally, directly and intentionally effects on the stimulation or weakening of certain development tendencies of the foreign trade.<sup>46</sup>

Influence over the economics of the state has over the time resulted in models of the trade regimes presented by the theory. The trade regimes are rules, norms, procedures, and institutions that are intended to achieve common economic goals by constraining the behaviour of governments.<sup>47</sup> In theory, the open economics is often linked with certain type of economic form of the integration, starting from the simplest forms proceeding up to the types of integration covering even political dimension of market integration, being defined

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<sup>43</sup>A.HARISSON, *Openness and Growth: A Time-Series, Cross-Country Analysis for Developing Countries*, in *Journal of Development Economics*, 1996, Volume 48, p.420.

<sup>44</sup>J.LISÝ, *Ekonomía (všeobecná ekonomická teória)*, Bratislava, 2003, p.54.

<sup>45</sup>D.ŠÍBL, B.ŠANKOVÁ, *Svetová ekonomika*, Bratislava, 2000, p.10.

<sup>46</sup>E.LIPKOVÁ, *Medzinárodné hospodárske vzťahy*, Bratislava, 2006, p.132.

<sup>47</sup>J.EDELMAN SPERO, J.A.HART, *The Politics of International Relations*, Boston, 2008, p.1.

as a behavioural notion indicating that activities of market participants in different regions or MS are geared to supply-and- demand conditions in the entire relevant idea.<sup>48</sup>

The differentiation of the economic stages could be identified as follows adapting Balassa's model:<sup>49</sup>

*Preferential tariff agreement* represents the simplest model of integration of the national economy to the world trade; principally the point is that certain trade entities agree on the specific commercial terms being lower than with any third countries. The trade between the contractual parties is realized under more favourable conditions than among parties which are not parties to that particular treaty. Nevertheless, the contractual parties keep preserving their own customs and other economic policies.

One little step forward is the *free trade area*. Free trade area is marked by significant elimination of the commercial barriers between states, mainly customs, quotas, import duties etc. In the relation to the third states the contracting parties preserve their own trade regime and their own duty policy.

*Customs union* is once again on step forward in respect to the free trade area. The above mentioned elements of the free market are preserved. In addition, there is adopted common customs code towards third countries. Usually, under the customs union there is usually created certain body (institution) governing the custom duties among contractual states. In this case the political borders are diminished in favour of smoother and time-saving border crossing by the goods.

*Common market* is even more developed customs union being accompanied by even more developed market, involving also free movement of further factors of production – labour and capital. From the organizational point of view there is established certain type of coordination body, governing the organization of

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<sup>48</sup>J.PELKMANS, *European Integration: Methods and Economic Analysis*, Harlow, 2006, p.6.

<sup>49</sup>F.TURNOVEC, *Political Economy*, Praha, 2003, p.10.

market and adopting rules for further development of the market, having binding nature to the MS.

The highest degree of the integration is *economic union*. The key elements of the economic union are coordination of the market, coordination of economic policies of the individual members of the economic union, coordination of economic development with decision making powers over the legal rules of the community. In summarizing the stages of the economic integration, it may be considered the three simplest steps as operating under the principles of coordination of the activities of the national governments.

The further steps of integration must necessarily overcome the creation of higher form of the integration, having supranational elements thus interfering more intensively in the national sovereignty, with creation of supranational organ overtaking the competences of the MS governments.

Lipková, referring to all the above mentioned models,<sup>50</sup> basically agrees with Turnovec's opinion about breaking down of the economic integration, nevertheless, identifies another, in fact sixth final stage of integration - political union. According to her opinion the creation of political union presumes the existence of all precedent steps and also delegation of the powers to supranational bodies of central international entity. Tendency of the overpassing was proved in the early sixties by Lindberg, clearly anticipating the later stages of the economic integration.<sup>51</sup> However, not all of the authorities share the same view on breaking down of the trade regimes in the same way. Some of them even perceive the

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<sup>50</sup>Ľ.LIPKOVÁ, *Medzinárodné hospodárske vzťahy*, Bratislava, 2006, p.136.

<sup>51</sup>Lindberg identifies evident tendency of the EEC to higher integration degrees, by following steps: 1.progressive creation of the Common Market, 2.prohibition on all discriminations based on the nationality 3.irreversible nature of the economic commitments 4.open character of the Community 5.applicability provisions of the Treaty (EEC Treaty) – in geographical and no time limit of the Treaty, 6.engagement of the signatory states to coordinate their economic policies, in L.N.LINDBERG, *The Political Dynamics of European Economic Integration*, London, 1963, p.16.

integration model of the EU as such unique one and they characterize the Union as the highest model of integration.<sup>52</sup>

In fact, advancement of the market is the inevitable pre – condition for the advancement of the economic progress within the European integration. As supportive argumentation might be presented Rodric's view, speaking about more intense cross-border approach: *"If we want true economic integration, we have to go either with the nation-state, in which case the domain of national politics will have to be significantly restricted, or else with mass politics, in which case we will have to give up the nation state on favor of global federalism. If we want highly participatory political regimes, we have to choose between the nation-state, we have to choose between mass politics and international economic integration."*<sup>53</sup>

## 1.5 Chapter Summary

In the rather introductory chapter the author has tried to outline the crucial issues of the dissertation. EU as one of the key world trade blocks, developed practically alongside of the GATT/WTO, represents the development of the entity from the Community controlling limited goods to one of the key trade blocks in the Europe. On the other hand, the GATT was at times ironically described as entity having *'accidental success'*.<sup>54</sup> Since both blocks co-existed and had a different coverage as subject matter, over the years proved significant proves of cooperation among them. That was in fact the logical consequence of the fact that the original 6 MS of the ECSC belonged to the founding members of the GATT. Nonetheless, the European integration has gone much further in terms of the integration as other projects of *'integration'* or cooperation overcoming the *'early'* stages of the economic integration up to supranational appearance. In fact, complexity of the

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<sup>52</sup>E.g. D.DILIP, *Regional Trading Agreements and the Global Economy: An Asia-Pacific Perspective*, Asian Development Bank, 2001.

<sup>53</sup>D.RODRIK, *How Far Will International Economic Integration Go?* in *Journal of Economic Perspectives*, Volume 14, Issue 1, 2000, p.180.

<sup>54</sup>A.O.KRUEGER, *The WTO as an International Organization*, London, 1998, p.4.

world trade and different legal regime inevitably led to the conflicts on different levels between these entities.

Thus, the dissertation provides in few words, a specific look on the contribution of the EC/ EU law reflecting the legal order of the GATT/WTO, or better said, the *'dialogue'* between the EU/EC law and GATT/WTO law not only in the legislative way, but also reflecting the juridical level of cooperation.

The quotation marks used this time do not result out of the chance, but represent rather the set of questions arising from the relation as to which extent it could be meant as dialogue, since international trade law represented by GATT/WTO is in some views perceived as constitutional trade law.



## 2 *History of Economic Thinking and International Trade*

### Summary

2.1 Preface 2.2 Ancient times 2.2.1 Introduction 2.2.2 Xenophone 2.2.3 Plato 2.2.4 Aristotelo 2.2.5 Conclusion to Antique Economic Theories 2.3 Mercantilism 2.4 Classical Theories of International Trade 2.4.1 Introduction 2.4.2 Adam Smith 2.4.3 David Ricardo 2.4.4 John Steward Mill 2.5 Protectionist Theories 2.5.1 Introduction 2.5.2 Alexander Hamilton 2.5.3 Friedrich List 2.6 Carl Henrich Marx 2.7 Economic thinking in 20th century 2.7.1 Introduction 2.7.2 Alfred Marshall 2.7.3 Gottfried Haberler 2.7.4 Eli Filip Heckscher, Betril Gotthard Ohlin, Paul Anthony Samuelson 2.7.5 John Maynard Keynes 2.7.6 Joseph Alois Schumpeter 2.7.7 Frank Duncan Graham 2.7.8 Charles Poor Kindleberger 2.7.9 Pure Economic Theory and International Trade 2.7.10 Monetary Theory and International Trade 2.8 Conclusion

### 2.1 Preface

*Most European politicians continue to treat Europa as Lilliputians treated Gulliver: They believe that multiplying tiny economic chains that tie European economies together will promote the political union, even of these chains are costly.*<sup>55</sup>

The investigation and outlining of the research issues, done in the first Chapter dedicated to introductory words needs to be further deepened. In order to understand the attitudes and approaches towards the forming of the trade regimes seems to be utile to have a look on the brief overview over the history of economic thinking and philosophical literature dedicated to the investigation of the economic issues. Introductory Chapter has proved that the economic relations of the states cover broad scale of the relations having an influence on the trade and trade interaction between the states.

Thus, in developing that definition, it appears somehow obvious that these appears as the trade itself and the decision-makers of any epoch were seeking (or trying to justify) the measures adopted within own economic policy destined on the appropriate governance of the *'management of the economic relations.'*

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<sup>55</sup>P.A.MESSERLIN, *Measuring the Costs of Protection in Europe: European Commercial Policy in the 2000s*, Washington, 2000, p.251.

Methodologically, the issues covered will be grasped using the historical analytical method which means that the investigation will start up with the very first compact doctrine stemming from the antiquity mostly dealing with *'management of the household'* and moving forwards to the contemporary economic thinking called in all *'the neoliberalism'* using sophisticated methodology in searching the answers in explanation of the economic phenomenon. However, the main point remains the same – searching of efficiency and optimal allocation of the limited resources and thus contributing to the wealth of the economic entity, using different way to do so though.

Maybe appear the question why to study the history of economic thinking. The answer to this question may be traceable in the magnum opus *History of Economic Analysis* written by one of the prominent modern economists, Schumpeter. As he states: *"The history of the intellectual efforts that men have made in order to understand economic phenomena, or which comes to the same thing, the history of the analytic or scientific component of economic thought."*<sup>56</sup> The following Schumpeter's justification of for the importance of the economic theories offers valuable guidelines as to the importance to study them, as Schumpeter states, the reasons to study economic theories are the following ones:

1. pedagogical benefits, as he states: *"The state of any science at any given time implies its past history and cannot be satisfactorily conveyed without making the implicit history explicit,"*<sup>57</sup>
2. as a source of new idea, or kind of refreshment of the all ones: *"[...] we learn to understand why we are as far as we actually are, and also why we are not further,"*<sup>58</sup>
3. the study of the history of economic thinking and analyses of the turning insights into patterns: *"[...]even the most reticent scientists are bound to reveal their*

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<sup>56</sup>M.BLEANNEY, D.GREEAWAY, I.STEWART,I.STEWART, *Companion to Contemporary Economic Thought*, London, 1991, p.30.

<sup>57</sup>J.A.SCHUMPETER, *History of Economic Analysis*, New York, 1954, p.4.

<sup>58</sup>J.A.SCHUMPETER, *History of Economic Analysis*, New York, 1954, p.5.

*mental processes because scientific – unlike political performance is self-revelatory by nature,*<sup>59</sup>

#### 4. an understanding of the scientific ideas.

Although having in mind these persuasive points, and also having at disposal the analyses of the economic theories, there are still some difficulties in understanding fully the economic processes. As the concluding argument, let the author quote Charles Wheelan and his work *Naked Economics. Undressing the Dismal Science* stating: *“Economics is more exacting science as Physics, since it cannot be verified by the laboratory experiments. People do not simple behave in the predictable way. ... We are not still able to predict human behavior. The fact that we do not understand everything does not mean that we do not understand anything. However, we know that in Economics apply numerous logical regularities as the consequence of the fact that we accumulated the considerable amount of knowledge.”*<sup>60</sup> Now, it is the right time to be persuaded whether the ‘*human genius*’ has reached finally an answer to the question which is the key points of the international trade and how the regularities of the world trade operate.

## 2.2 Ancient times

### 2.2.1 Introduction

The traces of the beginning in economic thinking are evident from the ancient times. In Greek antique epoch was given the birth to the word ‘*economics*’, derived from the from the word ‘*oikonomos*’ covering the administration of the household having different signification as it is to this notion attributed today.<sup>61</sup> One may as what is than the purpose of starting with the historical message of the Greek economic thinking for the contemporary one and about the implication

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<sup>59</sup>J.A.SCHUMPETER, *History of Economic Analysis*, New York, 1954, p.5.

<sup>60</sup>C.WHEELAN, *Odhalená ekonómia, O suchopárnej vede trocha inak*, Bratislava, 2012, p.11.

<sup>61</sup>T.PEKÁRY, *La storia economica del mondo antico*, Bologna, 1986, p. 11.

might have in terms of actual economic thinking<sup>62</sup> and for the European integration. In the contemporary research, the scholars claim that there was no record of the formal economic analyses until merchant capitalism was developed in Western Europe during 15th century. Therefore, the economic theory (called pre-classical) articulates the limited aspects of the economy without including them into a comprehensive economic system. It means that the pre-classical authors were not searching for grand theories, but tried to find answer to partial economic questions. Therefore, only later it was possible to synthesize their past analysis into an integral body of economic theory.<sup>63</sup>

In historical perspective, a deeper investigation and attention paid to the Greek economics started paradoxically in 1893, in the modernist-primitive controversy between prominent scholars Meyer and Buecher disputing in the academic way on the position, outcomes and implications of the Greek economics for their present-day economic thinking. At the core of the discussion was stationed the very nature of the Greek economics.

Buecher, opined that the Greek economy was basically primitive one, based simply on the bartering between households. On the other hand, Meyer argued in favour of being well developed, claiming further that what makes the difference in comparison to the modern economics was the question of the degree. In summary, the outcome of the discussion was the controversy between the research of the economic development vs. methods of analyses.<sup>64</sup>

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<sup>62</sup>Amenia opines that the triade of the books *Oikonomikos*, *Ways and Means* by Xenophone and Aristotle's *Nicomachean Ethics* belong clearly to the category in modern economics, in T.AMEMIYA, *Economy and Economics of Ancient Greece*, Oxon, 2007, p.118.

<sup>63</sup>H.LANDRETH, D.C.COLANDER, *History of Economic Theory*, Boston, 1989, p.21.

<sup>64</sup>T.AMEMIYA, *The Economic Ideas of Classical Athens* in *Kyoto Economic Review*, Volume 73, Issue 2, 2004, p.57-58.

### 2.2.2 Xenophone

The fundamentals of antique economic thinking were laid by the manuscripts of Xenophone<sup>65</sup> and further deepened by Plato and Aristotelo. (especially referring to the works *'Repubblica'* by Plato and *'Politica'* by Aristotelo)<sup>66</sup> With certain exaggeration, the Greek philosophers had in comparison to the contemporary ones a significant advantage. When the ancient Greeks faced a dilemma, they consulted the Oracle at Delphy. Actually the question is what would answer the Oracle on the question of the secret to wealth? The Oracle's answer would consist of few words: *"Do what you do best. Trade for the rest."* In other words, specialize and then trade.<sup>67</sup>

From Xenophone's Oikonomikos<sup>68</sup> comes out that economics represents a relatively compact body of knowledge<sup>69</sup>, similar to other sciences like for example medicine<sup>70</sup>. Xenophone, by himself defines oikonomia as the manner which allows people to increase their goods (possessions). Under the notion *'possessions'* Xenophone understands useful things for life. Secondary, the use of the term *'utility'* shall be understood as the attribute *'beneficial'* when someone uses the goods in the proper and suitable way.<sup>71</sup>

In the view of Xenophone and later on, Plato's one is not evident clear difference between running own household (possessions) and running of the state. In their view, the capacity to run a household is the basic presumption for the

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<sup>65</sup>Using for the first time in history the term *'economics'* meaning *'oikos'* household and *'nomos'* rule

<sup>66</sup>A. RONCAGLIA, *La ricchezza delle idee. Storia del pensiero economico*, Roma, 2003, p.30.

<sup>67</sup>*The Fruits of Free Trade, 2002 Annual Report*, reprint, Federal Reserve Bank of Dallas (available under: <https://www.dallasfed.org/assets/documents/fed/annual/2002/ar02.pdf>) [downloaded November 11, 2011], p.6.

<sup>68</sup>*Oikonomos* is an adjective meaning *'experienced in the art of household management'*, in T. AMEMIYA, *Economy and Economics of Ancient Greece*, 2007, Oxon, p.118.

<sup>69</sup>According to Neuser, Xenophone perceived economics as practical and applied science, applicable in the management of an estate, as rules governing the preservation of wealth in the form of land, craft of the household, land development, and agriculture, in J. NEUSNER, *The Mishnah: Social Perspectives*, Boston, 1999, p.98.

<sup>70</sup>Xenophone presents *'oikonomia'* as a branch of knowledge *'epistēmē'* purpose of which is to build one's wealth, meaning thus science on profit in L. Migeotte, *The Economy of the Greek Cities: From the Archaic Period to the Early Roman Empire*, London, 2009, p.34.

<sup>71</sup>G.A. PETROCHILOS, *The Hellenic contribution to economic thought in Coventry Business School Economics Research Paper Series*, Volume 4, 1999, p.4.

successful running of the state administration.<sup>72</sup> According to Lowry the management of one's property was unquestionably developed formalized act. He admits further that his approach might have direct connotation towards contemporary managerial theory of efficiency<sup>73</sup>. The original Xenophone's approach found its applicability not only in the works of his follower Plato, but also in the works of economists of the 20<sup>th</sup> and 21<sup>th</sup> century.<sup>74</sup>

While considering Xenophone's ideas further, it appears clear that he takes a negligent step forward towards the request of the specialization of the individuals, based on their own personal qualities. At once, he provides a very reasoning hereto: *"In small towns the same workman makes chairs and doors and plows and tables, and often the same artisan builds houses ... whereas in the large cities many people have demands to make upon each branch of industry, and therefore one trade alone, and very often even less than a whole trade, is enough to support man. ... In large cities, we find one man making men's boots only; and another, women's only" ... one man lives by cutting out garments, another by fitting together the pieces.*"<sup>75</sup>

### 2.2.3 Plato

Concluding argument dedicated to the economic thinking of Xenophone can be considered as an introductory to the Plato's one. Also for Plato, the division of the work was key consequence of any society, since the people differ from each other by their needs and the needs of people have growing tendency. As Plato further states, every single human being is gifted by different talent and if the

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<sup>72</sup>L.MIGGEOTTE, *The Economy of the Greek Cities: From the Archaic Period to the Early Roman Empire*, London, 2009, p.31.

<sup>73</sup>Modern microeconomic theory has a managerial component in the sense that the refinements of efficient combination are studied as the prerequisites for survival in a competitive market economy. It is assumed that competitive forces will reduce the prices to point that only firms that are managed in a manner consistent with the highest possible standards of efficiency will survive. As referred in S.T.LOWRY, B.LEWIS, J.GORDON, *Ancient and Medieval Economic Ideas and Concepts of Social Justice*, Leiden, 1998, p.11.

<sup>74</sup>As Marshall reflects: *"Political Economy or Economics is a study of mankind in ordinary business of life; it examines that part of individual and social action which is most closely connected with the attainment and with the use of the material requisites of wellbeing. Thus it is on the one side a study of wealth; and more important side, a part of the study of man."* in A.MARSHALL, *Principles of Economics*, London, 1961, p.1.

<sup>75</sup>M.N.ROTHBARD, *Economic thought before Adam Smith, An Austrian perspective on the History of economic Thought*, Volume I, Auburn, 2006, p.13.

person can specialize on the production of certain goods, where can he/she produce even more products.<sup>76</sup>

In his work, Republic Book II Plato presumes that no one is voluntary unjust to him/herself and no one will knowingly do harm to his/her own best interests. These presumption further leads to ethical dimension of human behaviour considering ethics of leading individual or individuals only reliable source of good and efficient administration of political economy.<sup>77</sup>

Partially, and maybe a bit doubtful is Plato's opinion on money as a mean of exchange and considering it '*spiritus moves*' of the monetary theory. Plato's rejected to use gold and silver as a mean of payments and idea of the domestic currency which would be useless abroad. His approach is consistent with the theory that the value of the money is independent from the material the coins are actually made of.<sup>78</sup>

#### 2.2.4 Aristotelo

In the works of Plato's legacy on economic thinking tied up his pupil and follower Aristotelo. Complexity of his work clearly proves that the analysed the economics on the micro and also macro level. Moreover, clearly methodologically, Aristotelo brought into practice the analyses of the causes, effects, material, formal and final one, having scientific relevance for the economic analyses as well.<sup>79</sup>

Starting from microeconomic level, he initiates with the analysis of the needs, their nature and linkage to the goods that shall be satisfied. Probably as the first one analysed the sectors of the production. Doing so, he broke down the

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<sup>76</sup>J.LISÝ, *Dejiny ekonomických teórií*, Bratislava, 2003, p.14.

<sup>77</sup>S.T.LOWRY, B.LEWIS, J.GORDON, *Ancient and Medieval Economic Ideas and Concepts of Social Justice*, Leiden, 1998, p.21.

<sup>78</sup>J.A.SCHUMPETER, E.B.SCHUMPETER, M.PERLMAN, *History of economic analysis: with a new introduction*, Oxford, 1996, p.53.

<sup>79</sup>N.NOOTEBOOM, *Aristoteles en de economie, Over vornomen van causaliteit in Economisch Statistische Berichten*, 1986, p.387-388 gives as an example of the furniture producer '*effective cause*' produces a chair from wood '*material cause*' for a company which provides the final step of production '*formal cause*' with the aim to sell the product and to make a profit from that sale.

economy into the sectors and examined the relationship between economic development, prosperity and financial policy and thus provided fundamental basis of inspiration for his followers among them can be clearly traced and without doubts identified Adam Smith as well.

Causality principle in Aristotelo's research gives an impetus to the investigation of the economic justice and fair distribution of the goods and formulating it as an ethical problem and proposing mathematical models of distribution of economic goods.<sup>80</sup> In the analyses of the needs comes to the conclusion that the production of commodities to satisfy needs was right and natural, whereas the production of goods in an attempt to satisfy unlimited desires was unnatural.<sup>81</sup>

In generally, Aristotelo did not reject property of such. According to him, the property is natural and motivating for the individuals to good performance and care for the own household. Nevertheless, the negative shape of the property can occur in the situation when the individual orients his/her activities on the accumulation of his/her property. Such type of accumulation of the wealth denominates '*chromatics*' and considers harmful.<sup>82</sup> In his view are the human beings political entities who take into account '*the Good*' and '*the Bad*', therefore, it is necessary to establish state authority sanctioning bad behaviour.

Similarly to Plato, Aristotelo dedicates part of his work to search of the determination of appropriate price on the market and warns about possible negative outcome of unjustified prices.<sup>83</sup> Within this analysis, provides the definition of the role of money in the trade. In his view: "*Money serve as a measure which makes things commensurable and so reduces them to equality. If there were no exchange there would be no association, and there can be no exchange without equality. If*

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<sup>80</sup>S.T.LOWRY, B.LEWIS, J.GORDON, *Ancient and Medieval Economic Ideas and Concepts of Social Justice*, Leiden, 1998, p.21.

<sup>81</sup>H.LANDRETH, D.C.COLANDER, *History of Economic Theory*, Boston, 1989, p.23.

<sup>82</sup>R.HOLMAN, *Dějiny ekonomického myšlení*, Prague, 2005, p.4.

<sup>83</sup>R.HOLMAN, *Dějiny ekonomického myšlení*, Prague, 2005, p.4.



*there were no exchange, there would be no association, and there can be no exchange without equality, and so equality without commensurability. ... There must be single standard and accepted by common agreement (called monism, customary currency); for such a standard makes all things commensurable, since all things can be measured by money.*"<sup>84</sup>

### 2.2.5 Conclusion to Antique Economic Theories

As it was proven in the paragraphs below, Greek economic thinking sent clear message for the next centuries touching upon all principal issues of economic thinking – starting with very nature of the analyses of economic thinking of the individuals, questions of the effective decision-making, value of the goods and accumulating and administration of the property, although it rather scattered way.

Starting on the micro level and analysing the rational behaviour, goes behind the principles of the effective distribution of labour and accomplished by the regulation of the money and their role played in the regulation of the society.

Nonetheless, it does not go without saying that the Greek philosophy did not neglect the ethical dimension in regard to the civil regulation on the principles of the ethics, to allow to the mankind to reach high levels of perfection and to live in peace and constructively with its fellow-citizens.<sup>85</sup>

The Greek philosophical message is also clear from methodological point of view approaching economic issues analysing the principle of cause-effect and also on the scope of the analyses, implicitly making a difference between the macro and micro level of the economic analyses.

## 2.3 Mercantilism

In the mediaeval ages has appeared more sophisticated approach to the international commerce, more putting into central point regulation of the world

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<sup>84</sup>D.N.KOUMPAROULIS, *Aristotle's Economic Thought* in *EuroEconomica*, Volume 30, Number 4, 2011, p.169.

<sup>85</sup>A.FANFANI, *Storia Economica, Prima parte*, Torino, 1968, p.70.

trade, directing the economics of the state - the theory of mercantilism. In fact, mercantilism as a complex economic idea became dominant over 2 centuries, starting from 16<sup>th</sup> century and lasting till 18<sup>th</sup> century.<sup>86</sup> Mercantilism as theory of international trade did not create any integral doctrine, and remained broken down among the scholars preferring mercantilist view on economic affairs.<sup>87</sup> Landereth and Colander rather sarcastically add that the age of mercantilism has been characterized as a time when every man was his own economist.<sup>88</sup> Doctrinally is mercantilism understood in three aspects, as a historical period, political philosophy and as a practical economic policy.<sup>89</sup>

The doctrine remained rather as a collection of similar attitudes and policies toward domestic economic activity and the role of international trade that tended to dominate economic thinking during this period.<sup>90</sup> However, many of these ideas not only were spawned by events of the time but also influenced history through their impact on government policies.

From the material conditions being dominant, mercantilism as a theory is connected mainly to the operation of manufactures and externally influenced by overseas discoveries, connected with the mining and import of precious metals to the 'homeland'. Nevertheless, the doctrine recalls also further sources of inspiration of this theory as the Renaissance, the rise of the merchant class, the discovery of precious metals in the New World, changing religious views on profits and accumulation and the rise of nation-states. Because of these reasons is this theory designated as political economy of state building.<sup>91</sup> Moreover, it shall have in mind that wealth is a necessary condition for national powers.<sup>92</sup>

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<sup>86</sup>Also today, are reappearing being considered in pejorative sense characterizing as inappropriate any intervention of the state to the industrial businesses, any measures vis-à-vis foreign companies and foreign competitors in A.GUERY, *Industrie et Colbertisme: origine de la forme française de la politique industrielle?* in *Histoire, Économie et Société*, Issue 3, 1989, p.298.

<sup>87</sup>P.TULEJA, P.NEZVAL, I.MAJEROVÁ, *Světová ekonomika*, Brno, 2007, p.69.

<sup>88</sup>H.LANDRETH, D.C.COLANDER, *History of Economic Theory*, Boston, 1989, p.29.

<sup>89</sup>D.N.BALAAM, B.DILMANN, *Introduction to International Political Economy*, Boston, 2011, p.22.

<sup>90</sup>D.R.APPLLEYARD, A.J.FIELD, *International Economics*, Chicago, 1995, p.19.

<sup>91</sup>D.APPLLEYARD, A.FIELD, S.COBB, *International Economics*, New York, 2006, p.18.

<sup>92</sup>P.ASHEGHIAN, *International economics*, Minneapolis, 1995, p.23.

Having said, in the early times of mercantilism, key axioms of the mercantilism are that the countries could not have exported rare materials, since they represented the wealth of the nation, furthermore, the export shall dominate over the import, meaning that the value of sales of the nation should be more voluminous in comparison to the purchases from the respective state.<sup>93</sup>

Thus, as introduction to the mercantilism can be quoted French economist Uztariz, characterizing mercantilism as system by using following words: *“Il est nécessaire d’employer avec rigueur tous les moyens qui peuvent nous conduire à vendre aux étrangers plus de nos productions qu’ils nous vendront des leurs; c’est tout le secret et la seule utilité du commerce.”*<sup>94</sup>

Reflecting existence of the manufacture production and overseas discoveries, the mercantilists identified the most important mercantilist aspects while approaching international economic policy. According to the mercantile approach, the most important aspects of the state economic policy are the relations to the ‘third countries’ and permanent search for positive economic balance towards third countries. Therefore, one may not wonder that this policy was considered to be very aggressive and its creators were in fact force to use all state power to hinder all restrictive measures adopted by another states.<sup>95</sup>

Keeping in mind aforesaid fundamental premise, it appears obvious that the key element of well managed mercantilist state policy is the obligation of the state to support the export and on the other hand to limit and restrict the import through customs, quotas and restrictions. In fact, the mercantilists were well-wishers of the economic nationalism, insisting on the control of the government over any economic activity. Inevitable consequence of mercantilist policy is that

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<sup>93</sup>A.BEER *Allgemeine Geschichte des Welthandels*, Vienna, 1860, p.42 ff.

<sup>94</sup>Author’s translation: *“It is necessary to call into play all the means which can lead us to sell to foreign countries more our products than we buy of their ones. It is the secret and the only utility of the trade,”* as referred to G.de UZTARIZ, *Théory pratique du commerce de la marine*, Paris, 1740 as quoted by A.J.BLANQUI, *Histoire de l’économie politique en Europe depuis les Anciens jusqu’à nos jours*, Paris, 1882, p.193.

<sup>95</sup>M.WATSON, *Foundation of International Political Economy*, Basingstoke, 2008, p.22.

one state can make a profit only under the condition that one state will lose, consequence of which is that final outcome of the world trade shall be zero.<sup>96</sup>

One may ask, whether mercantile approach accepts any kind of imports. The mercantilists accept the import only under particular circumstances. In their view, the import is not allowed unless the primary resources for the production are not accessible on the local market; however, final assembling of the production shall be done on the national territory. Just to give an illustration, it might be quoted Thomas Mun who wrote on imports: *"We may ... diminish our importations, if we would soberly refrain from excessive consumption of foreign goods in our diet and raiment [dress] ... In our exportations we must not only regard our superfluity, but also we must consider our neighbors necessities, that so ... we may ... gain to much of the high price cause not a less vent in the quantity [of our exports]."*<sup>97</sup>

In conclusion, the mercantilist view on the economic consists according to Philipp Wilhelm von Hörningk, is based on 9 fundamental axioms Hauptregeln ('main rules' - translation of the author)<sup>98</sup> of mercantilist approach which shall be observed and achieved:

1. thorough investigation of the production potential of the country must be carried out, especially the possibility to achieve the highest possible amount of gold and silver,
2. working-up raw materials in factories,
3. find and identify right means to increase the number of people, who can contribute to the processing of raw materials,
4. ensure that gold and silver, as far as possible, should not exported out of the country,

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<sup>96</sup>D.SALVATORE, *Economia internazionale*, Rome, 1999, p.62.

<sup>97</sup>T.MUN, *England Treasure by foreign trade* (1664) as referred in D.SALVATORE, *International Economics*, London, 2004, p.31.

<sup>98</sup>L.MAGNUSSON, *Mercantilism: The Shaping of an Economic Language*, New York, 1994, p.196-197.

5. inhabitants of the state should mainly consume the goods which are produced on the land itself,
6. all misuse of the foreign goods shall be avoided, all the imports should be avoided, unless the import is necessary and in such a situation shall be imported goods exchanged for other goods and not for money,
7. preference should be given to manufactured goods,
8. in necessary case, the raw materials need to be exported; however, they must be exchanged for gold or silver,
9. no goods that can be produced within the country shall be ever imported.

The theory of the mercantilism has never been completely forgotten and appears to be one of the key concepts even in the modern theories of the international trade. Mercantilism thus remains characterized in some view as the economic predecessor of the nation realism and statism. The system principally orients on the preference of the state over the individual, nonetheless, claiming from the state offering the services to citizens as well-being of the citizens,<sup>99</sup> and their protection against negative influences from abroad.<sup>100</sup>

As the doctrine clearly shows, the mercantilism is still present in various variants present also today<sup>101</sup>, providing several examples as the support of the market shares of the companies in the '*strategic branches*' of the industry and more generally, positive perception of the export and market share of the '*states companies*' and the systematic support of foreign industrial policies.<sup>102</sup>

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<sup>99</sup>However, this point remains doubtful since the aim might be seen as protection of the owners of the manufactures, in R.DEHEM, *Histoire de la pensée économique: des mercantilistes à Keynes*, Québec, 1984, p.17.

<sup>100</sup>J.M.SIROËN, *Le nationalisme dans les relations économiques internationales* in *Revue française d'économie*, Volume 7, Issue 1, 1992, p.6.

<sup>101</sup>Doctrine recalls the famous policies of the French president De Gaulle adopting policies to increase French exports and discourage imports and demanding the US to settle payment deficits with France in gold; reference in P.ASHEGHIAN, *International economics*, Minneapolis, 1995, p.24.

<sup>102</sup>V.HODULÁK, O.KRPEC, *Politická ekonomie mezinárodních vztahů*, Brno, 2011, p.67.

In spite of rather negative perception of the mercantilism theory must be admitted the primacy in several ways. The mercantilists were the first economists who tried to grasp and analyse the wealth of the nations with a clear aim to adopt appropriate measures in the foreign economic policy.<sup>103</sup>

## 2.4 Classical Theories of International Trade

### 2.4.1 Introduction

Another step forwards represents classic economics, starting from 18<sup>th</sup> century and lasting for more than approximately 150 years coming after. The 'center of gravity' moved towards material production, representing the origin and nature of the wealth – elaborating fundamentally concept of the labour value saying that the value of the goods is determined by the amount of the work spend in their production. The theories of classical economy muster the crucial step on the formation of the economics as separate scientific discipline having economic liberalism in the foreground.<sup>104</sup>

The premise in the determination of the work value represented the fundamental axiom in development of deeper and more complex analysis within fundamental issues risen - division of work and the analyses of comparative advantages, as a consequence searching for optimal cost of the production. In summary, the concept can be characterized as follows: *"Fundamental thesis is that any country specializes on the production of such goods destined for the export especially those products which can be in that country produce under lower costs as in second countries."*<sup>105</sup>

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<sup>103</sup>E.KOIŠOVÁ, E.IVANOVÁ, K.KRAJČO, *Vybrané kapitoly z ekonomických teórií*, Trenčín, 2003, p.82.

<sup>104</sup>J.LISÝ et. al., *Ekonomía v novej ekonomike*, Bratislava, 2005, p.21.

<sup>105</sup>E.CIHELKOVÁ et al., *Světová ekonomika*, Prague, 1997, p.28.

#### 2.4.2 Adam Smith

First of the classics, Adam Smith, strictly rejected the idea of mercantilism, styled it as not the precursor of capitalism<sup>106</sup>, but as an excessive exercise of the state power. The mercantilist system was more than a mode of commerce; in fact, above all mode of governmental management of commerce.<sup>107</sup>

Smith claimed that for the wealth of nation it is decisive the total amount of labour and its productivity. Coming to this conclusion, Smith identified direct proportion between productivity growth, development of the division of labour and specialization.<sup>108</sup> Upon empirical analysis of the productivity within certain European states and growing quantity of work Adam Smith claimed clearly in favour of efficiency and higher productivity starting with the personal qualities of every single human being with a specialization: *“This great increase in the quantity of work, which in consequence of the division of labour, the same number of people are capable of performing, is owing to three different circumstances; first, to the increase of dexterity in every particular workman; secondly, to the saving of the time which is commonly lost in passing from one species of work to another; and, lastly, to the invention of a great number of machines which facilitate and abridge labour and enable one man to do the work of many.”*<sup>109</sup>

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<sup>106</sup>Smith justifies the specialization which shall be developed under a full liberalization, protectionism and another measures for the protection of own economy. In the works of Smith, Ricardo and Mill was the theory of comparative advantages a tool against the outmoded feudalism, in E.CIHELKOVÁ et al., *Světová ekonomika*, Prague, 1997, p.28.

<sup>107</sup>J.G.HARRIS, *Sick Economies Drama, Mercantilism, and Disease in Shakespeare's England*, Philadelphia, 2004, p.4.

<sup>108</sup>Adam Smith founded his principles of comparison of the running of the state to the running of the household, while mentioning as the pattern the prudence of the master of the family. As Smith claims: *“It is the maxim of every prudent master of a family, never to attempt to make at home, what it will cost him more than to buy. The tailor does not attempt to make his own shoes, but buys them of the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a tailor. The farmer attempts to make neither the one nor the other, but employs those different artificers. All of them find it for their interest to employ their whole industry in a way in which they have some advantage over their neighbors, and to purchase with a part of its produce, or what is the same thing, with the price of a part of it, whatever they have occasion for.”* Reference according to A.F.LOWENFELD, *International Economic Law*, Oxford, 2008, p.4.

<sup>109</sup>A.SMITH, *An inquiry into the nature and causes of the wealth of nation*, Philadelphia, 2005, p.13.

Moreover, according to Smith the division of labour is determined by extent of the market. Therefore, in his view, the international commerce and freedom of international commerce shall be considered inevitably.<sup>110</sup> In this sense he opposes to the mercantilist approach encouraging only exporting of the finished products. According to him international trade should be conducted on the basis of the prices determined by the market – which shall not be distorted by tariff or the state subsidies.<sup>111</sup> Furthermore, according to Smith, the division of labour is essential even in terms of development of the wealth of the nations. Smith adds that this process does not run randomly but rather gradually resulting from certain propensity of the human beings to change one thing to another.<sup>112</sup>

As to the role of the government acting externally, Smith stressed that the government has to take all necessary steps to eliminate creation of monopolies and other commerce barriers. The role of the government is seen mainly in maintaining of natural justice, ensuring national security and in building public facilities destined for the trade purposes. Moreover the government shall ensure free entrepreneurship and open competition.

According to Smith: *“By restraining, either by high duties, or by absolute prohibitions, the importation of such goods from foreign countries as can be produced at home, the monopoly of the home market is more or less secured to the domestic industry employed in producing them. ... this monopoly of the home market frequently gives great encouragement to the particular species of industry which enjoys it, and frequently turns towards that employment a greater share of both the labour and stock of the society than would otherwise have gone to it, cannot be doubted. But whether it tends either to increase the general industry of the society, or to give it the most advantageous direction, is not, perhaps, altogether so evident.”*<sup>113</sup>

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<sup>110</sup>J.LISÝ, *Dejiny ekonomických teórií*, Bratislava, 2003, p.33.

<sup>111</sup>U.van SUNTUM, *The Invisible Hand: Economic Thought Yesterday and Today*, Berlin, 2005, p.133.

<sup>112</sup>I.P.McGREAL, *Velké postavy západního myšlení. Slovník myslitelů*, Prague, 1999, p.338.

<sup>113</sup>A.SMITH, *An inquiry into the nature and causes of the wealth of nation*, Philadelphia, 2005, p.361.



These 'central values' are crucial for the accumulation of the wealth of the nation and public good. In economic terms, Smith came up with a concept of 'absolute costs theory', based on the calculation of the lowest costs and highest efficiency of production, being described also as the theory of absolute advantages. The main point of the theory is that the international economic exchange between the countries may be advantageous only in case, when the countries have different absolute costs.<sup>114</sup>

The idea of absolute advantages as presented in the book '*An Inquiry into the Nature and Causes of the Wealth of the Nations*' was quite simple. Each state, acting in the international trade is acting rationally trade must be profitable. The key point is that a country has comparative advantages, if it produces the same quantity of the product with a lower input than other country does, and therefore enjoys greater productivity vis-à-vis this country.<sup>115</sup>

Smith in the development of this idea comes further to a conclusion that mutually advantageous trade is based on the concept of absolute costs. The principle is the following - when one nation is more efficient than the other nation is producing, then both nations gain by each specializing in the production of the commodity of its absolute advantage and exchanging part of its output with the other nation for the commodity of its absolute disadvantage.<sup>116</sup>

In order to calculate the absolute cost introduces Smith as well the concept of labour theory of value, going out from the presumption that within each nation labour is the only factor of production and is homogeneous which means that the cost or price of a good depends exclusively on the amount of the work required to produce the good at stake.<sup>117</sup>

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<sup>114</sup>J.LISÝ, *Dejiny ekonomických teórií*, Bratislava, 2003, p.34.

<sup>115</sup>S.SEGAL-HORN, D.FAULKNER, *Understanding Global Strategy*, Andover, 2010, p.331.

<sup>116</sup>Z.WEI-BIN, *International Trade Theory: Capital, Knowledge, Economic Structure, Money, and Prices over Time*, Berlin, 2008, p.24.

<sup>117</sup>R.J.CARBAUGH, *International Economics*, Mason, 2008, p.33.

Having in mind the concept of the work value, it would seem that the comparative method would bring positive results in the international trade. Nonetheless, Smith's theory is rather the subject to criticism as being vague and lacking the clarity<sup>118</sup>, and realistic implication since many countries (especially those in development) are not able to have any comparative advantage in comparison to the developed ones.<sup>119</sup> However, his theory was not forgotten even in 20<sup>th</sup> century and reappeared in the modified form in the Heckscher-Ohlin and Samuelson's theory.

#### 2.4.3 David Ricardo

Smith's successor in economic thinking, David Ricardo further developed Smith's ideas in terms of the principles of the trade. Similarly to Smith, Ricardo also advocated the market-oriented economics and freedom of the commerce.<sup>120</sup>

Nevertheless, Ricardo is rather famous for the elaboration and in-depth analyses of the comparative advantages theory, in sense that the country should target its activities on the production and exportation of the goods which is more effective in respect to the production costs of another country.<sup>121</sup> Having used rather reference method, he came to the conclusion that each country focalizes its economic activities to the branches which are for this country the most advantageous which implies that each country will produce and import those goods which produces relatively cheaper and import those goods which produces more cheaply another country – developed thus the theory of comparative advantages.<sup>122</sup>

Doing so, it may be agreed that Ricardo follows Smiths' ideas through the strengthening of the theory of absolute costs. According to Ricardo, the decisive

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<sup>118</sup>As the authors of the Princeton Encyclopedia of the World Economy claim that: "*Fallacy of equaling absolute advantages with cost advantages is a never-ending ending source of confusion.*" in K.A.REINERT, R.S.RAJAN, *Princeton Encyclopedia of the World Economy, Volume I, A-H*, Princeton, 2009, p.1.

<sup>119</sup>E.g. P.K.SINHA, S.SINHA, *International Business Management*, New Delhi, 2008, p.20.

<sup>120</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.63.

<sup>121</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.63.

<sup>122</sup>E.KOIŠOVÁ, E.IVANOVÁ, K.KRAJČO, *Vybrané kapitoly z ekonomických teórií*, Trenčín, 2003, p.101.

factor is the proportion of the national labour costs.<sup>123</sup> However, he rejects Smith's view, according to which the countries not having the absolute advantage cannot fully participate on the world trade.

Ricardo thus introduces the theory of relative comparative costs advantage which includes countries that do not have absolute trade to be involved in the trade taking into account their relative advantages. It might be agreed with Segal-Horn that this theoretical opinion is less intuitive.<sup>124</sup>

For his theoretical approach it can be provided an example in comparing the prices of wine and related labour costs of the England and Portugal. Comparing both countries and the labour costs in them, he comes to following conclusion: "... [the difference] in this respect, between a single country and many, is easily accounted for, by considering the difficulty with which capital moves from one country to another, to seek a more profitable employment, and the activity with which it invariably passes from one province to another in the same country."<sup>125</sup>

In the comparison to Smith, Ricardo methodically uses comparative approach and thus argues in favour of the necessity of the price comparison production, as decisive factor for the evaluation of the real and efficient place of production although having drastic consequences for the English industry. As he states: "It would undoubtedly be advantageous to the capitalists of England and to the consumers in both countries, that under such circumstances, the wine and the cloth should both be made in Portugal, and therefore that the capital and labour of England employed in making cloth, should be removed to Portugal for that purpose."<sup>126</sup>

Ricardo perceives the better mobility of capital and specialization as a sign of happiness and enhanced quality of life. As Ricardo states: "It is quite as important to the happiness of mankind, that our enjoyments should be increased by the better

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<sup>123</sup>A.SOUKUP, *Mezinárodní ekonomie*, Dobrá Voda, 2009, p.23.

<sup>124</sup>S.SEGAL-HORN, D.FAULKNER, *The Dynamics of International Strategy*, London, 1999, p.5.

<sup>125</sup>D.RICARDO, *On the Principles of Political economy and Taxation*, London, 1821, p.141.

<sup>126</sup>D.RICARDO, *On the Principles of Political economy and Taxation*, London, 1821, p.143.

*distribution of labour, by each country producing those commodities for which by its situation, climate, and its other natural or artificial advantages, it is adapted, and by their exchanging them for the commodities of other countries, as that they should be augmented by a rise in the rate of profits.*"<sup>127</sup>

These paradigms are called '*Ricardian model of international trade*', going out from the presumption that the geographical limits of factor mobility (including labour and capital) correspond perfectly to territorial limits of national economics, resulting into division into socio-legal entities called nation states. Accordingly, these presumptions are the pre-conditions for realization of the trade through the specialization and subsequent increase of the economic welfare accruing from mutual exchange. An additional Ricardian argument for the welfare is the presumption of existence of discrete and independently formed national economies.<sup>128</sup>

Furthermore, Ricardo laid the foundation of the '*four magic numbers*' representing the amounts of labour needed to produce wine and cloth in each country.<sup>129</sup> Traditionally, these numbers are interpreted as the units of each commodity in each country which are needed for the production of the goods. That is the reason why they are often labelled as input-output coefficients.<sup>130</sup> The concept of four magic numbers was further elaborated by Samuelson in 1969, referring to units of labour needed for the production of each commodity – wine and cloth in UK and Portugal. However, certain authorities like Ruffin argue that the new interpretation shall be given to them, since they do not represent input-

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<sup>127</sup>P.SRAFFA, M.H.DOBBS, *Works of David Ricardo, Volume 1*, Oxford, 1951, p.132.

<sup>128</sup>M.WATSON, *Ricardian political economy and the 'varieties of capitalism' approach: specialization, trade and comparative institutional advantage in Comparative European Politics*, Volume 1, Number 2, 2003, p.232.

<sup>129</sup>A.MANESCHI, *Comparative Advantage in International Trade: A Historical Perspective*, Cheltenham, 1998, p.52.

<sup>130</sup>A.MANESCHI, *The true meaning of David Ricardo's four magic numbers in Journal of International Economics*, Volume 62, Issue 2, 2004, p.433 ff..

output coefficients, but the quantities of labour needed to produce the amounts of wine and cloth as units of the trade between the UK and Portugal.<sup>131</sup>

As to the conclusion to Ricardian achievement, it might be concluded that he improved significantly Smith's theorems stating that the trade may exist only under assumption of the existence of absolute advantages as the key concept. However, his concept may be understood as the continuation of the Smith's theory of the advantages, nonetheless attributing the key importance to the absolute advantages concepts, presuming their relative nature.

The comparative advantages theory finds significant reflection also in contemporary economic thinking. This can be demonstrated by quoting Yang, stating: "[...] *Endogenous absolute and comparative advantages in terms of Smith's definition may exist in the absence of comparative advantages in terms of Ricardo's definition which cannot exist if all individuals are ex ante identical. The former comparative advantage does not exist if all ex ante identical individuals choose the same level of specialization in producing a good. In other words, the existence of such a comparative advantages depends upon people's decision of level of specialization.*"<sup>132</sup> Another point of criticism is that Ricardo exaggerated the gains from the international trade.

Kumar in evaluation of Ricardian theory states that the gains from international trade are not applicable to the countries which cannot produce the imported goods or can produce the goods under higher costs. John Stewart Mill is also critical towards Ricardo since he in his view does not to take into consideration the fact why international trade takes place and also misses distribution of the goods in the international trade.<sup>133</sup>

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<sup>131</sup>D.RUGGIN, *Ricardo's discovery of comparative advantage in History of Political Economy*, Volume 34, Issue 4, 2002, p.729.

<sup>132</sup>Y.XIAOKAI, *Endogenous vs. Exogenous Comparative Advantages and Economies of Specialization vs. Economies of Scale in Journal of Economics*, Volume 60, Issue 1, 1994, p.30.

<sup>133</sup>R.KUMAR, *International Economics*, New Delhi, 2008, p.84.

#### 2.4.4 John Steward Mill

John Stuart Mill continued and further developed the central ideas of Smith and Ricardo<sup>134</sup>. Despite certain degree of criticism towards Ricardian theory, he paid respect to Ricardo's work by clear reference to his opus: "[Ricardo] was engrossed by far more important questions, and who, having a science to create, had not time, or room, to occupy himself with much more than the leading principles. When he had done enough to enable anyone who came after him, and who took the necessary pains, to do all the rest, he was satisfied."<sup>135</sup>

Mill basically agreed with Ricardo by giving the preference to the analyses of the production costs rather than to the concept of the absolute advantages. In his writing, he never rejected the Ricardian theory of relative comparative advantages, nevertheless, he perceived this theory as once-side and incomplete, missing certain elements. Thus, in making previously mentioned theory complete, he added to the theory on the demand side money, as a comparative element.<sup>136</sup> Money, according to Mill, in economic terms shall be considered as leading force of demand. Under this presumption, Mill formulated two laws on mutual demand, having the sub-elements:

1. exchange relations between two countries are formed within state borders and are determined by the comparative costs (fundamentally by the labour costs, indirectly influenced by cost of labour productivity),
2. exchange relations in the international trade came to existence in favour of that country, which has proportionally lower demand for imported goods under the condition that the demand for the goods of this country is bigger.

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<sup>134</sup>In some views Mill was considered to be the last of the classics, as e.g. R.TORRES GAYTÁN, *Teoría del comercio internacional*, Mexico, 1972, p.89.

<sup>135</sup>J.S.MILL, *Essays on Some Unsettled Questions of Political Economy*, Rockville, 2009, p.13.

<sup>136</sup>O.S.SHRIVASTAVA, *International Economics*, New Delhi, 2012, p.32.

Globally, the international terms of trade<sup>137</sup> thus depend upon the strength of the world supply and demand for any two commodities which are subject to reciprocal demand. According to this concept the terms of trade are stabilized in the point where the demand and supply of the exchanged goods is balanced.<sup>138</sup> In other words, the terms of trade will depend on the strength and elasticity of each country's demand for the other country's products, i.e. reciprocal demand.<sup>139</sup>

## 2.5 Protectionist Theories

### 2.5.1 Introduction

The author decided to use the term protectionism theories, being aware of certain ambiguity which brings this notion.<sup>140</sup>

In 20<sup>th</sup> and 30<sup>th</sup> decade of the 19<sup>th</sup> century the industrial revolution dominated basically in whole Europe the industrial revolution. In the same time in terms of the economic development Great Britain dominated thanks to its technological advancement and the numerous colonies. However, at the same time started to appear at the scene new entity - USA.

After rather liberal approaches, presented by the classics, the impetus for further steps of the economic thinking were historical events caused by the tense relations between the Great Britain and its former colony USA which resulted into bilateral embargos and protectionist measures.

Paradoxically, British colonialism and protectionism became one of the principal causes of the American Revolution and as a next paradox, after Declaration of Independence; the Americans advocated protectionist policies

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<sup>137</sup>The notion '*international terms of trade*' shall be understood as the ratio of exchange between nation's export and import goods.

<sup>138</sup>A.SOUKUP, *Mezinárodní ekonomie*, Dobrá Voda, 2009, p.23.

<sup>139</sup>F.CHERUNILAM, *International Economics*, New Delhi, 2008, p.182.

<sup>140</sup>The notion '*protectionism*' has no unique and undutiful meaning, however seems the most appropriate for this chapter: thus the theory divides the into three periods: first one (1816-1846) designed as protectionism phase, followed by period (1846-1861) designed as the liberal phase and finally the phase of the strict protectionism lasting till 1945, for further details consult P.BAICHOR, *Protectionism and Industrialization: A historical perspective* in V.SUNEJA, *Understanding Business: Markets: A Multidimensional Approach to the Market Economy*, London, 2000, p.195.

which they previously condemned.<sup>141</sup> Another aspect of the protectionism is that this idea also meant the protection of the less developed countries to the developed ones. In some views it was again the British legislation and colonization, which forced the states as USA, Russia and Germany to adopt suitable measures to protect own national industry as less competitive.<sup>142</sup>

According to the economic theory, the historical variants of protectionism included also already presented theory of mercantilism, trade policies aimed at maximizing currency reserves by running large trade surpluses, import substitutions or trade policy in which targeted imports are replaced by local manufactures to stimulate local production.<sup>143</sup>

### 2.5.2 Alexander Hamilton

Among the first scholar, dealing with the protectionist theory shall be mentioned Alexander Hamilton. Hamilton clearly identified the danger of possible strong dominance of British economics over American market. Therefore as the first secretary of the treasury, proposed certain measures which were aimed on the introducing and justifying the protective measures against the British imports<sup>144</sup>. German economic doctrine labelled him as founder of '*Schutzzoll Theorie*'.<sup>145</sup>

As he wrote in his work Report on Manufactures: *"The superiority antecedently enjoyed by nations who have preoccupied and perfected a branch of industry, constitutes a more formidable obstacle ... to the introduction of the same branch into a country in which it did not before exist. To maintain, between the recent establishments of one country, and the long-matured establishments of another country, a competition upon equal terms, both as to quality and price is, in most cases impracticable. The disparity ...*

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<sup>141</sup>V.BULMER-THOMAS, *The Economic History of the Caribbean Since the Napoleonic Wars*, Cambridge, 2012, p.40.

<sup>142</sup>I.M.RAMCKE, *Die heutige Anwendbarkeit klassischer Außenhandelstheorien*, Munich, 2012, p.5.

<sup>143</sup>C.C.HODGE, *Encyclopedia of the Age of Imperialism, 1800-1914*, Westport, 2008, p.570.

<sup>144</sup>C.C.NORTHURP, E.C.PRAGNE-TURNEY, *Encyclopedia of Tariffs and Trade in U.S. History: 001*, Westport, 2004, p. 308.

<sup>145</sup>S.MÜLLER, M.KORNMEIER, *Streitfall Globalisierung*, Munich, 2001, p.90.



*must necessarily be so considerable, as to forbid a successful rival ship, without the extraordinary aid and protection of government.*"<sup>146</sup>

To be fair to Hamilton, his protectionist view was not absolute and one-side. He often advocated only modern tariff duties. If no protection was needed (as e.g. in case of bar iron) recommended no protection on the grounds that the price on the market advanced to a point that foreign competition would have left for the domestic producers a reasonable profit.<sup>147</sup>

Thus, the doctrine concludes that such a system envisages a competitive economy, formed by the large number of businessmen and on the basis of the competition would push the prices down to the minimum of a reasonable profit on the capital employed, nevertheless, being aware of the initial effect of bounties and tariffs increasing the prices up.<sup>148</sup>

### 2.5.3 Friedrich List

The 'German version' of protectionism as doctrinal approach to economic thinking represents German economist Friedrich List. List is considered the inventor of the theory of the protective defence of 'nascent industries.'<sup>149</sup> List was involved among German nationalists who had to react on industrialization running in the 19<sup>th</sup> century. According to Szporlik, List linked the economic aspects of a nation's life with the nation's culture and politics in a synthesis which, as he adds, enabled nationalism to compete successfully with its rivals, including Marxism.<sup>150</sup> In his economic analyses, the economy has 5 stages starting from the 'wild stages' and growing up to the 'international trade stage.'

List advocated the custom unification and disciplinary customs. He agreed with Hamilton's concerns that British free market as promoted by British Empire

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<sup>146</sup>E. L. HUDGINS, *Freedom to Trade: Refuting the New Protectionism*, Washington, 1997, p.12.

<sup>147</sup>J.C.MILLER, *Alexander Hamilton and the growth of the new nation*, New Brunswick, 2004, p.289.

<sup>148</sup>J.C.MILLER, *Alexander Hamilton and the growth of the new nation*, New Brunswick, 2004, p.289.

<sup>149</sup>T. I. BEREND, *An Economic History of Nineteenth Century Europe, Diversity and Industrialization*, Cambridge, 2013, p. 301.

<sup>150</sup>R.SZPORLUK, *Communism and Nationalism: Karl Marx Versus Friedrich List*, Oxford, 1988, p.95.

endangers analogically in his case the German market, being on the lower level of development being at that time. Free trade suited the interests of British Empire, in the same way as Zollverein served for the Germany.<sup>151</sup> Thus Zollverein represented an association oriented on protection of its industry and forming thus a precondition for the establishing of the common market on the German market prior to unification of Germany into single state.<sup>152</sup>

As he adds (in examining the functioning of world trade), cosmopolitan economy as defined by classical scholars fitted perfectly to the economic conditions of the economic life of the societies, since Britain economically dominated over the world economy.<sup>153</sup> However, the situation shall be changed. Speaking about the British dominancy, he speaks about *'kicking away the ladder'* concept. As he stated: *"It is a very common clever device that when anyone has attained the summit of greatness, he kicks away the ladder by which he has climbed up, in order to deprive others of the means of climbing up after him. In this lies the secret of the Cosmo political doctrine of Adam Smith, and of the Cosmo political tendencies of his great contemporary William Pitt, and all his successors in the British Government administration."*<sup>154</sup>

Despite the critical note, pragmatically implicitly approves the measures adopted by Great Britain continuing: *"Any nation which by means of protective duties and restrictions on navigation has raised her manufacturing power and her navigation to such a degree of development that no other nation can sustain free competition with her, can do nothing wiser than to throw away these ladders of her greatness, to preach to other nations the benefits of free trade, and to declare in penitent tones that she has hitherto wandered in the paths of error, and has now for the first time succeeded in discovering the*

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<sup>151</sup>Based on a simple idea of customs union, by creating national unified economic area and to protect it against the competitors from Britain; for further details consult J.BONCOEUR, T.HERVÉ, *Histoire des idées économiques. / 1, de Platon à Marx*, Paris, 1989, p.155.

<sup>152</sup>K.GAZDAR, *Germany's balanced development – the real wealth of a nation*, Westport, 1998, p.86.

<sup>153</sup>M.M.BEBER, *L'indipendenza. Produzione integrata e sovranità nel sistema internazionale* in F.ARMAO, V.E.PARSI, *Società internazionale*, Milano, 1997, p.80.

<sup>154</sup>F.LIST, *The national system of political economy*, London, 1885, p. 295-296.

*truth.*"<sup>155</sup> Due to the fact that List gave the priority to national inputs (in terms of political power and national character) into the wealth of the nation, he was labelled as '*propagandist of national economy.*'<sup>156</sup>

One of the reasons was that he argued in favour of protective customs being introduced on the temporary basis, however, in the same time being aware of the fact that the economy of a smaller country (in commercial terms) provides less chances for the country in terms of the implementation of own protectionism system. In his opinion, it comes to a quicker drainage of the absorption capacity of the protected country as a consequence of greater necessity to import, because the national economy is not able to have wide-spread diversification.<sup>157</sup>

As he stated: " [ ]...where industry and capital are to have a choice of pursuits, the government must provide an area for the exhibition of industry, and protect from intrusion, so long as may be necessary. And where more regard is paid to the interests of the millions who labor, than to the interests of foreign trade, this industry should continue to be protected from the revulsions and gluts of foreign markets, from the cheaper labour and the insufficiently paid laborers of foreign countries, and from all other foreign causes which might disturb the relations between the home laborer and his daily bread."<sup>158</sup>

In summarizing his doctrine, with the implications to current days, we may agree with Freeman and Soete stating that: "[...] in his endeavour List anticipated many contemporary ideas about 'national systems of innovation', including the crucial importance of technological accumulation through a combination of technology imports with local activities and proactive interventionist policies to foster strategic 'infant' industries."<sup>159</sup>

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<sup>155</sup>F.LIST, *The national system of political economy*, London, 1885, p.295-296.

<sup>156</sup>F.LIST, *The national system of political economy*, London, 1885, p.286.

<sup>157</sup>J.P.DORMOIS, P.LAINS, *Classical trade protectionism 1815-1914*, London, 2006, p.247.

<sup>158</sup>F.LIST, G.A.MATILE, H.RICHELOT, S.COLWELL, *National system of political economy Political Economy*, Philadelphia, 1856, p.249.

<sup>159</sup>C.FREEMAN, L.SOETE, *The Economics of Industrial Innovation*, Cambridge, 2000, p.314.

## 2.6 Carl Henrich Marx

Also socialist philosophers tried to explain and provide their explanation to the issues of international trade and to point out on their fundamental weaknesses. The socialist and Marxist doctrine was formed on the foundation of the utopic socialism, agricultural communism, French socialism and Ricardian socialism.<sup>160</sup> One of the principal protagonists of socialist theory, Carl Marx provided an explanation of the economic crises and massive criticism of the capitalism as the system.

The writings of Marx were under the influence of the poverty of the working class. Marx built up his doctrine on the basis of the ideas of historical materialism and a revolutionary class struggle, perceiving the market and movement of capital as the instruments of the exploitation.<sup>161</sup>

His doctrine was also clearly influenced by classical liberals, but also by French revolution and dynamism theory presented by Hegel. However, Marx rejected the liberal view on economy as positive-sum game for all actors. In opposition to this argumentation he perceives economy as source of human exploitation and class inequality.<sup>162</sup> Marx to certain extent agreed also with List in terms of the historical approach to economic problems and identifying thus two central points of foreign trade and commercial policy - the protection in the early stages and the free trade in later ones.<sup>163</sup>

Nevertheless, Marx provided certain innovation in terms of scientific methodology in investigation of historical events, wars and social institutions considering them as endogenous variables.<sup>164</sup> Thus, one cannot wonder that Marx's system of the world economic policy conditioned the development of the

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<sup>160</sup>J.LISÝ, *Dejiny ekonomických teórií*, Bratislava, 2003, p.65.

<sup>161</sup>J.RESTAKIS, *Humanizing the economy: Co-operatives in the age of capital*, Gabriola, 2010, p.45.

<sup>162</sup>R.H.JACKSON, G.SØRENSEN, *Introduction to international relations: theories and approaches*, Oxford, 2003, p.186.

<sup>163</sup>A.A.BROWN, E.NEUBERGER, *International Trade and Central Planning: An Analysis of Economic Interactions*, Berkeley, p.30.

<sup>164</sup>J.A.SCHUMPETER, *Capitalism, Socialism and Democracy*, London, 1966, p.47.

countries and societies, speaking about the system as fully deterministic one, since the distribution of the richness and power the state depends from the economic structure of the state at stake. Therefore it shall be spoken about the preponderance of the economics over the politics which can be characterized as economic determinism.<sup>165</sup>

This view might be supported by some authors as well who clearly point to the fact that Marxism and socialist doctrine share equally some fundamental assumptions also with the classical economists, although approaching differently the very last assumption.

The fundamental assumptions of Marxist and socialist approach may be summarized as follows:<sup>166</sup>

1. the expansion of capitalism (production and trade) occurs under the stimulus of a homogeneous world market,
2. governments initially realize the interests of ruling classes,
3. borders are unimportant because competitive trade is not only cross-border, but also universal.

According to Negishi, Marx examined the key issue of his doctrine 'exploitation' in his works (Capital, Theories of Surplus value) having various dimensions.<sup>167</sup>

First element is the exploitation of labour by capital in equal situation, meaning that there is equal labour quantity exchange, and secondly the exploitation of poor countries by rich ones through unequal labour by capital.<sup>168</sup> Negishi comments the Marx's doctrine is the following words: "*The assumption is*

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<sup>165</sup>M.H.GUIMARÃES, *Economia política do comércio internacional: teorias e ilustrações*, São João do Estoril, 2005, p.99.

<sup>166</sup>R.BÜCKER, *Karl Marx's Conception of International Relations* in *Glendon Journal of International Studies*, Volume 3, 2000, p.6.

<sup>167</sup>T.NEGUSHI, *Developments of international trade theory*, Boston, 2001, p.83.

<sup>168</sup>T.NEGUSHI, *Developments of international trade theory*, Boston, 2001, p.83.

*that the variable capital (the wage goods like food and necessities) is advanced by capitalists to labourers, which is quite in contrast to modern neo-classical assumption that wage is paid out of current, not past output. Capital must be advanced because there is a time lag between input of labour and output on commodities and labourers cannot wait output since they are stripped out of any means of subsistence.”<sup>169</sup>*

Thus, logically, Marx rejects the idea of international free trade as the expression of world harmony<sup>170</sup> and clearly induces his doubts on this point while stating: *“Every one of destructive phenomena to which unlimited competition gives rise within any one nation is reproduced in more gigantic proportion in the market of the world.”<sup>171</sup>*

His criticism to capitalism arose from the criticism of overproduction of capitalism; causing inequalities between the particular nations, meaning that not every single goods produced find its own proprietor (consumer). That has for consequence the destabilization of the circulation of the goods in the international trade and causes chain reaction marked by bankruptcy of the banks, increased level of dismissals of the employees, decreasing tendency in the sale of the machines and resources.

Van Bereijk explains this part of Marx’s theory by making reference to modern age. According to him: *“The discovery of economies of scale caused a top-heavy production apparatus in the industrialized world and led to such a superfluous supply of goods that the domestic market could no longer be absorbed. Hence, the international markets had to be won in order to create the necessary outlet. That meant colonization as a defence against the competition from other capitalist countries that had identical problems*

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<sup>169</sup>T.NEGUSHI, *Developments of international trade theory*, Boston, 2001, p.83.

<sup>170</sup>S.HOLLANDER, *The economics of Karl Marx: analysis and application*, Cambridge, 2008, p.227.

<sup>171</sup>As reproduced in B.FINE, A.SAAD-FILHO, M.BOFFO, *The Elgar companion to Marxist economics*, Cheltenham, 2012, p.208.

*at home. The resulting clash of commercial interests would have necessarily resulted in a more or less permanent war treat.*"<sup>172</sup>

Marx perceives the capitalist production as a process of the self-aggrandizement of capital via the extraction of the maximization of the surplus value from the living labour power used in this process. As Tucker quotes Marx: *"The end and aim, the driving force of the capitalist production is an endeavour to promote to the uttermost the self-expansion of capital, meaning the production of the largest possible amount of surplus value and therefore the maximum possible exploitation of labour power by the capitalist."*<sup>173</sup> In order to avoid the conflicts the society must proceed into the stage of the communism with the material abundance.<sup>174</sup>

In Marx's view is necessary to distinguish between certain wars in the early stages and wars during modern capitalism. As Bückler opines on this part of Marx's doctrine: *"War in early capitalism was a frequent form of interaction between states for colonies and trade competition."*<sup>175</sup> Modern or industrial capitalism, according to Marx, was characterized by the drive for peace, as military action could have a disastrous impact on *'the stock market.'*<sup>176</sup>

Despite the criticism paid to the Marxist economic theory, the academics admit that Marxism belongs to the classical contribution of the economic writings.<sup>177</sup> However, it is subject of significant criticism, especially in terms of the searching the understanding of the economic and social phenomena on the

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<sup>172</sup>P.A.G.van BERGEIJK, *Economic diplomacy and the geography of international trade*, Cheltenham, 2009, p.27.

<sup>173</sup>R.C.TUCKER, *Philosophy & myth in Karl Marx*, New Brunswick, 2000, p.209.

<sup>174</sup>This stage of the development is characterized by several features – people cease to compete and come into conflict over the use of the scarce resources, there is a need for high degree of development of the means production is needed to abolish the specialization as a source of particular interests and social conflict as referred in M.C.HOWARD, M.C.HOWARD. J.E.KING, *The Political Economy of Marx*, New York, 1988, p.21.

<sup>175</sup>R.BÜCKER, *Karl Marx's Conception of International Relations* in *Glendon Journal of International Studies*, Volume 3, 2000, p.6.

<sup>176</sup>R.BÜCKER, *Karl Marx's Conception of International Relations* in *Glendon Journal of International Studies*, Volume 3, 2000, p.6.

<sup>177</sup>E.g. G.G.IGGERS, N.BAKER, *New directions in European historiography*, Middletown, 1975, p.123.

patterns of the human behaviour leading the determinism of the world development.

As Fernandez Benayas states, since its origins, Marxism presented itself as the science of the reality, what is known, far away from the imagination, putting in the foreground the materialism, being distant from the idealism, the scientific socialism, far away from the utopic socialism.<sup>178</sup>

The answer to the economic reality is however, according to Lohmann an appropriate answer to the reality of the modern capitalism creating '*homo economicus*', as only the working, producing, mobilizing human being.<sup>179</sup>

## 2.7 Economic thinking in 20th century

### 2.7.1 Introduction

The author was searching within the dissertation an adequate title of the heterogeneous group of the economists falling into the time-matter category of 20<sup>th</sup> century. At the end, he opted for the time-matter approach appearing most pragmatic. In reality, the neoclassical theory contributed to the forming of the theories in the 20<sup>th</sup> century contributed mainly which started to appear in the seventies of the 19<sup>th</sup> century. Historically, at that time Great Britain gradually started to lose its dominant economic position.<sup>180</sup> This fact caused that the economists could take into consideration the presumption of perfect competition and started to investigate new concepts within economic theory as the rational decision-making of the consumers (households) and entrepreneurs (companies) and optimal operation of the economic system as such.<sup>181</sup>

What is the principal difference of the classical and neoclassical economics? The reply provided in the mid 1954 Schumpeter, stating that classical economics is '*advanced economics*' whereas neoclassical economics is '*synchronization*'

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<sup>178</sup>A.FERNANDEZ BENAYAS, *Raíces y Dimensiones del Marxismo*, Raleigh, 2008, p.5.

<sup>179</sup>H.M.LOHMAN, *Marxismus*, Frankfurt, 2001, p.33.

<sup>180</sup>E.KOIŠOVÁ, E.IVANOVÁ, K.KRAJČO, *Vybrané kapitoly z ekonomických teórií*, Trenčín, 2003, p.129.

<sup>181</sup>J.LISÝ et. al., *Ekonomía v novej ekonomike*, Bratislava, 2005, p.21.



*economics*.<sup>182</sup> As Ikeo and Kurz explain, the classical economics basically assumes a period of production whereas the approach to neoclassical economics refers to timeless system.<sup>183</sup>

Other authors perceive as the main difference to the classical one in terms of the fundamental presumption of the supply of factors of products. In their view, this theory presupposes the given supplies of the production factors and presuming their international immobility. As the outcome the production, factor price is thus determined by its value productivity, depending on physical productivity and price of the product.<sup>184</sup> In terms of the time-matter, the preference is given to the marginal and short-term analyses and accepting existing economic power relations and asymmetries on the market as given values.<sup>185</sup>

Several economists, being active in the 20<sup>th</sup> century, analysed the issues of the foreign trade and effects of foreign trade while giving priority to the internal measures and internal economic decision-making.

### 2.7.2 *Alfred Marshall*

Alfred Marshall has a particular position in the transformation process of the classical theories of the international trade to the modern ones has Alfred Marshall. Marshall gained the reputation of the most respected economist of the end of 19<sup>th</sup> and beginning of 20<sup>th</sup> century.<sup>186</sup> In the view of Maneschi, Marshall holds a pre-eminent place among neoclassical trade theorists because of his invention of reciprocal demand and offer curves suitable for the analysis of the international trade equilibrium, its stability and how this reacts in response to the

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<sup>182</sup>A.NOGUCHI, *Alternative view on Ricardian trade theory* in A.IKEO, H.D.KURZ (eds.), *A History of Economic Theory: Essays in honor of Takashi Negishi*, New York, 2009, p.105.

<sup>183</sup>A.NOGUCHI, *Alternative view on Ricardian trade theory* in A.IKEO, H.D.KURZ (eds.), *A History of Economic Theory: Essays in honor of Takashi Negishi*, New York, 2009, p.105.

<sup>184</sup>T.NEGESHI, *International Exploitation in Marxist and Neo-Marxist Economics* in M.C.KEMP, H.HERBERG, N. van LONG, *Trade, Welfare, and Economic Policies: Essays in Honor of Murray C. Kemp*, Ann Arbor, 1993, p.353.

<sup>185</sup>M.TRIBE, F.NIXSON, A.SUMNER, *Economics and Development Studies*, New York, 2010, p.143.

<sup>186</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.73.

change of factors like trade taxes or technological changes.<sup>187</sup> The key terms shall be the measurement of the social surplus which shall be used to analyse the effects of the economic policy.<sup>188</sup>

According to Baláž, the outcomes of the writings of Marshall on foreign trade may be summarized in the form of the 3 laws on trade:

1. the trade operates under the principle of 'reciprocity' which shall be understood that the curve of the demand of the country A upon the goods from the country B is equal to the offer curve of the country A by its exportation to the country B (and vice versa),
2. the curves of the reciprocal demand and the supply of two countries express the relation between the potentially desired quantity of the goods from the country B and the quantity of the domestic goods which the country A is eager to sell (exchange) in order to gain the desired quantity of the goods (from the country),
3. by using the curves of the reciprocal demand and supply of two countries may be determined exactly the terms of exchanges in the international trade and also equilibrium prices.

Upon the analyses of the curves, Marshall came to the conclusions on the effects of the foreign trade<sup>189</sup> in the world trade ambience. However, it is visible his concern as to the fact whether Britain can maintain its superiority over the time.<sup>190</sup> Another Marshall contribution to the economic theory is the concept of the elasticity of the demand within which he investigated the influence which the change of the price has of the sale of the product. Doing so, he deepened the

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<sup>187</sup>A.MANESCHI, *Comparative Advantage in International Trade: A Historical Perspective*, Cheltenham, 1998, p.127.

<sup>188</sup>A.SANDMO, *Economics evolving: a history of economic thought*, Princeton, 2011, p.227.

<sup>189</sup>Among those may be mentioned incensement of the efficiency of the domestic industry; opportunities for the migration of the capital and labor; exerts and influence on the steadiness of employment; assist in the development of large-scale industry, in L.GOMES, *The economics and ideology of free trade : a historical review*, Cheltenham, 2008, p.108.

<sup>190</sup>L.GOMES, *The economics and ideology of free trade : a historical review*, Cheltenham, 2008, p.108.

writing of John Steward Mill who reflected that there is certain '*elasticity*', however has lacked to formulate it in clear terms.<sup>191</sup>

### 2.7.3 *Gottfried Haberler*

The decision-making process of the production can be analysed through the deep-in analysis of substitution costs invented by American economist Gottfried Haberler. Haberler alleges that in the theory of production there exists not only production-related costs but at the same time so-called '*opportunity costs*', costs representing expendable costs, costs '*sacrificed*' in order to produce the other goods. Haberler states that there are different possible combinations of the goods production which are possible to be produced (or imported).

Although his theory might be clearly similar to the Ricardian one, it is true, however, in comparison to Ricardo that Haberler made to his theory of opportunity costs certain modifications. In comparison to the classical economists, he replaced labour cost of production with opportunity cost and transformed the comparative advantages theory in terms of the opportunity costs whereby he used two factors to measure the opportunity costs – labour and capital.<sup>192</sup> His inventions in terms of the grasping the comparative costs theory were doctrinally evaluated as '*masterful achievement, as was his clear and comprehensive evaluation of the various arguments for protection.*'<sup>193</sup>

In the substance, economic law as formulated by Haberler may be summarized as follows:<sup>194</sup>

1. the production cost for the fabrication of the product A represents the quantity of the product B, fabrication of which must be abandoned in order to be able to produce and export one additional unit of the product A,

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<sup>191</sup>R.HOLMAN, *Dějiny ekonomického myšlení*, Prague, 2005, p.215.

<sup>192</sup>D.N.DWIVEDI, *Microeconomics : theory and applications*, New Delhi, 2002, p.587.

<sup>193</sup>L.GOMES, *The economics and ideology of free trade: a historical review*, Cheltenham, 2008, p.148.

<sup>194</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.80.

2. there are open-end combinations of the cost by various sorts of products, which is possible to produce, export or import which makes possible interchangeability. Moreover, it has a significant influence on the decisions of the entrepreneurs which have a particular importance in terms of the specialization of the manufacture within the international trade.

As the consequence, Haberler<sup>195</sup> states that the foreign trade may contribute to the international development of the developing countries arguing by referring back to the writings of Ricardo: *“International division of labour and international trade, which enable every country to specialize and to export those things that it can produce cheaper in exchange for what others can provide at a lower cost, have been and still are one of the basic factors promoting economic well-being and increasing national income of every participating country.”*<sup>196</sup> Nonetheless, as he can be quoted further, this conclusion was accepted positively in the economic community, which was not the case of the governmental decision-makers. He states: *“Economists are nearly as unanimous in favour of a liberal trade policy as are Governments in favour of the contrary.”*<sup>197</sup>

Haberler came to these conclusions also partially due to his expertise, Haberler’s report which came to existence on the basis of the commission of the GATT. In the report, he revealed clearly the shortcomings in terms of the exports from the third countries, meaning that the markets of the third countries do not grow as quickly as the markets of the industrialized countries do. One of the causes, as identified by Haberler are the tariff and non-tariff barriers of the products which were at that time imported from those countries.<sup>198</sup> As the outcome, of his rather critical report, there was established standing committee of

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<sup>195</sup>Haberler’s writings is considered as the return to the classics of the economic thinking as Smith and Ricardo in the modification of the comparative advantages in the form of the contradiction between the North and the South and the interlinked theory of the periphery theory of the trade, in E.CIHELKOVÁ et al., *Světová ekonomika*, Prague, 1997, p.27.

<sup>196</sup>G.HABERLER, *Dynamic Benefits of Trade* in G.M.MEIER, *Leading issues in economic development: studies in international poverty*, Oxford, 1971, p.492.

<sup>197</sup>G.HABERLER, *Theory of International Trade*, London, 1936, p.viii.

<sup>198</sup>T.G.WEISS, R.C.THAKUR, *Global Governance and the UN: An Unfinished Journey*, Bloomington, 2010, p.167.

the GATT with the clear mission encouraging and supporting the trade policies of the least developed countries.<sup>199</sup>

#### 2.7.4 *Eli Filip Heckscher, Betril Gotthard Ohlin, Paul Anthony Samuelson*

A neoclassical theory fundamentally turns the attention of the economists back to the domestic economy. As Archibugi and Iichie state: *“According to standard neo-classical theory of international trade, countries ought to specialize in areas of production that make intensive factors of production with which the country is relatively well equipped. In spite of the dominant role played by traditional neo-classical theory in this area, there has always been a strand of thought that has emphasized learning as a potential source of comparative advantage. This tradition points to the potential effects of relations between firms or sectors, within the domestic economy, on innovation and learning, and the impact of this in the international competitiveness of the country and its specialization pattern in international trade.”*<sup>200</sup>

One of the most complex models as presented by Swedish economists Heckscher and Ohlin is the theory of the endowment of the production. They initialized the neoclassical discussion that the liberal international trade has similar influence on the production factor price like the international circulation of the factors of the production.<sup>201</sup>

Their key research investigates two interlined parts how the production prices factors affect the production of the goods in international trade and what influence of the international trade have on the prices of the production. The second part of the question is to which extend the international transfers of the factors of production affect the prices and affect the structure of the production and the prices of the products.<sup>202</sup> The basic assumption is that the price of the factor of production depends on its relative offer, meaning its relative availability

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<sup>199</sup>H.W.ARNDT, *Economic development: the history of an idea*, Chicago, 1987, p.77-78.

<sup>200</sup>D.ARCHIBUGI, J.MICHIE, *Trade, growth, and technical change*, New York, 1998, p.208.

<sup>201</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.98.

<sup>202</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.98.

or unavailability. In case of its sufficiency the product price will be low and vice versa. Thus, they came to the conclusion that a country will be specialized in the production and export of such goods which is relatively demanding on the factors of production to which is the economy relatively better equipped whereas the import will be oriented on such goods, production of which is relatively demanding on the shortage factor.<sup>203</sup> As Kubišta states, in comparison to the Ricardian model, this model is better in terms of the original comparative advantage concept (which takes into consideration only labour). On the other hand, speaking about the Heckscher-Ohlin model, this aims as well on the comparative advantage only in one factor on the basis of its better facilities.<sup>204</sup>

The initial Heckscher-Ohlin theory was further elaborated by Samuelson who investigated the issue of the prices of the international mobile production factors. Samuelson formulated the theorem based on equalizing the prices of the products and factors of production between two countries. Basic assumption remained that the country takes part in the international trade. As a consequence, this leads to the change of the price of the factor of production and the world price as well.<sup>205</sup>

As the conclusion of his investigation he came to the result that the price of the product in which the surplus factor of production is contained grows and as an implication of the growing offer grows also and the price of the product using the shortage factor of production drops.<sup>206</sup> Under the international trade equation comes between the two specialized countries to the equalization of the different relative prices of the factors of production and the final prices of the products as well.<sup>207</sup>

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<sup>203</sup>P.TULEJA, P.NEZVAL, I.MAJEROVÁ, *Světová ekonomika*, Brno, 2007, p.72.

<sup>204</sup>V.KUBIŠTA et al., *Mezinárodní ekonomické vztahy*, Prague, 1999, p.41.

<sup>205</sup>H.KUNEŠOVÁ, E.CIHELKOVÁ, *Světová ekonomika - nové jevy a perspektivy*, Prague, 2006, p.73.

<sup>206</sup>J.HEČKOVÁ, A.CHAPČÁKOVÁ, Teoretické východiská problematiky konkurenční schopnosti ekonomiky in *Zborník vedeckých prác katedry ekonómie a ekonomiky ANNO 2008*, Prešov, 2008, p.198-199.

<sup>207</sup>G.HEIDUK, *Außenwirtschaft : Theorie, Empirie und Politik der interdependenten Weltwirtschaft*, Heidelberg, 2005, p.58.

In summary of the overview of the Hecksher-Ohlin-Samuelsson theorem, it might be shaped the consequences seem logical that under this theory, the situation will 'control' those subjects that have the factors of the production whereas the preference is given to the capital.

#### 2.7.5 John Maynard Keynes

John Meynard Keynes contributed to the history of economic thinking in the significant way. Economist Keynes broke the presumption of the classical economics. Under his presumptions, savings create investment which can be financed by ex-ante savings. As a second presumption, savings and investment are brought to equality by variations in the rate of interest.<sup>208</sup>

The Keynesian theory is perceived in the doctrine as the unification of classical theories of the international trade, economic growth and economic policy, however does not replacing them. Its importance consists in the functional interconnection of the questions of investments, production, employment and exportation with an aim to support the economic growth.<sup>209</sup>

As a product of the investigation the mathematical equation was invented between the export, import and the national income in which came to the conclusion that if comes within the economy to the depression of the demand for products, the entrepreneurs decrease the production and also the number of employees. In case of the economic depression in his view, the state shall intervene on the market and ensure sufficient volume of the production and employment.<sup>210</sup>

Therefore the outcome of this theory is that any capital input produces certain amount of the labour opportunities, generates growth of the incomes, and

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<sup>208</sup>C.GNOS, L.P.ROCHON, *The Keynesian multiplier: an introduction* in C.GNOS, L.P.ROCHON, *The Keynesian multiplier*, London, 2008, p.1.

<sup>209</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.101.

<sup>210</sup>J.LISÝ, *Dejiny ekonomických teórií*, Bratislava, 2003, p.156.

increases the employment and the consumer demand. The growth of the capital has positive influence on the production, employment in other branches of economy.

As Baláž further adds, the active balance is the fountain of the primary source of the income and subsequently having the chain effect, affecting the growth of the national income and causing other favourable development effects.<sup>211</sup>

#### 2.7.6 *Joseph Alois Schumpeter*

One of the prominent economists preferring this approach to the analysis of world trade was Joseph Alois Schumpeter analysing the effects of the erases of the economic relations. In this process the operation of the innovations play the essential role. Within that one of the effects of the innovations is opening of the new markets or markets designed for new industry.<sup>212</sup> Schumpeter understands the innovations as a disruption of the stationary growth and these can have the following attributes:<sup>213</sup>

1. introduction of a new kind of product, new property of the product,
2. introduction of a new fabrication method, or alternatively that one, which has not been empirically verified,
3. opening of a new market or market suitable for certain industry,
4. production by new organization of industry (e.g. the creation of a new situation based on monopoly or the cancellation of monopoly situation,
5. invention of the new source of raw materials or semi-products.

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<sup>211</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.101.

<sup>212</sup>J.LISÝ, *Dejiny ekonomických teórií*, Bratislava, 2003, p.144.

<sup>213</sup>J.LISÝ, *Dejiny ekonomických teórií*, Bratislava, 2003, p.144.



### 2.7.7 *Frank Duncan Graham*

Historical approach to the world trade represented Frank D. Graham. Graham to certain extent criticized the price theory of J.S. Mill. According to him, the prices in the international trade are formed under pressure of supply and demand. In his opinion the price, formed in the international trade cannot be separated from the production costs which are the most important factor in the field. Graham agrees that international supply and demand are grounds for determination of exchange rates and price, but there are certainly also another factors having the same importance as the competition and foreign trade practice of the states.<sup>214</sup>

As to the advantages of international trade Graham rejected the previous theories of international trade. He keeps criticizing them because of their static effects, being not elastic enough in regard to the changing conditions of economic reality and in the same time changes in the particular branches of economics in the world countries. Graham contested the existence of absolute advantages of the international trade, since the effects of international trade operate differently in various branches of economy, naming concretely, e.g. the sector of industry production where the fall of industry costs is more realistic and effective than in the sector of agriculture and therefore the international trade is more advantageous for more developed countries which have still as the core business the industrial production.

### 2.7.8 *Charles Poor Kindleberger*

Kindleberger (one of the few) belongs to the group of the economists who claimed that the key issue of economics – questions of grow and stagnation are not sufficiently explained by the economists, providing only partial explanation to these processes and not paying attention to the diversity of the national

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<sup>214</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.78.

approaches.<sup>215</sup> Maybe the cause of his preoccupation and demands for the deeper understanding laid in the fact that he focused on the history of world economy and thus becomes respected and recognized authority in the international economic relations and international monetary relations.<sup>216</sup>

One of the concepts which he became respected for is the concept of the 'capacity to transform'. What does the notion 'capacity to transform' stands for? Kindleberger by himself provides a clear answer to this question as "[...]...an ability to respond to price signals, to get out of old industries with the low income elasticities, and to enter new ones (or to employ new processes coming to the fore in old industries)." <sup>212</sup>

Kindleberger applies this principle in terms of the investigation of the poor and rich countries in their potential to transform their economies. As he states: "[...] (the developed countries) had the capacity to transform and poor countries, less developed countries, or primary producers did not. When prices of goods that primary producers exported raised new entry in other less developed countries and in the developed countries brought them down again. When such prices fall, inability of the primary producers to achieve exit from their export lines meant that those prices stayed down, relative to those manufactured exports. If price changes are stochastically distributed, primary-producing countries that face new entry when prices rise, and are unable to exit when prices fall, while experience a long-run declining trend in terms of trade. For developed countries at their prime, the position was reverse; increases in prices could be sustained, because new entry was difficult, and price declines were met by effective exit, which brought them up again." <sup>217</sup>

The concept of the lack of transformation capacity was furthermore doctrinally perceived and elaborated as a broader concept. E.g. German economist Lorenz perceives that the causes for the 'transformation incapacity' may be broader

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<sup>215</sup>D.CLARK (ed.), *The Elgar companion to development studies*, Cheltenham, 2006, p.310.

<sup>216</sup>J.TÁNCOŠOVÁ, *Charles Poor Kindleberger in Biatec*, Volume 12, Number 11, 2004, p.22 ff..

<sup>217</sup>C.P.KINDLEBERGER, *Economic Laws and Economic History*, Cambridge, 1990, p.18.

than a general concept of the economic policy and in the social insurance system or the pluralist welfare system.<sup>218</sup> Other German economist Billerbeck, perceived the adjustment and re-structuring as *'das tägliche Brot'* (daily bread – author's translation), i.e. as an inevitable consequence of the existence of an entity. As to the subject's transformation speed, this is a question of the mentality of the economic subjects and the countries' economic political instances.<sup>219</sup>

#### 2.7.9 Pure Economic Theory and International Trade

Basically, the pure economic theory means the search for the explanation why the trade exists, using *'old kits'* of analysis of international trade as differences in the factor proportion, technology, preferences.

The pure theoretical approach can be expressed in the words of Marshall, stating that: *"The function of a pure theory is to deduce definite conclusions from definitive conclusions from definitive hypothetical premises. The premises should approximate as closely as possible the facts with which the corresponding applied theory has to deal. But the terms used in the pure theory must be capable of exact interpretation, and the hypotheses on which it is based must be simple any easily handled."*<sup>220</sup>

However, as Boehm explains: *"The pure theory of international trade aims to explain not just the existence of some trade, but the pattern of international trade."*<sup>221</sup> According to Baláž, this theory investigates the international flow of goods *'in the clear form'*, investigating thus the theory of value, price, terms of trade in the international business, rules determining the structure and terms of trade in international commerce.<sup>222</sup> As Cherunilam states the pure theory of international

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<sup>218</sup>D.LORENZ, *Dynamische Theorie der internationalen Arbeitsteilung: Ein Beitrag zur Theorie der weltwirtschaftlichen Entwicklung*, Berlin, 1967, p.142.

<sup>219</sup>K.BILLERBECK, *Die Konsequenzen der Industrialisierung der Entwicklungsländer für die Industrieländer*, Cologne, 1964, p.41.

<sup>220</sup>A.MARSHALL, *The Pure Theory of Foreign Trade: The Pure Theory of Domestic Values, Issue 1*, London, 1930, p.1.

<sup>221</sup>A.MANESCHI, The 'institutional factor' in international trade in S.BOEHM, C.GEHRKE, H.D.KURZ, R.STURN, *Is there progress in economics?: Knowledge, truth and the history of economic thought*, Cheltenham, 2002, p.265.

<sup>222</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.55.

trade has a micro-economic nature and encompasses topics such as the nature of trade and the pattern of trade, effect of trade on production, gains from trade and the distribution of the gains, effect of trade barriers on trade, factor and product prices and income distribution, and, effect of trade on economic growth and vice versa.<sup>223</sup>

#### 2.7.10 *Monetary Theory and International Trade*

The theory of monetarism started to appear since the mid-seventies as a reaction on massive state interventions in economic sphere.<sup>224</sup> How to distinguish the monetary theory and the pure one? As Flassbeck states as to the difference the pure economic theory orients on the commerce circulation between the states and tries to provide the answers to the question how the preference system and commodity endowment contribute to the circulation of the products and under which conditions. On the other hand, the monetary theory concentrates on the aggregation of the results of the described theory and how to transform them into macroeconomic numbers and on their basis explain the complex economic processes and on pointing on the possibilities of the adjustment.<sup>225</sup>

In terms of international trade, this theory investigates the trade and its correlation which international circulation of money, international monetary-finance relations, with the theory and the price factors, currency relations, the general balance in the market economy and employment.<sup>226</sup> Thus it seems obvious that the monetary theory of international trade has a macro-economic nature, dealing with matters concerning the balance of payments and international monetary system. One of the key elements of this theory is the investigation of the

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<sup>223</sup>F.CHEUNILAM, *International economics*, New Delhi, 2008, p.23.

<sup>224</sup>J.DEJINET. al., *Ekonomía v novej ekonomike*, Bratislava, 2005, p.27.

<sup>225</sup>H.FLASSBECK, *Freihandel, GATT und das internationale Währungssystem*, Tübingen, 1985, p.30.

<sup>226</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.54-55.

international economic transactions as they happen and their institutional environment in which they take place.<sup>227</sup>

In the view of monetarists, the disequilibria in payment balances between the exchanging parties can never arise in the system of barter and therefore the money is the active element determining the balance of payments and not merely in terms of product circulation, but also in giving a passive response to discrepancies what arise in the trade of commodities, services and assets.<sup>228</sup>

However, the significance in terms of the commerce and its development is related to the availability of money determined directly by the interest rate. Nonetheless, under the presumption that the drop of the interest rate, caused by monetary expansion enables the expediency of the credits which reflects further in the excessive growth of investments and consumption.<sup>229</sup> Lastly, the importance given to the monetary policy and ill-advised monetary policy may lead to the bad investments and be one of the causes of the swinging of the economy and cause the disruption of the stability of the financial system of the country.<sup>230</sup>

## 2.8 Conclusion

In introduction to this chapter Schumpeter was quoted, motivating the students to study deeper of the economic theories providing more theoretical approaches, the end and conclusion of this chapter provides rather practical reasons to do so.

Slovak economist Baláž provides rather practical view on this issue stating that: *"The practical functions of the theories of international trade are given by the fact what they research, explain, reflect and in this way are applicable in the economic policy, foreign and political decision-making of the states and furthermore international*

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<sup>227</sup>F.CHEUNILAM, *International economics*, New Delhi, 2008, p.23.

<sup>228</sup>J.T.SALERNO, *The gold standard : an analysis of some recent proposals*, Washington, 1982, p.248.

<sup>229</sup>P.DVOŘÁK, *Veřejné finance, fiskální nerovnováha a finanční krize*, Prague, 2008, p.219.

<sup>230</sup>P.DVOŘÁK, *Veřejné finance, fiskální nerovnováha a finanční krize*, Prague, 2008, p.220.

*organizations and mutually interlinked processes in international economy and for the operation of the international institutions as WTO, IMF, UNCTAD.*"<sup>231</sup>

Brief overview on the history of economic thinking has clearly shown that the economic regularities were investigated since the ancient times considering the economics as a practical daily activity. Despite rather scattered writings on economic issues, the tendency may be clearly tracked to investigate the issues which dominated in the later times as questions of '*comparative advantages*' oriented on individual human beings.

Historical and geopolitical level development was formed by historical and geological development. Mercantilism represented the first compact branch of the economic thinking represented mercantilism, although the scholars did not create one single branch. However, there are remarkable common features putting clearly in the foreground the strict economic nationalism with limited approach to the foreign trade.

The limited approach of the protectionists was lately replaced by the classical theory giving the preference to liberal free trade. In addition to that classics bring into the theory the concept of absolute advantages and the calculation of the efficiency of the production.

The classical theory was denied by the protectionism, having in the foreground the protection of the national states by economic measures. Fundamentally negative approach towards international trade presented also Marxism perceiving in the circulation of the capital sort of exploitation of the workers.

20<sup>th</sup> century represents divergence in terms of economic branches presenting the investigation of the parameters from the economic figures, and continuing to development theories trying to find an answer to the question of the

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<sup>231</sup>P.BALÁŽ et al., *Medzinárodné podnikanie*, Bratislava, 2005, p.51.

underdevelopment of the developing countries and the causes and importance of the innovations. International mobility of the industrial production provides a platform for the most recent theories - pure economic theory and monetary theory investigating the international economic relations in the quantitative way.

## 3 *Legal Personality in International Law*

### Summary

3.1 Preface 3.2 Introduction to the Concept of Legal Personality 3.3 Legal Personality in International Law 3.3.1 General Overview on Legal Personality in International Law 3.3.2 States as Subjects of International Law 3.3.3 Legal Personality of International Organizations 3.3.4 Individuals and Corporations as Subjects of International Law 3.4 Conclusion

### 3.1 Preface

As promised in previous chapter, upon the analysis of economic issues, the object of the further investigation and research will have purely legal nature. As the first point linked to the legal arguments is the question of the legal personality investigated at first in general terms and further towards the '*application*' of the general model to the EU one.

Conceptual grasping of the legal personality helps to identify the actors operating on international plane and the rights and duties they might have. It is a key element for understanding of their role they play in international legal relations and to which extent they may contribute to the law-making procedures in the international legal milieu including their interaction to other actors. The knowledge-base of the legal personality will further serve for better understanding of shaping the nature of the GATT/WTO agreement, including its decision-making and adjudicating procedures. As it will be further proved, the very existence of the legal personality of an international organization constitutes one of the principal elements of its appropriate functioning and operability.

The analysis of the legal personality is pretty much simplified and not every single time fully consisted with the doctrinal approach which is not fully consistent and univocal as one may think, but rather represents an issue depending on individual scholar's investigation of the given argument. Hence, the author will limit the investigation for the purpose of this dissertation to the analysis of the legal personality of the states, international organizations and individuals, although some scholars would certainly perceived such kind of



analysis insufficient and not covering the variety of subjects operating on the plane of international economic law.

### 3.2 Introduction to the Concept of Legal Personality

While studying every single legal branch, one of the fundamental issues appearing at the very first pages of the respective textbooks covers the issue of the subjects, as the main actors falling under the scope of applicability of that legal discipline. General theory of law characterizes the subjects of law as persons having the legal personality, i.e. as the subjects having the capacity to have own subjective rights and duties.<sup>232</sup> Hans Kelsen in his investigation of the legal personality gives preference to certain kind of imagination and fiction in the process of clear identification of the bearer of the rights. In his perception: *“The concept of the legal persons – who, by definition is the subject of legal duties and legal rights – answers the need of imagining a bearer of the right”*<sup>233</sup> Similar view shares also P.W.Duff: *“... [the legal personality] is highly technical term of jurisprudence. It means the capacity for legal rights and duties and an entity capable of legal rights and duties is called a Legal Person.”*<sup>234</sup>

Nevertheless, the question of legal personality does not relate exclusively to the person itself, as much as also to the rights and duties given to the persons need to be examined and equally relates to the existence of the originator of the norms determining the *‘package of rights and duties.’* As D.P.O’Connell states: *“ [...] it is clear that the word ‘person’ is used to refer to one who is a legal actor, but that is of no assistance in ascertaining who or what is competent to act. Only the rules of law can determine this, and they may select different entities and endow them with different legal functions, so that is a mistake to suppose that by merely describing an entity as a legal ‘person’ one is formulating its capacities in law.”*<sup>235</sup> Accordingly, these rules of law

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<sup>232</sup>P.VOJČÍK et al. *Základy práva : pomôcka pre stredoškólkov, mladých manažérov a podnikateľov*, Nitra, p. 29.

<sup>233</sup>H.KELSEN, *General Theory of Law and State*, Clark, 2009, p. 93.

<sup>234</sup>P.W.DUFF, *Personality in in Roman Private Law*, Cambridge, 1938, p. 1.

<sup>235</sup>D. P. O’CONNELL, *International Law*, London, 1970, p. 80.

may determine who these subjects are and make the distinction between them. As the doctrine recalls, the primary role plays actually the *'human being'* from which are derived other forms of the personality. According to Belley: *"The modernity operates with reversal of paradigmatic status between the legal personalities of the human being and the impersonal entity. Classically, the first model was legal personality as human beings, being the model of reference for the conception of legal personality for other entities, designated as persons but being 'moral' or 'legal' since their existence did not respond to the possession of human body, but represented the 'moral' or 'legal' values they embodied or resulted in the fiction created by state enactment."* <sup>236</sup>

Legal personality is the capacity to become the subject to particular legal relation, thus having the capacity to have right and duties, as they emerge from the legal relation.<sup>237</sup> Or in another words, going out from the German legal doctrine from 19<sup>th</sup> century, being a person in legal sense means being a subject to which the legal order confers the rights and obligations (*'centri di imputazione'*) in the way which is legally relevant having legally binding effects.<sup>238</sup> Nevertheless, in German legal doctrine can be significantly traced civil law origins. Gierke distinguishes three ways of the attribution of the legal personalities to the subjects of law which are despite their primary law origin applicable as universally valid ways of granting legal personality. In Gierke's view, the legal personality may be granted by the following means: <sup>239</sup>

1. *'Persönlichkeit kraft Daseins'* (legal personality given by *'very existence'*) meaning granting of the legal personality by the very existence of a subject. The legal personality is granted to the corporation basically on the same principles as to human beings through the birth,

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<sup>236</sup>J.G.BELLEY, *The Protection of Human Dignity in Contemporary Legal Pluralism* in R.PROVOST,C.SHEPPARD (ed.) *Dialogues on Human Rights and Legal Pluralism*, Dordrecht, 2013, p. 120

<sup>237</sup>P.VOJČÍK et al. *Základy práva : pomôcka pre stredoškólkov, mladých manažérov a podnikateľov*, Nitra, p. 29.

<sup>238</sup>R.BIN, G.PITRUZZELA, *Diritto costituzionale*, Torino, 2010, p. 28.

<sup>239</sup>O.GIERKE, *Deutsches Privatrecht I, Allgemeiner Teil*, Munich, 1936, as reproduced in A.MEIJKNECHT, *Towards International Personality: The Position of Minorities and indigeneous*, Antwerp, 2001, p.28.

2. *'Persönlichkeit kraft Verleihung'* (legal personality given by *'attribution'*) meaning attribution of the legal personality by an act. This attribution is linked to the granting of the legal personality by act of given by the entitled authority,

3. *'Persönlichkeit kraft Kundmachung'* (legal personality by proclamation) meaning the attribution of the legal personality through the explicit formal attribution of the legal personality in an official document as convention, statute or constitution.

### 3.3 Legal Personality in International Law

#### 3.3.1 General Overview on Legal Personality in International Law

In the national legal orders is the issue of legal personality rather closed-end issue, provided in the various acts of the national legislation clearly qualifying subjects to which the legal personality is granted. Nevertheless, certain level of private law analogy might help to develop an understanding of the role of the concept in international law, naturally having in mind the peculiarities of the international law system.<sup>240</sup>

Actually, according to the contemporary trends in the development of the international law, including the emergence of a set of international rules (as concept of the human rights and rule of the state), are widened the borders of the national and international domain. This leads to the dispersion of the state authority in vertical and horizontal directions as well (including the change of actors involved as well) and lastly causing certain kind of international law system deformation, in favour of global governance.<sup>241</sup>

Historically, the first known definition of the legal personality appears in writing *'Codex juris gentium diplomaticus'* elaborated by Leibniz. In his view: "...[the personality in international law possesses] who represents the public liberty, such that he is not subject to the tutelage or power of anyone else, but has in himself the power of war

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<sup>240</sup>R.PORTMANN, *Legal Personality in International Law*, Cambridge, 2010, p.7.

<sup>241</sup>R.A.WESSEL, *Reconsidering Legal Relationship between International and EU Law: Towards a Content Based Approach* in E.CANNIZZARO, P.PALCHETTI, R. A. WESSEL, *International Law as Law of the European Union*, Nijhoff, 2011, p.7.

*and of alliances. ... If his authority, then, is sufficiently extensive, it is agreed to call him a potentate, and he will be called a sovereign or sovereign power... Those are counted among powers ... who can count on sufficient freedom and power to exercise some influence in international affairs, with armies or by treaties.*"<sup>242</sup>

The doctrine of international law for a long time sets up rather strict imperative conditions, required from subjects in order to recognize them legal personality. The true is that this question has been significantly changed from the initial position as presented by Oppenheim who approximately 100 years ago presented a clearly statist opinion: *"Since the law of nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are subjects of international law."*<sup>243</sup> The statist approach further reaffirms by staying: *"One who possesses legal personality in international law, meaning one who is subject of international law so as itself to enjoy rights, duties or powers established in international law, and generally, the capacity to act on the international plane either directly, or through another state."*<sup>244</sup> However, the doctrine was for a long time conservative by limiting the subjects to which the legal personality arising from the international law shall be granted.<sup>245</sup>

Actually, international legal ambience in regard to the question of the legal personality provides rather open – end enumeration of the subjects of international law. The fact is that international law (to which belongs as a subsection international economic law) does not provide any exhaustive definition of subjects falling into the scope of the international law.<sup>246</sup> Doing so, rather opens a place for discussion on the nature and conditions required from the subjects

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<sup>242</sup>G.W.VON LEIBNITZ, *Political writing*, Cambridge, 1988, p. 175 in J.E. NIJMAN, *The Concept of International Legal Personality - An Inquiry into the History and Theory of International Law*, Hague, 2004, p.58-59.

<sup>243</sup>L.OPPENHEIM, *International law : a treatise*, London, 1912, p.19.

<sup>244</sup>R.JENNINKS, A.WATTS (ed.), *Oppenheim's International Law, Vol 1, Peace*, London, 1996, p.119.

<sup>245</sup>E.g. the textbook of M.AKEHURST, *A Modern Introduction to International Law*, Routledge, 1987, p.75, states mentions that: *"the news subjects (of international law) shall be treated as limited exceptions."*

<sup>246</sup>E.g. N.ROZEHNALOVÁ, *Mezinárodní obchodní právo*, Prague, 2010, p. 43.

falling under the scope of international law.<sup>247</sup> For instance Nowrot explicitly mentions the role of the non-state actors in international law, being '*driving forces*' of the processes of globalization. Thus, these are not only the economic perspective participants in the current international system, but in most cases indirectly, contributing to the inherent heterogeneity of modern partnership in international law-making and international law adjudication.<sup>248</sup>

A dictionary definition understands legal personality in international law as possessing rights and duties governed directly by this corpus of law in general, as a capacity to act on the international plane, including, among other entitlements, the capacity to enter into contractual obligations with other international legal persons, to bring in international claims, and to enjoy the privileges and immunities under the international law.<sup>249</sup> Thus, the international legal personality in public international law is the technical-legal category having certain procedural profile which is not corresponding to the function of the value which shall have the entity in the international relations.<sup>250</sup> Mazák claims that the subjectivity under international law shall be defined as a capacity being capable to be right-holder of rights and duties and in the same time disposing of legal capacity under international law.<sup>251</sup> Nonetheless, this definition does not seem sufficient, since provides only superficial approach and lacks missing further elements of the legal personality to be attributed.

In this direction provides more profound definition of Soresen as presented in the *Manual of International Law*. Soresen distinguishes three elements of the subjectivity in the international law. First, refers to the fact that the subject has

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<sup>247</sup>E.g. Portmann recognizes five conceptions on the international law as – states only approach, recognition conception, individualistic conception, formal conception and actor conception in R.PORTMANN, *Legal Personality in International Law*, Cambridge, 2010, p.2.

<sup>248</sup>K.NOWROT, *New Approaches to International Legal Personality of Multinational Corporations – Toward a rebuttable Presumption of Normative Responsibilities*, 2005 (available under <http://www.esil-sedi.eu/sites/default/files/Nowrot.PDF>) [downloaded May 12, 2012] p.1.

<sup>249</sup>B.A.BOCZEK, *International Law: A Dictionary (Dictionaries of International Law)*, Lanham, 2005, p.75.

<sup>250</sup>V.M.SÁNCHEZ et al., *Derecho internacional público*, Barcelona, 2010, p.134.

<sup>251</sup>J.MAZÁK, M.JÁNOŠÍKOVÁ, *Lisabonská zmluva: ústavný systém a súdna ochrana*, Bratislava, 2011, p.37.

duties, including responsibility for any behaviour at variance with that prescribed by the system. Secondly, the subject is capable of claiming the benefits of rights, and thirdly a subject possesses the capacity to enter into contractual or other legal relations with other legal persons recognized by the particular system of law.<sup>252</sup> Seidl-Hohenveldler in examination of the international legal subjectivity granted to the subjects of international law puts in the foreground the possible of direct applicability of the rules of the international law on the given subject. Moreover, the extent to which these rules are directly applicable to the subjects of the international law, determines the scope of legal personality granted to the particular subjects of international law.<sup>253</sup>

Bearing in mind this premise, it appears obvious that the extent of the rights and duties of particular subjects of international law cannot be the same for every single subject under international law. Therefore, the key point remains to investigate whether the execution norm attributes to such a subject a legal subjectivity to execute its subjective positions.<sup>254</sup>

Dixon in investigating the legal personality adds to the mentioned opinion the elements of the attribution of the legal personality to a subject. In his view, the person must be able to make claims before international (and national) tribunals in order to vindicate rights given by international law, secondly, must be subject to some or all of the obligations imposed by international law, thirdly must have law-making power to make valid international agreements (treaties) being binding within international law. Lastly, as the fourth conditions mentions to enjoy some or all of the immunities as they arise from international law.<sup>255</sup>

However, not for all subjects are these conditions the same, especially in regards to the individuals and non-governmental subjects Sometimes are the

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<sup>252</sup>M.NKAMBO, *Subjects of International Law* in M.SORENSEN, *Manual of Public. International Law*, London, 1968, p.249.

<sup>253</sup>I.SEIDL-HOHENVELDEM, *Mezinárodní právo veřejné*, Prague, 2006, p.125.

<sup>254</sup>E.CANIZZARO, *Corso di diritto internazionale*, Milano, 2011, p.256.

<sup>255</sup>M.DIXON, *Textbook on International Law*, Oxford, 2007, p.112.

individuals and non-governmental organizations entitled to initiate the proceeding against the state, however, the law-making procedure is rather limited indeed.<sup>256</sup> Moreover, the non-state actors as subject of international law face are confronted with the *'effect of fragmentation'*<sup>257</sup> in comparison to original subjects of international law.

Implicit fact that the subjects of international law are not inevitably identical as doctrine constantly says was *'sanctified'* by the ICJ which in the Reparation for Injuries case confirmed unequal content of the legal personality of subjects of international law by saying: *"The subjects of law in any legal system are not necessarily identical in their nature or in the extend of their rights, and their nature depends upon the needs of the community."*<sup>258</sup>

As Malanczuk concisely comments this opinion, it is up to the international legal system to determine which the subjects of international law are and to determine what kind of legal personality they shall enjoy on the international level.<sup>259</sup> Thus, under these circumstances, the acceptance of existence of the subjects non-enjoying full personality under the international law renders appropriate the use of the term *'relative legal personality'* a concept depending on the number of factors, exempli gratia nature and the purposes of the entity, its action on the international plane and relations vis-à-vis other entities operating in

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<sup>256</sup>J.D'ASPREMONT, *Non-state actors from the perspective of legal positivism: the communitarian semantics for the secondary rules of international law* in J. D'ASPREMONT (ed.) *Participants in the International Legal System. Multiple perspectives on non-state actors in international law*, New York, 2011, p.26.

<sup>257</sup>Under the notion *'fragmentation'* Green understands twofold attitude towards non-state subjects of international law. Firstly, the *'procedural'* which causes the exclusion at the international level of non-state actors from the majority of dispute settlement fora, secondly *'material'* within which Green criticizes the ICJ that has attributed the personality to the non-state actors in a haphazard and arbitrary way, applying different legal regimes to different entities without any coherent legal framework, in F.Green, *Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality* in *Melbourne Journal of International Law*, Volume 9, Issue 1, Melbourne, 2008, p.50-53.

<sup>258</sup>Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11 April 1949, International Court of Justice [ICJ].

<sup>259</sup>P.MALANCZUK, *Akehurst's Modern introduction to international law*, New York, 1997, p.91.

international relations and the rights or obligations for which the recognition is sought.<sup>260</sup>

Certain authorities claim that the subjects of the international law do not constitute an unchangeable institute, thereby accentuating necessity of certain dynamic approach. Dynamism within the issue of subjectivity means that the subjects of international law are subjects to constant change and development, respecting the needs of the international community. This approach corresponds obviously to enlargement of spheres of regulation covered by international law, or (and) alternatively comes into question appears while ensuring the observance of the fundamental rules under international law.<sup>261</sup> In fact, the doctrinal contribution to the necessity dynamic approach in regard to the subjects of the international law does not represent any significant invention, given the fact that the dynamic approach theory represents the reflection of the jurisprudence of ICJ. Therefore, this emanates from '*Damage recovery case*' which was decided by ICJ, in which the court held that the subjects of law do not need to be inevitably identic; since their nature depends on the needs of the community. Throughout its history, the development of international law has been influenced by requirements of international life, and the progressive increase of the collective activities of States have already given rise to instances of action upon the international plane by certain entities which are not States.<sup>262</sup> Thus, the ICJ left the door open for the doctrine while stating about open – end concept of the subjects under international law.

One may not wonder that this is the reason why the subjects of international law might differ while analysing the issue of the subjects of the international law.<sup>263</sup> As Kelsen states almost 100 years ago: "[...] *the tendency of*

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<sup>260</sup>D.ADEDAYO, *The Extension of Corporate Personality in International law*, New York, 1978, p.9.

<sup>261</sup>J.KEUČKA, *Medzinárodné právo verejné (všeobecná a osobitná časť)*, Bratislava, 2008, p.51.

<sup>262</sup>Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11 April 1949, International Court of Justice [ICJ].

<sup>263</sup>For example Czech textbook of V.David et al., recognises as the subjects under international law lists among the subjects of the international law states, the insurgents and liberation movements, particular



[contemporary] international law to lay down direct rules of obligation and authorization of individuals must necessarily be reinforced to the same degree as it increasingly extends to subjects of areas that were previously governed by state law alone.’<sup>264</sup>

As a result of the multiplicity of the subjects of international law, Noormann and Zyngared, tried to provide a ‘final list’ of non-state organizations to which has been recognized the legal personality. In their view shall belong among the following subjects: non-governmental organizations, multinational enterprises, national liberation armies, intergovernmental organizations, amorphous groupings and indigenous people, criminal and terrorist organizations.<sup>265</sup> However, there are to be added also the individuals acting in form of ‘plaintiff diplomacy’ challenging the violation of human rights before the international courts<sup>266</sup>, claiming investments protection<sup>267</sup> or being confronted with the responsibility for the crimes falling under criminal international law.<sup>268</sup> Although the subjectivity of non-state actors remains limited, it might be agreed with Hobe that international law is actually rather reluctant to accept a growing institutionalization of representatives of private sectors.<sup>269</sup>

### 3.3.2 States as Subjects of International Law

It goes without saying that the key subjects of the public international law are the states and the international organizations. Some authors give clear priority to the states as subjects having creative originality to the international law. This approach may be equally derived from the fact that the states as subjects under

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political units, towns with particular status, international organizations and individuals in V.DAVID et al., *Mezinárodní právo veřejné*, Prague, 2006, p.123.

<sup>264</sup>H.KELSEN, *Pure Theory of law*, as commented in C.LEBEN, *Hans Kelsen and the Advancement of International law in European Journal of International Law*, Volume 9, 1998, p.304.

<sup>265</sup>M.NOORTMANN, C.RYNGAERT, *Non-State Actors: International’s Law Problematic Case* in M.NOORTMANN, C.RYNGAERT, *Non-state Actor Dynamics in International Law: From Law-takers to Law-makers*, Farnham, 2010, p.1.

<sup>266</sup>B.STEPHENS, *Individuals enforcing international law : The Comparative and Historical Context* in *DePaul Law Review*, Volume 52, 2002, p.435.

<sup>267</sup>N.ROZEHNALOVÁ, *Právo mezinárodního obchodu*, Prague, 2010, p.43.

<sup>268</sup>V.DAVID et al., *Mezinárodní právo veřejné*, Prague, 2006, p.139.

<sup>269</sup>S.HOBE, *Global Challenges to Statehood: The increasingly Important Role of Nongovernmental Organizations* in *Indiana Journal of Global Legal Studies*, Volume 5, Issue 1, 1997, p.208.

international law are independent and sovereign. This means that there is no higher authority above the states and therefore exclusively between the states are the legal relations de iure based on coordination principles as the expression of equality between the states.<sup>270</sup>

Giving the priority to the states, in reference to the elements giving the state the attributes of the statehood, it is suitable to refer back to the Montevideo Inter-American Convention on the Rights and Duties.<sup>271</sup> The Convention provided in its Article 1 rather clear and unconditional criteria which are indispensable attributes of the statehood. As to the Convention the state as a subject of the international law should dispose the following qualifying elements: 1. permanent population, 2. a defined territory 3. the government, 4. to have a capacity to enter into relations with other states. To be objective, the Convention has been ratified by only a very small of Latin American states; however, it became worldwide accepted definition of statehood and turned into customary rule in international law.<sup>272</sup>

The principle of clear enumeration of the principles required from the unit granting the attributes of the state are not applicable easily, however, these elements are constantly confirmed also by the doctrine as being appropriate for the determination of the statehood under public international law.<sup>273</sup> Nonetheless, in some views this definition theory is not sustainable since that control over the territory of the state shall be effective as the real expression of the execution of the power.<sup>274</sup>

It remains to recall also famous the sentence of the Italian Cassation Court from 28 June 1985 stating that: *“The international law recognizes States only those exclusive entities, having full independency, executing over their territory own governmental power in confrontation with the Community, settled on those territory, from*

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<sup>270</sup>V.DAVID et al., *Mezinárodní právo veřejné*, Prague, 2006, p.123.

<sup>271</sup>(Montevideo) Convention on Rights and Duties of the States of 26 December 1933.

<sup>272</sup>J.CRAIG, BARKER, *International Law & International Relations*, London, 2000, p.39.

<sup>273</sup>W. R.SLOMANSON, *Fundamental Perspectives on International Law*, Belmont, 2010, p.55.

<sup>274</sup>A.CASSESE, *Diritto internazionale*, Bologna, 2006, p.61.

*which shall be considered that the state summarization shall be expressed as the triad – population, government, territory and which requires that the component of the population and the governmental apparatus shall be in accordance with the territory of the execution of the government and the activities of the subjects.”<sup>275</sup> The triad can be further characterized as the expression of the internal sovereignty.<sup>276</sup> To similar conclusion came also the US Restatement of Law, stating that: “An entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical and financial capabilities to do so. An entity which has the capacity to conduct foreign relations does not cease to be a state because it voluntarily turns over to another state some or all control of its foreign relations.”<sup>277</sup>*

Having in mind these remarks, the element for the state to execute effectively its functions on the international level is its independence which shall be understood as external sovereignty, as the capacity to establish the relations with other states. The state thus needs to find own legitimacy in itself. Therefore, it cannot depend on the legal order of any state or eventually, group of states.<sup>278</sup> Such an argumentation can be supported by the opinion, as presented by the PCIJ in the opinion of 5 September 1931 concerning the customs union between Germany and Austria.<sup>279</sup> The most important part is the Court’s opinion on definition of the concept of dependency between the states which shall be understood as follows: *“The dependency imposes a (formal) relation between the superior and inferior state in which is established the relation between the states, that one state may legally intrude its own will and the second one is legally obliged to subordinate*

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<sup>275</sup>Cassazione penale Arafat e Salah, sezione I, June 28, 1985.

<sup>276</sup>S.M. CARBONE, R. LUZZATTO, A. SANTA MARIA, *Istituzioni di diritto internazionale*, Torino, 2003, p.6.

<sup>277</sup>American Law Institute, vol. I, s. 201, 1986, p.73.

<sup>278</sup> S.M. CARBONE, R. LUZZATTO, A. SANTA MARIA, *Istituzioni di diritto internazionale*, Torino, 2003, p.6.

<sup>279</sup>Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41, 5 September 1931, Customs Régime between Germany and Austria (Protocol of March 19, 1931), para 82.

to such *volonté express*.”<sup>280</sup> In the conclusion to this subtopic, it might be stated that: “Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other States, the function of the State.”<sup>281</sup>

Nevertheless, it may be agreed with Canizzaro, characterizing sovereignty as a capacity of an entity to determine freely the objectives and the instruments of own internal political action and to contribute with the other subjects to the determination of the organization on the international level.<sup>282</sup> This might be understood under the concept of formal independence meaning that the state has control over all its functions or competences having thus ‘*Kompetenz-Kompetenz*’.<sup>283</sup>

Having the absolute law-making competence, states possess international legal personality, enabling them to enter into legal relation with each other by way of treaties, furthermore, possess international legal rights as these are bestowed under international law, and are capable of enforcing those legal rights in international litigation or being the subject of the claim, if they are derelict in meeting their international legal obligations.<sup>284</sup>

These attributes clearly demonstrate which the key elements of state actions as subjects of the international community are. Thus, the relationship between international law and the international community is regulated as inextricable and inexorable as the relationship between law and society anywhere.<sup>285</sup> The states are thus considered to be the main subjects of the international law; however, the

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<sup>280</sup> Island of Palmas Case (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), April 4, 1928, Permanent Court of Arbitration [PCA].

<sup>281</sup> Island of Palmas Case (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), April 4, 1928, Permanent Court of Arbitration [PCA].

<sup>282</sup> E.CANIZZARO, *Corso di diritto internazionale*, Milano, 2011, p.258.

<sup>283</sup> A.KACZOROWSKA, *Public International Law*, New York, 2010, p.189.

<sup>284</sup> D.ROTHWELL, A.A-KHAVARI, R.DAVIS, S.KAYE, *International Law*, Cambridge, 1997, p.216.

<sup>285</sup> P.S.RAO, *The Concept of International Community in International Law: Theory and Reality* in I.BBUFFARD, G.HAFNER (eds.), *International Law between Universalism and Fragmentation: festschrift in honor of Gerhard Hafner*. Leiden, 2008, p.86.

development tends to stress the importance to other subjects of international law.<sup>286</sup>

### 3.3.3 *Legal Personality of International Organizations*

Historically, till the beginning of the 20<sup>th</sup> century international law was governed fundamentally as the law among states, although there were established and maintained the relations to non-states subjects as e.g. the Holy Seat. Nonetheless, this statement is true despite the fact that in 19<sup>th</sup> century were established first international commissions by limited number of states for local, regional or ad hoc purposes like international river commissions which had limited territorial jurisdiction over the international rivers. (as e.g. Central Commission for the Navigation on the Rhine, established in 1805)<sup>287</sup> However, the situation has significantly changed over the 20<sup>th</sup> century, especially after the Second World War and the establishment of the UN and its specialized agencies as ILO, UNESCO, WHO.<sup>288</sup>

The doctrine of the international law clearly distinguishes between the states and international organizations, nonetheless accentuating the fact that the international organizations have derived, specialized legal personality; some of them even speaks about partial international personality. Concrete content of the derived legal personality is defined in its constituent act or any other legal act constituting international organization, and thus containing its institutional and competences.<sup>289</sup> Therefore, it might be concluded that the international organizations under international law enjoy lower degree of legal personality.

The general theory of international law defines the international organization as the union of the states, established under international treaty for the fulfilment of the aims and with respective system of bodies, endowed by rights

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<sup>286</sup>A.VAN ARNAULD, *Völkerrecht (Schwerpunktbereich)*, Heidelberg, 2012, p.20.

<sup>287</sup>F.SEYERSTED, *Common Law of International Organizations*, Leiden, 2008, p.8.

<sup>288</sup>W.GRAF VITZTHUM (ed.), *Völkerrecht*, Berlin, 2007, p.156.

<sup>289</sup>V.DAVID et al., *Mezinárodní právo veřejné*, Prague, 2006, p.135.

and obligations, distinct to the rights and obligations of the states. The nature of the international organization comes out from the will expressed in the constituent treaties. Therefore, the legal personality of the international organization cannot be original, but has rather derived nature. The states create the international organizations with an aim to confer upon them particular tasks.<sup>290</sup> Some scholars perceive the fundamental difference between constituent and the international organizations as a '*conflict*' of functional entities v. territorial entities represented by international organizations v. the states.<sup>291</sup> In other opinion, in order to evaluate the nature of the international organizations shall be executed a negative test of the '*personality*' which means that it shall be examined what extent of the constituent members on their own are not allowed to do.<sup>292</sup>

As professor Biscottini states, the international organizations operate as the subjects with associational feature. Through the international organizations the subjects execute their common interests which would not be possible to reach, or would be reached with less efficiency in case that the states would have acted as '*uti singuli*' (single actors). Thus, the international organizations act as '*uti universi*' (universal actors) common interest of which is not formed only as a simple sum of the interests of the member subjects, but tends to have own identity as international organization, arising from the principle of association, representing the rationale of the association and equally stresses the importance as it is given by its constituent subjects.<sup>293</sup>

Leaving for the moment the doctrine apart, it will be referred to the opinion of the ICJ Reparation of the damages.<sup>294</sup> The Court's ruling clearly sets up the

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<sup>290</sup>S.MRÁZ, F.POREDOŠ, P.VRŠANSKÝ, *Medzinárodné právo verejné*, Bratislava, 2003, p.81-82.

<sup>291</sup>P.C.SCHMITTER, *Is It Really Possible to Democratize the Euro-Polity?* in A.FOLLESDAL, P.KOSLOWSKI, *Democracy and the European Union*, Berlin, 1998, p.30.

<sup>292</sup>A.WENDT, *The state as person in international theory* in *Review of International Studies*, Volume 30, Issue 2, 2004, p.296.

<sup>293</sup>As to Hurd, the question of being recognized as an actor the international organization is conditioned upon the recognition by the international community and in the same time and the decision shall have some impact in I.HURD, *International organizations, Politics, Law, Practice*, Cambridge, 2011, p.18.

<sup>294</sup>Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11 April 1949, International Court of Justice [ICJ].

conditions required by the international organization. If an entity aspires to be international organization, the set of following conditions shall which to be fulfilled:

1. international organization has to be founded on the grounds of international treaty,
2. international organization is obliged to have own permanent bodies,
3. international organization has the competences on the international level and in relation to its MS and its nationals,
4. international organizations enjoy the above mentioned competences.

Nevertheless, the Court did not provide any extensive explanatory on its requirements in more detailed way. In author's view it is necessary to provide the reader with supportive theoretical explanatory argumentation.

Ad 1)

The international organization as unions of the states are founded under the particular legal act, so - called '*constituent treaty*' enacted by the status of the organization, providing further its objectives – *raison d'être*, principles of its activities, principles and rules of membership, rights and duties of its members and as the counterpart the competences of the organization, the attribution of the international legal personality, its budget and the seat.<sup>295</sup> Very demonstrative example of that provides Azud, resembling the nature of international organizations to companies in sense of commercial law, within this view the international organizations shall have also legal personality being different to the legal personality of its singular members.<sup>296</sup>

Ad 2)

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<sup>295</sup>J.AZUD, *Medzinárodné právo*, Bratislava, 2003, p.207.

<sup>296</sup>A.AUST, *Handbook of International Law*, 2005, p.199.

The international organizations are the unions of the states, based on the grounds of a constituent treaty, under which they were founded have its own permanent bodies and its further attributes. Thus, from the institutional point of view international organizations dispose by own legal personality, separated from the legal personality of its constituent members however, they are financially are dependent upon their members and have also permanent secretariat.<sup>297</sup>

Ad 3)

Every single international organization has the international personality under the international law. The international law do not define the exact and single content of the international personality. Therefore, in consequence to this premise the legal personality of international organizations may be characterized in comparison to the legal personality of the states by two adjectives - derived and partial.<sup>298</sup> The content of the adjective derived means being secondary to the legal personality of its constituent subjects and in the same time enjoying full legal personality limited to the extent of the competences given to the international organizations by the constituent subjects.

Ad 4)

The existence of own competences of the international organizations is one of the preconditions for autonomy related to the legal personality of the international organizations. That could of course represent certainly limited extent of the legal personality in regard to the personality as given by it from constituent subjects.<sup>299</sup> Naturally, for the international organizations is of importance the principle of its specialty. The specialty principle comes out from the particularity of competences different to the competences which are at disposal of the

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<sup>297</sup>M.POTOČNÝ, *Mezinárodní právo veřejné*, Praha, 1973, p.271.

<sup>298</sup>J.MAZÁK, M.JÁNOŠÍKOVÁ, *Základy práva Európskej únie: ústavný systém a súdna ochrana*, Bratislava, 2009, p.50.

<sup>299</sup> ECJ judgment, 13 December 1967, Neumann v. Hauptzollamt Hof/Saale, case 17/67 [1967] ECR, p.441. in which the Court clearly decided that when the MS conferred powers on the Community institutions, they agreed to corresponding limitation in their sovereign rights.



constituent subjects. That means that the classical international organizations have only those competences which have been given to them by to constituent treaty by the constituent members.<sup>300</sup>

The attribution and principles of the division of the competences have an importance also while interpreting the competences. The majority of the scholars content that by the interpretation of the constituent treaties of international organizations, including function and competences shall be preceded in accordance with general rules of interpretation of international law of treaties as codified by the Vienna Convention on Law of Treaties in its Article 31.<sup>301</sup>

However, the situation is a little bit more complicated, if the legal personality of the international organization is not clearly enacted by the constituent act. In order to overcome these shortcomings, the doctrine found on the basis of decision of and the ICJ, the doctrine of implied legal personality. In the nucleus of this theory is that the legal personality need not to be explicitly determined in the constituent acts, but may be derived from the tasks and functions which are contained therein.<sup>302</sup>

To this end, the international legal personality of the international organization may be derived in general from three sources,<sup>303</sup> although however some scholars prefer other approaches.<sup>304</sup>

1. from the explicit wording of the constituent treaty,

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<sup>300</sup>Legality of the Threat or Use of Nuclear Weapons Advisory opinion of 8 July 1996, ICJ Reports, 1996. According to the ICJ in case of the classical international organizations the nature and the extent of their competences is directed by the principle of the specialty, since the international organizations as derivative subjects of the international law have only that competences, which were given to them for the fulfillment of their functions by the founding states.

<sup>301</sup>Article 31 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969.

<sup>302</sup>V.KARAS, A.KRÁLIK, *Európske právo*, Prague, 2012, p.52.

<sup>303</sup>V.KARAS, A.KRÁLIK, *Európske právo*, Prague, 2012, p.52.

<sup>304</sup>According to Klabbbers and Wallendahl, there are only two ways of the acquisition of the legal personality among which is important 1. 'will theory' (based on the explicit or implicit) attribution of the powers to international organization and on the other hand 'objective theory' based on the presumption of the originality of the legal personality of international organizations in J.KLABBERS, A.WALLEND AHL, *Research Handbook on the Law of International Organizations*, Northampton, 2011, p.34.

This type of legal personality does not need closer explanation. One of the advocates of this theory was also Kelsen stating that: *“An international community possesses juridical personality in the field of international law. if the treaty constituting the community confers upon its organs the competence to exercise certain functions in relation to the members and especially the power to enter into international agreements establishing duties, rights and competences of the community.”*<sup>305</sup>

2. from tasks and functions the international organizations shall fulfil,

In reference to the tasks and functions, which have been given to the international organization, if they are virtually executed (in fact theory of the implied powers).<sup>306</sup> As Reinisch alleges, although the constituent acts of international organizations do not contain any provision dealing with (domestic) legal personality, international organization must be deemed to have implicitly conferred such personality (as an example provides and Universal Postal Union) and the functions which this shall in relation to constituent subjects fulfil.<sup>307</sup>

In fact the question and doubts on the legal personality of international organizations lasted till 1949 when the quoted advisory opinion or was delivered.<sup>308</sup> In the first part of the legal opinion, the Court recalled the principle that the subjects of law are not identical in their nature or in their extent of their rights, and their nature depends upon the needs of the Community. As the Court's view: *“Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is ‘super-State,’ whatever that expression may plane, any more than all the rights and duties must be upon international plane, any more than all the rights and duties of State must be upon that plane. What it*

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<sup>305</sup>H.KELSEN, *The Law of the United Nations*, London, 1951, p.329.

<sup>306</sup>This issue will be discussed in more detailed way in the Chapter V.

<sup>307</sup>A.REINISCH, *International organizations before national courts*, Cambridge, 2000, p.44.

<sup>308</sup>J.BRSAKOVSKA-BAZEROVSKA, *The Legal Personality of the EU in Iustinianus Primus Law Review*, Volume II, Issue 2, 2011, p.2-3.

does mean is that it is a subject of international law, and that it has capacity to maintain its rights by bringing international claim.”<sup>309</sup> More to that, the doctrine sometimes refers to the first case the advisory opinion of the PCIJ concerning the interpretation of the Greek-Turkish Agreement of December 1926.<sup>310</sup>

As the Court stated in this case: “[...] from the very silence of the article on this point, it is possible and natural to deduce that the power to refer a matter to the arbitrator rest with the Mixed Commission when that body finds itself confronted with question of the nature indicated.”<sup>311</sup>

As appears evident from the above analysed advisory opinions, the legal personality of the international organizations is linked to the powers which shall execute. That is doctrinally labelled as ‘functional’ meaning that an international organization derives its legal personality from the functions which have been set to be performed.<sup>312</sup> On the middle of the road still exists an opinion deriving legal personality from the scope of the functions, regardless to the fact whether it was attributed expressly or in implied way.<sup>313</sup> In giving an exhaustive answer on these questions, it might be quoted prof. A.N.Talakaev, advocating that this issue might be solved only under the complex evaluation of the constituent act entirely “[...] only proceeding from the entire totality of contents of functions and competence of the concrete international organization which are fixed in its Charter and other relevant normative act.”<sup>314</sup> In summary, the legal personality remains preserves the status of

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<sup>309</sup>Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11 April 1949, International Court of Justice [ICJ].

<sup>310</sup>J.WOUTERS, P.de MAN, *International Organizations as Law Makers*, Working paper Nr. 21, Leuven, 2009, p. 15 in commenting Interpretation of the Greco-Turkish Agreement of December 1, 1926 (Final Protocol, Article IV), Advisory Opinion, (1928) PCIJ Series B no 16, ICGJ 283 (PCIJ 1928), 28th August 1928, Permanent Court of International Justice (historical) [PCIJ].

<sup>311</sup>Interpretation of the Greco-Turkish Agreement of December 1, 1926 (Final Protocol, Article IV), Advisory Opinion, (1928) PCIJ Series B no 16, ICGJ 283 (PCIJ 1928), August 28, 1928, Permanent Court of International Justice (historical) [PCIJ], para 47.

<sup>312</sup>A.S.MULLER, *International Organizations and their Host States: Aspects of their Legal Relationship*, Leiden, 1995, p.74.

<sup>313</sup>R.FRID, *The Relations Between the Ec and International Organizations: Legal Theory and Practice*, Leiden, 1995, p.11.

<sup>314</sup>S.A.VOITOVICH, *International Economic Organizations in the International Legal Process*, Dordrecht, 1995, p.18.

'*res inter alios acta*' in regard to third parties, and therefore cannot affect rights and obligations other than those of the constituted subjects.<sup>315</sup>

3. on the basis of the recognition by the international community.

Speaking about the recognition by the international community it is meant the ex-post recognition by the community, based on customary law. In fact, this conception is once again a modification of '*state-only*' conception. Although the traditional international law attributes the primacy to the states which can further recognize other entities as international persons.<sup>316</sup> The doctrinal conception comes from Strupp and Cavaglieri advocating the possible transfer of the sovereignty from states to other auteurs. According to Strupp: "*It is not appropriate to derive the only international legal personality from the states. The common will of the states that has attributed to the states the legal personality may grant to the legal personality to another subjects.*"<sup>317</sup> Or as Cavaglieri states: "*There is no doubt about the fact that the legal personality was recognized to the Communities which are not the states, and which nonetheless derive directly from the international law the claims and the obligations.*"<sup>318</sup>

In any case, the recognition of the legal personality as arising from international law cannot be equalled and confused with legal personality in national law, since this must come from the international law first and as the consequence from the national one. This presumption was confirmed by the judgment of the Court in New York in the case *International Tin Council v. Amalgamet Inc.*, where the Court clearly stated that the '*personal*' law of international organizations is international law and thus, the recognition of the domestic legal personality in regard to international organization follows from the existence of legal personality on the international plane.<sup>319</sup> The possibility of legal personality recognition by common recognition of the international community

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<sup>315</sup>A.STUMER, *Liability of Member States for Acts of International Organizations, reconsidering the Policy Objections in Harvard International Law journal*, Volume 48, Number 2, 2007, p.573.

<sup>316</sup>R.PORTMANN, *Legal Personality in International Law*, Cambridge, 2010, p.80.

<sup>317</sup>K.STRUPP, *Das völkerrechtliche Delikt, Handbuch des Völkerrechts*, Berlin,1920, p.22.

<sup>318</sup>A.CAVAGLIERI, *Règles générales du droit de la paix*, Hague, 1929, p.315.

<sup>319</sup>Judgment *International Tin Council v. Amalgamet Inc.*, 524 NYS 2d [1988] p. 971.

has however declaratory nature as a confirmation of the factual legal state.<sup>320</sup> Such type of recognition is similar to the recognition of states or international treaties, although for third states having constitutive effects.<sup>321</sup> The admission of the subject as a member of such a subject implies the recognition of that international organization though.<sup>322</sup>

### 3.3.4 *Individuals and Corporations as Subjects of International Law*

The theory of international law recognizes besides the states and international organizations also the legal personality given to quite rich variety of the subjects having '*special legal personality*' status or even can be considered '*controversial candidatures*.'<sup>323</sup> The basic objection against individuals as subject of international law is that these are not creators of international law to which is the international law linked directly.<sup>324</sup>

The position of the individuals and corporations in international law has developed significantly towards the affirmation of the legal personality of these subjects vis-à-vis the states.<sup>325</sup> Such an approach is historical legacy, consistent with the principle of nationality where the national status of the individual against the foreign state was considered in relation to his/her national state.<sup>326</sup>

The relation between the individual and the legal entity can be demonstrated as pretty much interconnected – if international law recognizes '*an individual*' as a subject of international law for certain purposes, such a recognition

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<sup>320</sup>V.KARAS, A.KRÁLIK, *Európske právo*, Prague, 2012, p.43.

<sup>321</sup>M.BREUER, *Die Völkerrechtspersönlichkeit Internationaler Organisationen in Archiv des Völkerrechts*, Volume 49, Number 1, 2011, p.5.

<sup>322</sup>I.DIACONU, *Manual de drept internațional public*, Bucharest, 2007, p.152.

<sup>323</sup>E.g. Brownlie includes among the the subjects having the special personality – non-self-governing peoples, national liberation movements, states in '*statu nascendi*', legal constructions, belligerent and insurgent communities, entities sui generis, individuals; corporations in his view belong to the controversial candidatures; some authors even subsume the to the individuals also the corporations, in I.BROWNLIE, *Principles of international law*, Cambridge, 2008, p.62-67.

<sup>324</sup>A.AUST, *Handbook of International Law*, 2005, p.13.

<sup>325</sup>B.G.BOAS, *Public International Law, Contemporary Principles and Perspectives*, Cheltenham, 2012, p.236-237

<sup>326</sup>The Panevezys-Saldutiskis Railway Case, The Panevezys-Saldutiskis Railway Case Estonia v. Lithuania, General List No. 74 and 76, judgment No. 29, February 28, 1939.

does not refer exclusively to individual human beings, but also to corporate entities endowed with legal personality under national or international law.<sup>327</sup> The fact is that such kind of legal personality is actually pronounced more intensively (due to the power of multinational companies, their responsibility), entrenchment of remedies and the rights given to them by the dispute settlements entities.<sup>328</sup> Thus, the legal personality and the divided dependency of the individual upon the state has been confirmed.<sup>329</sup>

In this sense it might be referred back to the ICJ Opinion *Reparation of Injuries* as applicable also to the other subjects of international law while saying that the subjects of the international law may vary according to the: “[...] *needs of the [international] community and the requirements of international life.*”<sup>330</sup>

Traditionally, the position of the individuals in international law has been object to international law, connected to the international law via the state.<sup>331</sup> Such an approach has been confirmed also by the PCIJ in the Advisory Opinion *Danzig* via which the PCIJ decided that: “*It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definitive rules creating individual rights and obligations and enforceable by national courts*”<sup>332</sup> with certain limitation as to the extend and quality, as confirmed in the case *Texaco v. Libya* wording: “*Stating that a contract between a State and a private person falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has only limited capacity and his quality as a subject of international law, does enable him only to invoke in the field of international*

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<sup>327</sup>I.SEIDL-HOHENVELDERN, *International Economic Law*, Leiden, 1989, p.11.

<sup>328</sup>A.H.QUERESHI, *International Economic Law*, London, 1999, p.31.

<sup>329</sup>Y.KERBRAT, P.M.DUPUY, *Droit international public*, 2012, p.217.

<sup>330</sup>*Reparation for injuries suffered in the service of the Nations*, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11 April 1949, International Court of Justice [ICJ].

<sup>331</sup>German legal doctrine speaks about ‘*Mediatisierung des Individuums*’ meaning that the individual is at first considered to be as the belonging of the state, in K.IPSEN, V.EPPING, E.MENZEL, *Völkerrecht*, Munich, 2004, p.73.

<sup>332</sup>*Advisory Opinion Jurisdiction of the Courts of Danzig*, Advisory Opinion, (1928) P.C.I.J. (ser. B) no. 15, 3 March 1928.

law, the rights which he derives from the contract.”<sup>333</sup> Such opinion may be clearly perceived as an overrun of the state sovereignty concept towards the consequent transnational one in which the economic interests are applied at the first place.<sup>334</sup>

As general rule of granting the individual the legal personality under the international law is that the individual must be concerned by the norms of international law and have a possibility to exercise his/her rights in international law under the supervision of that norms.<sup>335</sup> Fundamentally, this definition fits perfectly to the actual trend which is marked by the fact that the states do not have complete control over the continuance, development and interpretation of individual rights and that the rights of individuals are distinct in regard to the state ones. Thus, there are rights of individuals which are clearly separated from the specific control and direction of States to the extent as they are protected by the international law and individual rights within the international legal system.<sup>336</sup> Thus, the legal personality of the corporations may arise under international law via the ‘*internalization*’ of the private contract and subsuming it to the control of an international panel of judges applying the rules of international law.<sup>337</sup>

Actually, the basic conception of the position of the individual is spread between two fundamental positions - being the holder of the rights ‘*Rechtsträger*’ or being on the other side ‘*Pflichtträgerschaft*’ meaning being the subject to obligations arising out of international law. The clearest example of the legal personality of the individuals is the responsibility of the individuals in terms of war crimes, crimes against the peace and humanity, i.e. crimes to which the individual is responsible personally under international law, irrespective of the

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<sup>333</sup>Texaco Overseas Petroleum Company and California Asia Oil Company v. The Government of Libyan Arab Republic 19th January 1977 53 I.L.R at 474.

<sup>334</sup>U.LEANZA, *Il diritto internazionale: da diritto per gli Stati a diritto per gli individui*, Torino, 2002, p.242.

<sup>335</sup>M.BOSSUYT, J.WOUTERS,M.J.BOSSUYT,J.WOUTERS, *Groendingen van international recht*, Antwerpen, 2005, p.244.

<sup>336</sup>M.D.EVANS, *International law*, Oxford, 2006, p. 291.

<sup>337</sup>M.DIXON, *Text book on international law*, Oxford, 2013, p. 130.

law of his own country.<sup>338</sup> On the other hand, it means being the addressee of the human rights which can be depending on the international treaty enforced on the international level.<sup>339</sup> Under particular circumstances can also international treaty by itself determine that the companies may be directly subjects to international dispute settlement proceeding. Such an example may the Settlement of Investments Disputes 1964.

Nonetheless, the international legal personality of such subjects has functional (limited to the extent what is necessary under the realization of the rights and duties arising out of the agreement) and relative (limited in regard to the contracting state) nature.<sup>340</sup> However, it shall be make clear to which subjects such a personality applies to. These subjects are called private enterprises with transactional activities which activities have cross-boarding impact, nonetheless with non-existing international legal status.<sup>341</sup> Or better said, there are some definitional difficulties since there is apparently growing number of transnational companies and the criteria being used for defining them.<sup>342</sup>

However, the development of the international economic law in 20<sup>th</sup> century has provided broader possibilities to bring international claims under international law. The original procedures starting with ad hoc arbitrations and inter-State bodies led up to currently valid International procedures of International Chamber of Commerce, International Centre of Dispute Settlement or UN Commission on International Trade Law<sup>343</sup> and not excluded is the initialization of the disputes by the individuals represented officially by the

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<sup>338</sup>M.DIXON, *Textbook on international law*, Oxford, 2013, p. 128.

<sup>339</sup>G.BOAS, *Public International Law, Contemporary Principles and Perspectives*, Cheltenham, 2012, p.236-237.

<sup>340</sup>M.BOSSUYT, J.WOUTERS,M.J.BOSSUYT,J.WOUTERS, *Groendingen van internationale recht*, Antwerpen, 2005, p.281.

<sup>341</sup>A.R.CARRION, *Lecciones de derecho internacional público*, Madrid, 2006, p.154.

<sup>342</sup>G.DAHM, J. DELBRÜCK, W.RÜDIGER, *Völkerrecht, Band 1*, Berlin, 2002, p.245.

<sup>343</sup>M.D.EVANS, *International law*, Oxford, 2006, p. 296.



states.<sup>344</sup> As the biggest novelty is that there was established a platform for arbitration and conciliation where the private investors can enter into direct dispute settlements with the states proceeding.<sup>345</sup>

### 3.4 Conclusion

The concept of the legal personality in the legal system is one of the key aspects of law as a scientific discipline. It helps to identify the subject being holder of individual rights and duties under the scope of particular legal discipline. In the central focus of the legal personality appears a human being from whom are derived all following legal personalities. (clear reference to the civil law approach).

The multiplicity of the subjects of international law causes difficulties in precise specification of the subjects under international law. This premise is valid especially under the circumstances of the contemporary development in international law offering more and more access to the international legal personality to the subjects having private nature.

In general, the states have predominant position among the subjects of international law have the states as original holders of the sovereignty and treaty-makers. For the states as subjects of international law still remains applicable the principles as set forth by the Montevideo conference, being composed by population, territory, government and the capacity to enter into contractual relation with other subjects of international law. 20<sup>th</sup> century brought into practice the multiplicity of the international organizations as secondary legal personality, derived from the will of the primary ones – states. International organizations as the secondary subjects of international law are based on four fundamental elements, they are founded on the basis of an international treaty (constituent act), have own permanent bodies with decision-making powers, dispose over the

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<sup>344</sup>Evans in reflecting to the litigation cases in the WTO, being initiated and run by the private companies like Kodak and Fuji, or Banana case, on the international level initiated by the US, reference to M.D.EVANS, *International law*, Oxford, 2006, p. 296-297.

<sup>345</sup>P.F.DIEHL, C.KU, *The dynamics of International law*, Cambridge, 2010, p.165.

competences on the international level, having the competence in regard to the member subjects of their nationals and outwards. Important element is the set of competences and aims which the international organization shall play on international level.

The constituent acts of the international agreements may not be fully on the nature of the international organization and their acceptance by the international community. However, these shortcomings are overcome by the practice and theory of international law. In regard to these elements, these may flow clearly from the explicit wording of the constituent acts, secondly, giving priority to the functional approach from its tasks and function this shall fulfil on the international plane and finally, subsidiary, on the basis of the recognition by the international community. Obviously, there can be differences between international organizations in terms of their nature and properties, therefore the international organizations may differ from each other in their features.

For the time being, the actual development in the international law brought into practice new actors – individuals, acting not only in terms of the human rights protection procedure, but also as responsible subjects for the international crimes. Lastly, the development has shown that the individuals as subjects of international law involve also the economic entities, however, sometimes necessarily accompanied by the state intervention.

## 4 *EU as Actor in International Relations*

### Summary:

4.1 Preface 4.2 Legal Personality of the EU 4.2.1 Introductory Remarks 4.2.2 ECSC and its Legal Personality 4.2.3 EURATOM and Legal Personality 4.3 Legal Personality of the EEC under the Treaty of Rome 4.3.1 EU Legal Personality after Lisbon Treaty 4.4 Competences of the EU v. MS 4.4.1 Introduction to the Competences of the Union and MS 4.4.2 Formation of the Competences between the EU and MS 4.5 Systematic Redistribution of the Competences 4.5.1 Generalities 4.5.2 Horizontal and Vertical Competences 4.5.3 Explicit and Implied Powers 4.5.4 AETR Doctrine 4.5.5 Kramer Doctrine 4.5.6 ECJ Opinion 1/76 4.5.7 ECJ Opinion 2/91 4.5.8 ECJ Opinion 1/94 4.5.9 ECJ Opinion 2/94 4.5.10 ECJ judgment Open Skies 4.5.11 ECJ Opinion 1/03 4.5.12 Division of Competences according to their Enactment 4.6 Sources of EU Law 4.6.1 Generalities 4.6.2 Written Law 4.6.3 Unwritten Primary Law 4.6.4 International Agreements in the EU Law 4.6.5 Secondary Law 4.7 Conclusion

### 4.1 Preface

Investigating the modalities of the operating of the states and international organization on the international plane will serve as valuable background for the investigation of the positioning of the EU as an international actor, from the legal point of view. Such an investigation will be broken down into several principal elements.

Initially, as the first starting point which shall be investigated is the legal personality of the EU in terms of its international scope and linkage to the action which can/shall be covered by the Union while fulfilling its aims and objectives. Moving from the rather international law approach to the legal personality of the EU, it will be provided the answer to which extend the legal personality shall be executed and what the real content of the legal personality of the EU is and which are its limits.

Upon adoption of the Lisbon Treaty the issue of the legal personality seems at the first sight to be clarified sufficiently, since the treaty is clear on the point of the existence of the EU legal personality. However remains open-end question, if this personality is absolute or is to be perceived via the prism of the repartition of the competences between the EU and the MS and the aims the EU shall fulfil.

The investigation of the legal personality of the EU has significant impact on other related issues as the existence of own unique system of sources of law,

with own characteristics and principles of application with impact not only on the legal order of the EU itself, but in the same time on the legal orders of the MS.

The EU was never intended as an isolationist group of states. On the contrary, it was created as a platform destined for the establishing of active economic relations towards other international organizations and states. To this purpose the EU concluded international agreements which form integral part of the EU legal order. However with certain particularities, causing not fully consistent applicability as one would think. Since the EU was created as a block of states, defending their interests in economic domain represents currently international economic corpus of international agreements concluded by the EU with third parties.

In finding an answer to maybe a little bit shady and obscure applicability of international agreements, this shall be analysed not only via the relevant primary law provisions, but also via the case-law of the CJ EU formulating the principles of the applicability of correspondent international agreements and answering thus as the final instance the question of their applicability.

Since the relation international law – EU law could have caused uncertainty, at times was called into play the CJ EU called upon to adjudicate clearly on the delimitation of the competences between the EU and its MS. Such delimitation has not only impact on determination of the competent subject in terms of treaty-making, however, it has for direct consequence the determination of the subject entitled to conclude the international agreements at stake.

## **4.2 Legal Personality of the EU**

### *4.2.1 Introductory Remarks*

The doctrine on the nature legal nature of the EU (previously EC) oscillates between several concepts and attitudes. The complex analysis of the nature of the EU (EC) nevertheless, requires deeper analyses.

As the appropriate starting point can be the opinion of Králik and Karas going out primarily from the 'treaty theory' referring to the point that the legal personality of the EU was historically contained in every single constituent treaty and contained thus clear provision of the legal personality. In defence of this statement the authors refer to the simple provision on endowment of the legal personality to as by the Article 281 TEC, Article 6 ECSC and Article 184 of the EURATOM Treaty.<sup>346</sup> Paradoxically, there was no provision attributing the legal personality to the EU upon the Maastricht Treaty.<sup>347</sup> Nonetheless, in fact, despite the silence of the legislator, the EU maybe surprisingly concluded an international agreement with Federal Republic of Yugoslavia.<sup>348</sup> The lack of the granting the legal personality to the EU heated a discussion, appearing since the entry into power of the Maastricht Treaty and caused preoccupation between the MS that an eventually enactment of the Union would be risky in terms of the underpinning of intergovernmental character of the Union.<sup>349</sup>

The Lisbon Treaty brought among other things into practice several novelties. Among the most principal ones, it was the removal of the pillar structure and granting the legal personality to the EU. Thus, with the removal of the pillar structure, the Union (as in fact a single entity) was endowed by the legal personality, although strictly linked in their practical applicability to: "[...] *competences conferred upon it by the MS in the Treaties.*"<sup>350</sup> The attribution of the legal personality in single form comments Cabeci as the step in more active appearance of the Union at the world scene. In his view: "*The acquisition of legal personality is crucial for the EU in the sense that it now has the competence to make international agreements and treaties in realm of the CFSP; a competence which rested with the EC*

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<sup>346</sup>V.KARAS, A.KRÁLIK, *Právo Európskej únie*, Prague, 2012, p.42.

<sup>347</sup>T.C. HARTLEY, *The Foundations of European Community Law: An Introduction to the Constitutional and Administrative Law of the European Community*, Oxford, 2007, p.158.

<sup>348</sup>Council Decision 2001/352/CFSP of 9 April 2001, OJ 2001, L125, p.1, however, as the legal basis for the conclusion of such an agreement served the ex-article 24 TEU stipulating the procedure for the conclusion of the agreements in regard to common foreign and security policy.

<sup>349</sup>P.KOUTRAKOS, *Trade, Foreign Policy and Defense in EU Constitutional Law: The Legal Regulation of Sanctions, Exports of Dual-use Goods and Armaments*, Oxford, 2001, p.32.

<sup>350</sup>M.CABECI, *Reassessing EU and US Foreign Policy: The Lisbon Treaty, the Obama Administration and Beyond* in M.CABECI (ed.), *Issues in EU and US Foreign Policy*, Plymouth, 2011, p.316.

*before the Lisbon Treaty. If employed effectively, this can actually help the Union to become more active, diplomatically more capable, and more coherent in its foreign policy. It can also enhance the EU's 'effective multilateralism' and add to the Union's representation – in terms of acting with a single voice.*"<sup>351</sup>

Surely, there are several approaches how to grasp legal personality of the 'Union'<sup>352</sup>, the author considers the historical and comparative method as the most suitable one. In fact, the analysis of the legal personality would without doubt deserve more detailed way of elaboration; the author will limit this analysis to essential elements of the legal personality in reference to its nature and functions and the shaping of the personality in international relations linked to the commercial relations of the EU.

#### 4.2.2 ECSC and its Legal Personality

While investigation legal personality of ECSC, it is necessary to start with small reference to the 9 May 1950. That particular day, the French minister of foreign affairs Robert Schuman solemnly declared the agreement putting the production of the carbon and steel production of France, Germany and other states having the will to adhere, under control of common authorities respecting the parity principle among the states.<sup>353</sup>

In order to take a closer look to the European integration of that time also from the historical point of view, the '*pères fondateurs*', even after years upon the foundation presented certain level of insecurity and certain concern in regard to the grasping of the integration pattern and nature of brand new formed Community.<sup>354</sup>

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<sup>351</sup>M.CABECI, *Reassessing EU and US Foreign Policy: The Lisbon Treaty, the Obama Administration and Beyond* in M.CABECI (ed.), *Issues in EU and US Foreign Policy*, Plymouth, 2011, p.316.

<sup>352</sup>It cannot be referred only to the Union, since historically not only EU formed the part of the integration associations.

<sup>353</sup>R.RERISSICH, *L'Unione europea: una storia non ufficiale*, Milano, 2008, p.21.

<sup>354</sup>Going out from the fact not fully successful projects of the integration as Council of Europe and Organisation for European Economic Co-operation.

Yet, leave a space for Jean Monnet and his view on this issue. As he states: *“It cannot be given to the European unity one concrete expression. In these broad groupings of the states was too little an obvious common interest and common discipline was too much swapped. It was necessary for the beginning to work on something more practical and ambitious. Therefore, it was necessary to attack the national sovereignty on more courageous and on the narrower basis.”*<sup>355</sup>

Particular status of the ECSC was commented also by Harold Macmillan in reflection to the Schuman’s plan: *“[...] being not only conventional tool, but rather the revolutionary and almost mystical vision.”*<sup>356</sup> In reference to the nature of the ECSC Tilotson summarized the innovative features of the ECSC as follows:<sup>357</sup>

1. the primary motive underlying this integrative initiative was political rather than economic,
2. it was seen merely as a first step in the integrative process – a sectorial scheme providing guidelines for a more general form of economic union later,
3. great weight was attached to the creation of new European institutions, in particular to supranational HA, under the executive control of which the coal and steel production of the MS was placed,
4. the independence of the non-elected HA was balanced by a Council of Ministers (representative of the MS), and a Common Assembly (later, on the EP) with the power to dismiss the HA,
5. the Community was firmly set in the legal framework with a ECJ, charged with the duty of ensuring the observance of the law in the interpretation and application of the Treaty.

The ECSC Treaty in one of its initial provisions (Article 6 (2)) stipulates that in the international relations the ECSC Community enjoys the legal capacity which

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<sup>355</sup>C.BOOKER, R.NORTH, *Skryté dějiny evropské integrace.od roku 1918 do současnosti*, Brno, 2006, p.73.

<sup>356</sup>C.BOOKER, R.NORTH, *Skryté dějiny evropské integrace.od roku 1918 do současnosti*, Brno, 2006, p.73.

<sup>357</sup>J.TILLOSTON, N.G.FOSTER, *Text, Cases and Materials on European Union Law*, Portland, 2003, p.6-7.

can be considered functional one.<sup>358</sup> The attentive reader of this provision immediately found out that there is no provision dealing in the explicit way with treaty-law-making. To be more precise on this point, such type of attributed legal personality does not say anything on the point which international negotiations the ECSC may conduct and thus is doctrinally perceived as a mere assertion that the ECSC may take part in international relations.<sup>359</sup> However, as the doctrine recalls, it has not prevented the ECSC to conclude the series of agreements with third countries and international organizations.<sup>360</sup>

The provision enacting the legal personality may be considered having rather declaratory nature.<sup>361</sup> However, as Carl alleges, notwithstanding such a provision has rather declaratory nature, it was adopted in the explicit way and it is linked to the tasks and enactment of the aims contained in the constituent treaty. In her opinion disperse any misunderstandings in terms of the legal personality given to this entity.<sup>362</sup> In other view, it can be considered as consistent with the theory of legal personality '*kraft Verleihung*' within which was made a reference in the constitutional charter is the simplest way of its enactment being similarly used also by three constituting treaties.<sup>363</sup>

Thus, it cannot be fully agreed that the legal personality of the ECSC towards the third subjects was possible only under the condition of recognition by

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<sup>358</sup>Article 6 (2) Treaty establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.Y.S. 140. Expired 23 July 2002. wording as follows: "*The Community shall have legal personality. In international relations, the Community shall enjoy the legal capacity it requires to perform its functions and attain its objectives. In international relations, the Community shall enjoy the legal capacity it requires its functions and attain its objectives. In each of the MS, the Community shall enjoy the most extensive legal capacity accorded to legal persons constituted in that State; it may in particular, acquire or dispose of movable and immovable property and may be party to legal proceedings. The Community shall be represented by its institutions, each within the limits of its powers.*"

<sup>359</sup>C.BECKER-DÖRING, *Die Außenbeziehungen der Europäischen Gemeinschaft für Kohle und Stahl von 1952–1960: Die Anfänge einer europäischen Außenpolitik*, Stuttgart, 2003, p.90.

<sup>360</sup>As reference to the implied powers theory, in D.VAUGHAN (ed.), *Vaughan on Law of the European Communities*, London, 1986, p.480.

<sup>361</sup>This first-sight approach may be treacherous, since the intention of the founders of the ECSC was not to create another international organization of the intergovernmental nature, but rather to create a new type of organism, which could be characterized in the insight of Jean Monnet as the first level on the way of European federalism, in M.MARE, M.SARCINELLI, *Europa: cosa ci attende?*, Bari, 1998, p.6.

<sup>362</sup>M.H.CARL, *Die Kompetenzverschiebung zwischen Kommission und Rat der EWG auf dem Gebiet der Aussenbeziehungen*, Karlsruhe, 1974, p.9-10.

<sup>363</sup>P.de SCHOUTHEETE, S.ANDOURA, *The legal personality of the European Union in Studia Diplomatica*, Volume LX, Number 1, 2007, p.3.



third states.<sup>364</sup> Supporting argument for this may be mentioned the conclusions of the agreement with Great Britain 21 December 1954, with Switzerland from 7 May 1965, 28 June 1965 or with the United States from 8 November 1958.<sup>365</sup>

Such a conditional applicability of recognition theory may be refuted also by numerous provision of the ECSC Treaty as contained in the provisions of the Article 49 (1), Article 52 (2), Article 71 (2), Article 74 (1), Article 93, Article 94 and Article 98,<sup>366</sup> presuming the conclusion of international treaties, however despite the existence of the general overwhelming competence to conclude the international agreements.<sup>367</sup>

Principally, it must be taken into account that the ECSC had an intention to go beyond the aims and integration process run by the Council of Europe, working on intergovernmental principles.<sup>368</sup>

As a matter of principle, the legal personality was intensively linked to the functions and objectives the ECSC as required for fulfilment of the international plane. To this end, it may be recalled the enumeration of the aims of the ECSC as contained in its Article 2.<sup>369</sup> Enumeration of the aims, as contained in the treaty in Article 2 may be further rolled out by the Article 3, defining the framework of the

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<sup>364</sup>C.BECKER-DÖRING, *Die Außenbeziehungen der Europäischen Gemeinschaft für Kohle und Stahl von 1952–1960: Die Anfänge einer europäischen Außenpolitik?*, Stuttgart, 2003, p.91, as previously proved, the recognition of the legal personality by the states, since it is only one way of attribution of the legal personality.

<sup>365</sup>H.P.IBSEN, *Europäisches Gemeinschaftsrecht*, Tübingen, 1972, p.201.

<sup>366</sup>According to H.KRÜCK, *Völkerrechtliche Verträge im Recht der Europäischen Gemeinschaften. Abschlußkompetenzen Bindungswirkung Kollisionen*. Berlin,1977, p. 30.

<sup>367</sup>C.BECKER-DÖRING, *Die Außenbeziehungen der Europäischen Gemeinschaft für Kohle und Stahl von 1952–1960: Die Anfänge einer europäischen Außenpolitik?*, Stuttgart, 2003, p.229.

<sup>368</sup>G.VERMEULEN, *Europese en internationale instellingen en organisaties relevant voor criminologie en strafrechtsbedeling*, Antwerpen, 2009, p.29.

<sup>369</sup>Article 2 Treaty establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.Y.S. 140. Expired 23 July 2002. wording as follows: “*The ECSC shall have as its task to contribute, in harmony with the general economy of the MS and through the establishment of a common market as provided in Article 4, to economic expansion, growth of employment and rising standard of living in the MS. The Community shall progressively bring about conditions which will of themselves ensure the most rational distribution of production at the highest possible level of productivity, while safeguarding continuity of employment and taking care not to provoke fundamental and persistent disturbances in economies of MS.*”

powers and responsibilities executed in the common interest.<sup>370</sup> However, among them are only two provisions which are related to – a) and f).<sup>371</sup>

Despite the mentioned facts to the Article 6, some authors had doubts about the fact whether this provision may be considered as general explicit treaty-making provision.<sup>372</sup> Some authors on the other hand state that by the Article 6 the ECSC gained the treaty-making competence in the international relations.<sup>373</sup> The consequence the international legal personality is the principle that the ECSC can in principle conclude the international agreements with third states and international organizations and that the ECSC may become responsible for non-fulfilment of the obligations and equally interfere, if its rights have could have been violated. A valuable contribution to this discussion presents also Castaldi, claiming in favour of the existence of the legal personality of the EU and referring to substantial finance autonomy by which it could levy taxes on coal and steel production and trade and obtain credit on the international market.<sup>374</sup>

Nevertheless, while analysing the practical applicability of the Article 6 (2) ECSC Treaty as a legal basis for other legal act, it may be added that this Article has been used as legal basis for several legal acts. Among them, there can be identified numerous legal acts having international background, covering general

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<sup>370</sup> According to the aforementioned Article the institutions of the ECSC shall “(a) see that the common market is regularly supplied, taking account of the needs of third countries;(b) assure to all consumers in comparable positions within the common market equal access to the sources of production; (c) seek the establishment of the lowest prices which are possible without requiring any corresponding rise either in the prices charged by the same enterprises in other transactions or in the price-level as a whole in another period, while at the same time permitting necessary amortization and providing normal possibilities of remuneration for capital invested; (d) see that conditions are maintained which will encourage enterprises to expand and improve their ability to produce and to promote a policy of rational development of natural resources, avoiding inconsiderate exhaustion of such resources; (e) promote the improvement of the living and working conditions of the labor force in each of the industries under its jurisdiction so as to make possible the equalization of such conditions in an upward direction;(f) further the development of international trade and see that equitable limits are observed in prices charged on external markets;(g) promote the regular expansion and the modernization of production as well as the improvement of its quality, under conditions which preclude any protection against competing industries except where justified by illegitimate action on the part of such industries or in their favor.”

<sup>371</sup> F.A.M. ALTNG Von GEUSAU, *Beyond the European Community*, Leiden, 1969, p.69.

<sup>372</sup> M.KANIEL, *The Exclusive Treaty-Making Power of the European Community*, Leiden, 1996, p.26.

<sup>373</sup> It is important to stress that the author reflects in his opinion of the judgment of the ECJ in the case ECJ judgment, 31 March 1971, Commission v. Council, case 22/70 [1971] ECR, p.263.

<sup>374</sup> R.CASTALDI, *The dynamic development of the European Communities (and then Union) and the relationship with EFTA and the Council of Europe in Perspectives on Federalism*, Volume 2, Issue3, 2010, p.83.

issues of the sale of the products in coal and steel sector in the relations to the third countries.<sup>375</sup> Nonetheless, broad perception and wide-reaching understanding of the scope of this provision may be useful in enabling the existence of symmetry between internal and external competences and thus further contributing to the enforcement of the legal personality.<sup>376</sup>

Globally, there are some indications that ECSC created an organizational system having different quality as regards to the previous groupings of states. Torres Espinosa identifies two elements, in support of its supranational character. As the first one, refers to the obligation of the signatory parties not to intervene in the functioning of the ECSC, secondly refers to the provision granting the ECSC the biggest extent of the legal personality as to the national legal subjects, granting of the immunities and privileges as granted to the legal persons of national law, and the obligatory binding character of the executive decisions over the whole territory of the MS.<sup>377</sup> In this sense, the supranationality shall be understood as the right of international organization to bind its MS in certain domains which were originally in the sovereignty of the MS even also without their explicit consent adopted by the majority decision of the independent supranational organs.<sup>378</sup>

It might be concluded that ECSC Treaty fostered external appearance of the ECSC by granting the legal personality to the Community by the enactment as contained in the Article 6. Doing so, the Community while acting externally must

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<sup>375</sup> As examples may be mentioned Decision No 3073/73/ECSC of the Commission of 31 October 1973 on the sale of iron and steel products in certain EFTA countries OJ L 314, 15 November 1973, Decision No 911/75/ECSC of the Commission of 7 April 1975 on the sale of iron and steel products in the Kingdom of Norway, OJ L 88, 9 April 1975, p.7–8, 76/754/ECSC: Commission Decision of 17 September 1976 concluding the Protocol concerning commercial and economic cooperation between the European Coal and Steel Community and Canada, OJ L 260, 24 September 1976, p. 27–28, Protocol concerning commercial and economic cooperation between the European Coal and Steel Community and Canada - Final Act - Declaration by the Government of the Federal Republic of Germany on the application of the Protocol to Berlin, OJ L 260, 24.9.1976, p.28–35.

<sup>376</sup> B.UBERTAZZI, *The End of the ECSC in European Integration online Papers*, Volume 8, Number 20, 2004, p.4.

<sup>377</sup> E.TORRES ESPINOSA, *La Comunidad Europea del Carbon y del acero. Un exitoso y ain inacabado experimento institucional in Anuario Mexicano de Derecho Internacional*, Volume 8, Mexico, 2008, p.7228.

<sup>378</sup> D.NOVÁČKOVÁ, *Základy európskeho práva a vnútorný trh Európskej únie*, Bratislava, 2004, p.19.

be represented by its institutions, acting within the frame of own powers and responsibilities, acting under limited scope of own powers and responsibilities, as set forth by the treaty which was not paradoxically enacted in exhaustive way.

#### 4.2.3 EURATOM and Legal Personality

Moving forwards the European integration there was significant an intergovernmental Conference held in 1956 in Brussels. The key issue at stake was the reluctance of France to grant under the EURATOM Treaty the use of military use of nuclear energy. The rest of the negotiating states arrived to the final stage of negotiation, finally agreed on the fact that the military use of nuclear energy would not be subject to the treaty, nevertheless and submitted the use of nuclear energy under the international control. To be objective, the EURATOM Treaty was oriented on the peace purposes.<sup>379</sup> Another argument for the creation of the atomic energy Community was the deficit of the traditional energetic sources and the growing tendency in consumption of the energy, within which the EURATOM contracting parties identified the atomic energy as an effective mean to avoid the energetic dependency.<sup>380</sup>

The person behind the idea of EURATOM Treaty was again Jean Monnet who surprisingly opined that sectorial and technical cooperation in the field of nuclear energy seem to be more promising to foster the European integration than cross-sectorial economic integration.<sup>381</sup> The final signature of the Treaty dates back to the 25 March 1957 when the EURATOM Treaty was signed together with the Rome Treaty founding EEC. Nonetheless, in comparison to the EEC Treaty, the EURATOM Treaty was considered a promotional treaty where the futuristic

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<sup>379</sup>This comes out from the EURATOM Treaty preamble, Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167: “[...] Recognizing that nuclear energy represents an essential resource for the development and invigoration of industry and will permit the advancement of the cause of peace.”

<sup>380</sup>J.KLUČKA, J.MAZÁK et. al., *Základy európskeho práva*, Bratislava, 2004, p.19.

<sup>381</sup>S.WOLF, *Euratom, the European Court of Justice, and the Limits of Nuclear Integration in Europe in German Law Journal*, Volume 12, Number 8, 2011, p.1637.

aspect is evident in the fact that it promotes the development of the (that time) nascent civil nuclear energy production.<sup>382</sup>

The general introduction to the legal personality of the EURATOM is derived from the Article 184<sup>383</sup> saying that the EURATOM Community shall have the legal personality. This article is subsequently complemented by the provision that the Article 185 stating that the Community shall enjoy the most extensive legal capacity accorded to legal persons under the laws of MS. The Community can in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. As Gauder states the consequence is that EURATOM is subject to national laws, respecting its privileges and immunities, prerogatives and fiscal exemption granted to the international organizations.<sup>384</sup>

The legal personality in external terms as granted by the EURATOM Treaty is enshrined and further developed by the Article 101.<sup>385</sup> Leading principle of the external dimension legal personality of the Treaty is enshrined in its provision of the Article 101 (1) EURATOM Treaty.<sup>386</sup> The Treaty clearly indicates the principle of the conferral of the limits of its powers and jurisdiction. Moreover, the Treaty further extends the potential subjects of the agreements as to the – third states, international organizations and even the nationals of a third state.<sup>387</sup>

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<sup>382</sup>I.CENEVSKA, *The exercise of giving way to 'giving in' - some aspects of the Member States EURATOM obligations revisited* in *Journal of European Environmental and Planning Law*, Volume 6, Issue 4, 2009, p.481.

<sup>383</sup>Article 184 Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167, containing rather laconic proclamation: "*The Community shall have legal personality.*"

<sup>384</sup>M.GAUDET, *Euratom*, London, 1959, p.161.

<sup>385</sup>Article 101 Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167 providing as follows: "*The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with third State, an international organization or a national of a third state. Such agreements or contracts shall be negotiated by the Commission in accordance with the directives of the Council: they shall be concluded by the Commission with the approval of the Council, which shall act by a qualified majority. Agreements or contracts whose implementation does not require action by the Council and can be effected within the limits of the relevant budget shall, however, be negotiated and concluded solely by the Commission; the Commission shall keep the Council informed.*"

<sup>386</sup>Article 101 (1) Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167 providing as follows: "*The Community may, within the limits of its powers and jurisdiction, enter into obligations by concluding agreements or contracts with a third State, an international organization or a national of a third State.*"

<sup>387</sup>Article 101 Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167.

The provision of the following Article 102 clearly anticipates the '*mixed agreements*'<sup>388</sup> requiring the notification to the European Commission that such type of mixed agreement which were ratified on the national level.<sup>389</sup>

Moreover, the EURATOM Treaty clearly enforces the principle of consistency being promoted by the provision of the Article 104. Due to its provision the MS shall communicate to the Commission the drafts of agreements or treaties with the third states, international organization or a national of the third state falling into matter of the purview of the treaty. The respective state shall not conclude such kind of the agreement, until the previous approval of the Commission (upon the satisfaction of the objections of the Commission) or in compliance with the ruling of the ECJ (ruling on the compatibility of such a treaty with the provisions of the EURATOM Treaty).<sup>390</sup>

In addition, the legal personality and external dimension of the EURATOM Treaty in comparison to the other three treaties (ECSC, EEC) is doctrinally considered as the most detailed one in terms of the external relations of this Community.<sup>391</sup> The regulations of the external dimension of the Community is contained furthermore in the provisions of the Articles 199-201 (in actual wording) on the relations to the UN and WTO, Council of Europe and Organisation for Economic Co-operation and Development, the general provisions of the Community in external relations as enacted by the Articles 101-106, other provisions are contained in the Articles 10, 29, 46 let. e), 64, 66, 73, 77 let b) and 206.

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<sup>388</sup>D.VAUGHAN (ed.), *Law of the European Communities*, London, 1986, p.480.

<sup>389</sup>Article 102 Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167 wording as follows: "*The Agreements or contracts concluded with a third State, an international organization or a national of a third State to which, in addition to the Community, one or more MS are parties, shall not enter into force until the Commission has been notified by all the MS concerned that those agreements or contracts have become applicable in accordance with the provisions of their respective national laws.*"

<sup>390</sup>Article 103 Treaty Establishing the European Atomic Energy Community, 25 March 1957, 298 U.N.T.S. 167.

<sup>391</sup>J.GRUNWALD, W.de GRUYTER, *Das Energierecht der Europäischen Gemeinschaften: EGKS-EURATOM-EG : Grundlagen, Geschichte, geltende Regelungen*, Berlin, 2003, p.277.

As it was demonstrated above, the EURATOM Treaty provides more profound elaboration of the legal personality as ECSC did. It is true that the legal personality is rather laconic; however, as it was demonstrated there are several further enforcing elements of the outer dimension of the legal personality of the EURATOM, as conclusion of international agreements, establishing relations to the high-ranking world institutions and international relations in general in atom energy sector.

#### 4.3 Legal Personality of the EEC under the Treaty of Rome

The Rome Treaty clearly defines the fact that the EEC has recognized legal personality<sup>392</sup>, while stating so in Article 210 states: *“The Community shall have legal personality.”* The Article 210 is supplemented by the provision of the Article 211 wording as follows: *“In each of the MS, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may in particular acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end the Community shall be represented by the Commission.”*

What is the extent of the legal personality Community? In the most general way, the legal personality of the Community means that the Community has a capacity to be holder of the rights and obligations taking into consideration international law, former EC law and national law.<sup>393</sup> Nonetheless, paradoxically, the international dimension of the legal personality was not enacted by Rome treaty.<sup>394</sup> From the systematic view it seems evident that Articles 210 and 211 TEC are speaking about different quality of the legal personality. The Article 211 represents the internal attribute, whereas the provision of the Article 210 probably

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<sup>392</sup>The doctrine recalls that the express attribution of the legal personality and the fact that this personality being necessary to fulfil the functions and obligations under international law is rather exceptional case in I. SEIDL-HOHENVELDERN, *Corporations in and Under International Law*, Cambridge, 1986, p.86; the same opinion shares N.D.White stating that there is no need for an express statement in the provisions of the treaty is however useful because “[...] such provision obliges the Members to accept the organization as separate international person, competent to perform acts which under traditional international law could only be performed by states. In addition, such a provision clarifies the status of the organization for non-members.” in N.D.White, *The Law of International Organizations*, Manchester, 2005, p.33.

<sup>393</sup>R.GEIGER, *EG-Vertrag : Kommentar zu dem Vertrag zur Gründung der Europäischen Gemeinschaft*, Munich, 1995, p.728.

<sup>394</sup>F.A.M. ALTING VON GEUSAU, *Beyond the European Community*, Leiden, 1969, p.70.

its 'external dimension'<sup>395</sup>. As Morvan states, the provision of the Article 210 contains the 'virtual capacity' meaning that the Community has a theoretical capacity to conclude the agreements susceptible to conclude the agreements for the attainment of the objectives of the treaty, however while taking into account the provision of the treaty and the relevant case law.<sup>396</sup> The EEC is thus considered as the standard subject of international law alongside the states and the majority of international organizations.<sup>397</sup> However the problem for some authors was that contrary to the provisions of the ECSC and EURATOM Treaty, the EEC Treaty did not contain a clear provision of the international legal personality.<sup>398</sup> Some authors even express some doubts whether the provision of the legal personality shall be understood as the legal personality under national or international law.<sup>399</sup> Hence, it remained an open question whether the legal personality of the EEC shall not be understood as internal one, with regard to the rights to acquire goods, rent buildings, hire personnel etc.<sup>400</sup>

As the ECJ decided in relation to the Article 210,<sup>401</sup> the article grants the capacity of the EEC to establish the legal relations with third countries.<sup>402</sup> In this judgment the Court ruled that the legal personality "[...]means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty, which Part Six supplements."<sup>403</sup> As the doctrine adds to that, the ECJ recognised the authority

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<sup>395</sup>H.VON DER GROEBEN, J.SCHWARZE, *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, Munich, 2004, p.1241.

<sup>396</sup>D. LE MOUTVAN, *Compétences communautaires en matière de protection de l'environnement marin-lutte contre la pollution* in *CNEXO Rapport Économiques et Juridiques*, Issue 4, 1977, p.11.

<sup>397</sup>A. BLECKMANN, *Europarecht*, Cologne, 1990, p.375.

<sup>398</sup>H.De WAELE, *Layered Global Player: Legal Dynamics of EU External Relations*, Nijmegen, 2011, p.4.

<sup>399</sup>P.J. KUIJPER, J.WOUTERS, F.HOFFMEISTER, G. de BAERE, T.RAMPOULOS, *The Law of EU External Relations Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford, 2013, p.1.

<sup>400</sup>H.De WAELE, *Layered Global Player: Legal Dynamics of EU External Relations*, Nijmegen, 2011, p.4.

<sup>401</sup>While taking into consideration of this enactment it cannot be neglected the fact that the provision on legal personality of the European Communities has been placed at the Part Six of the Rome Treaty which is dedicated to the General and Final Provisions. Certainly, it goes without saying that of the importance is also the fact that part six of the Treaty constitutes the supplement to the Part one to the Treaty. This fact, explain the rather modest external aspect of the EEC.

<sup>402</sup>ECJ judgment, 31 March 1971, *Commission v. Council*, case 22/70 [1971] ECR, p.263.

<sup>403</sup>ECJ judgment, 31 March 1971, *Commission v. Council*, case 22/70 [1971] ECR, p.263.para 14.



of the Community to enter into agreements, i.e. whether the powers were conferred in particular case.<sup>404</sup> The doctrine considers the judgment as approbation of the capacity of the Community to establish contractual links with non-Community countries in varying areas of activity that form the subject-matter of the Treaty<sup>405</sup> including the establishment of the diplomatic relations.<sup>406</sup> Under these conditions, the legal personality of the Union has not been impugned by the third states<sup>407</sup> and has even contributed to the '*birth of the effective international legal personality of the EEC,*'<sup>408</sup> although the EEC itself was not much preoccupied by the recognition of the international legal personality by the third states.<sup>409</sup>

In summary, the provision of the Article 210 in itself is no competence-norm. However, the governing principle remains the principle of conferral of the powers, limiting the scope of powers of the EC (applicable equally to EEC/EU).<sup>410</sup> Nonetheless, its importance rises in connection with the objectives of the Community and singular provisions of the Treaty,<sup>411</sup> implied powers theory<sup>412</sup> which together serve as the key element for its existence.

External dimension of the legal personality of the EEC was further enforced by the Article 238, contained also in the Part six of the Treaty of Rome providing certain background for the establishing of the external relations between the EEC

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404 R.HOLGAARD, *The External powers of European Community*, Alphen aan den Rijn, 2008, p.115.

405 W.RAWLINSON, *An Overview of EEC Trade with An Overview of EEC Trade with Non-Community Countries and the Law Governing These External Agreements in Fordham International Law Journal*, Volume 13, Issue 2, Article 3, 1989, p.205.

406 H. van HOUTTE, *International Law and Community Treaty-Making Power in Northwestern Journal of International law and business*, Volume 3, Issue 2, 1981, p.621.

407 J.SOBRINO HEREDIA, *The international legal personality of the European Union after the Lisbon Treaty in Annals Magazine of Titu Maiorescu University*, Volume 9, 2010, p.59.

408 C.HUBENE, *Los aspectos jurídicos de las relaciones entre la Comunidad Europea y el Grupo Subregional Andino in Integración Latinoamericana*, Issue 68, 1982, p.72-73.

409 European Parliament, Working documents 1973-1974 Documents 57/73, 28 May 1973, states that:"

*Recognition of this personality by third countries is not an essential requirement because the Treaty provisions have an independent effects. There is, therefore, no need to examine this problem further."*

410 C. CALLIESS, M.RUFFERT, *Kommentar zu EU-Vertrag und EG- Vertrag*, Neuvied, 1999, p.2046.

411 F.BINDI, *European Union Foreign Policy: Historical Overview in F.BINDI (ed.), The Foreign Policy of the European Union: Assessing Europe's Role in the World*, Washington DC, 2010, p.15 state that these provisions include the customs union between the states, establishment of a common external tariff and external trade, the possibility for other states to join the EEC, the establishment of a free trade area, creation of European Fund for Development, organization of commercial policy in regard to the states and international organizations. In addition, these provisions include the provision dedicated to the association of the non-European countries with special relation to EEC.

412 This topic will be discussed in detailed way within the Chapter IV.

and third states and international organizations. The generally perceived provision of this article reads as follows: *“The Community may conclude with a third State, a union of States or an international organization agreement establishing an association involving reciprocal rights and obligations, common action and special procedures.”*<sup>413</sup> Furthermore, the treaty-making power was further enforced by the Article 228 providing the fundamental background for the conclusion of the international agreements having binding effects not only for the EEC, but also the MS.<sup>414</sup> As Craig - de Búrca comment in reference to the Article 228 in this field, the EEC was empowered to maintain the relations with other international organizations, in particular the Council of Europe, the OECD and other organs and agencies of the UN system.<sup>415</sup>

In summary, Treaty of Rome introduced an ambitious plan for the prospering EEC and presented broad scale aims.<sup>416</sup> Nevertheless, the doctrine recalls that the EEC competences in external affairs were driven by purely economic aims, in particular linked to the fact that the EEC was originally

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<sup>413</sup>Article 238 Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3.

<sup>414</sup>Article 228 Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3. reading as follows: *“Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the Assembly [EP] where required by this Treaty. The Council, the omission or a MS may obtain beforehand the opinion of the ECJ as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the ECJ is adverse, the agreement may enter into force only in accordance with Article 236. 2. Agreements concluded under these conditions shall be binding on the institutions of the Community and on MS.”*

<sup>415</sup>P.CRAIG, G.de BÚRCA, *EU Law: Text, Cases and Materials*, Oxford, 2008, p.173.

<sup>416</sup>Article 3 Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3 provides list of the the activities to be done by the European Economic Communities containing: *“(a) the elimination, as between MS, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) the establishment of a common customs tariff and of a common commercial policy towards third countries; (c) the abolition, as between MS, of obstacles to freedom of movement for persons, services and capital; (d) the adoption of a common policy in the sphere of agriculture; (e) the adoption of a common policy in the sphere of transport; (f) the institution of a system ensuring that competition in the common market is not distorted; (g) the application of procedures by which the economic policies of MS can be co-ordinated and disequilibria in their balances of payments remedied; (h) the approximation of the laws of MS to the extent required for the proper functioning of the common market; (i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living; (j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources; (k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.”*

intended as a custom union, with a common customs tariff.<sup>417</sup> This opinion may be supported by the provision of the Article 2 of the Rome Treaty reading as follows: *“The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of MS to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.”*<sup>418</sup>

As it can be concluded, in regard to the legal personality of the EEC, it was taken into consideration principle of functionalism being in fact even far-reaching and rather open-end in comparison to the factual enacted of the external appearance of the Community.<sup>419</sup> These principles are confirmed even by the doctrine. Since there is a considerable exercise of these powers, even the exercise of developing the Communities’ participation in other international organizations, there is clear evidence of the recognition accorded by the international community to the legal capacity of the Communities under public international law,<sup>420</sup> and by other actors of international milieu.

The scope of the legal personality and competence provided by the Treaty of Rome has been subject to certain amendments and revision of treaty-making adjustments under the SEA.<sup>421</sup> The signing of the SEA constituted a huge debate on the fact whether the Act constitutes a step forward European unification or whether the objectives set forth in the Act could have been attained without it, meaning *de lege lata*.<sup>422</sup>

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<sup>417</sup>J.C.PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Oxford, 2010, p.238.

<sup>418</sup>Article 2 Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 3.

<sup>419</sup>Please consult for further details the chapter IV dedicated to the distribution of the competences.

<sup>420</sup>R.LEAL-ARCAS, *EU Legal Personality in Foreign Policy?* in *Boston University International Law Journal*, Volume 24, Number 2, p.198, for more details please consult also the argument of the chapter VII dedicated to the relations between the EEC/EC/EU and the GATT/WTO.

<sup>421</sup>The Single European Act, OJ No L 169, 27.06.1987.

<sup>422</sup>H.J.GLAESNER, *The Single European Act: Attempt At An Appraisal* in *Fordham International Law Journal*, Volume 10, Issue 3, Article 4, 1986, p.446.

This conclusion of the doctrine refers to the Article 30 of the SEA providing the legal basis for the EPC. This article in principle provided the necessity of the consistency between the EEC and EPC with regular meetings between the representatives of the MS on EPC matters although respecting the fact that EPC preserves its international character from the legal point of view.<sup>423</sup> Another positive obligation contained in the SEA was the formulation of an ambitious plan given to the Community to realize an internal market, 'abolishing all kinds of borders.'<sup>424</sup> As Conybeare et al. state: "The SEA in fact establishes the institutional conditions necessary to begin thinking a closer political union in serious way. By establishing new decision-rules designed to allow Community policy making to less constrained by any single MS, the Act represents a major step in the construction of a EC that goes far beyond a 'common market.' It increased the degree to which MS were willing to pool their sovereignty. It increased the degree to which MS are willing to pool their sovereignty."<sup>425</sup>

The principal amendments brought by the SEA may be described as twofold.<sup>426</sup> One of them are the amendments to the EEC Treaty and the new-concept appearing in the Title III, dedicated to the formalization of the system of the EPC within the MS. The scope of the international personality of the EEC was enlarged by the Title VI of the SEA, dedicated to the Research and technological development<sup>427</sup> and subsequently in the Title VII dedicated to the Environment.<sup>428</sup>

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<sup>423</sup>A.SARI, *Between Legalization and Organizational Development: Explaining the Evolution of EU Competence in the Field of Foreign Policy* in P.J.Cardwell, *EU External Relations Law and Policy in the Post-Lisbon Era*, Hague, 2011, p.74.

<sup>424</sup>P.MANIN, *The External Relations of the European Community and Its Member States at the Time of the Internal Market and of the Maastricht Treaty* in *Hitotsubashi journal of law and politics*, Volume Vol. 22, Special Issue, 1994, p.138.

<sup>425</sup>A.M.SBRAGIA, *Asymmetrical Integration in the European Community: The Single European Act and Institutional Development* in D.L.SMITH, J.L.RAY (eds.) *The 1992 Project and the Future of Integration in Europe*, New York, 1992, p.93.

<sup>426</sup>D.T.MURPHY, *European Political Cooperation After the Single European Act: The Future of Foreign Affairs in the European Communities* in *Boston College International and Comparative Law Review*, Volume 12, Issue 2, Article 2, 1989, p.336 ff..

<sup>427</sup>Article 130n The Single European Act, OJ No L 169, 27.06.1987 wording as follows: "In implementing the multi-annual framework program, the Community may make provision for co-operation in Community research, technological development and demonstration with third countries or international organizations. The detailed arrangements for such co-operation may be the subject of international agreements between the Community and the third parties concerned which shall be negotiated and concluded in accordance with Article 228."

As a conclusive remark to SEA may be quoted Lord Arthur Cockfield, former Commissioner for internal market stating that: *“The real significance of the Single Act [was] that when the chips were down, the great majority of MS [would] go along with the ultimate development of the Community. Those who chose not to...would simply left behind.”*<sup>429</sup>

Another step forward was the Maastricht Treaty.<sup>430</sup> In terms of the legal personality Maastricht Treaty remained somehow *‘stuck on the halfway’*. The Treaty de facto created two independent subjects – EC and the EU having different legal nature.<sup>431</sup> The reason for this is that through the Maastricht Treaty the EC unlike the EU acquired the legal personality. The results of the negotiation outcomes of the Maastricht Treaty reflected the political ambitions and values of the MS and equally the European institutions and represented a compromise between preservation of national identity and the ambitions of integration.<sup>432</sup>

Maastricht Treaty introduced the well-known concept of known as a Greek temple, where the roof represents the common objectives. These represent the fact that the Union created a single institutional framework. The roof is supported by three pillars, representing the *‘fields of the EU policies,’* first one representing the EC, second one CFSP and third one JHA. Finally, the basement of the Treaty represents a set of common provisions being applicable to all three pillars.<sup>433</sup> The legal personality of the EC stayed confirmed in the same wording as contained in the EEC Treaty, however, the existence of the personality of the EU was not fully

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<sup>428</sup>Article 130r The Single European Act, OJ No L 169, 27.06.1987 wording as follows: *“Within their respective spheres of competence, the Community and the MS shall co-operate with third countries and with the relevant international organizations. The arrangements for Community co-operation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 228. The previous paragraph shall be without prejudice to MS’ competence to negotiate in international bodies and to conclude international agreements.”*

<sup>429</sup>A.MORAVCSIK, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, Ithaca, 1998, p.313.

<sup>430</sup>Treaty on European Union (Maastricht Treaty) OJ C 191, 29.07.1992.

<sup>431</sup>J.SVÁK, *Advokát pred európskymi súdmi*, Bratislava, 2004, p.86.

<sup>432</sup>D.THÜRER, P.YVES-MARRO, *The Union’s Legal Personality: Ideas and Questions Lying in H.J.BLANKE, S.MANGIAMELI (eds.) The European Union after Lisbon: Constitutional Basis, Economic Order and External Action of the European Union*, Berlin, 2011, p.53.

<sup>433</sup>R.SCHÜTZE, *European Constitutional Law*, Cambridge, 2012, p.29.

clear. The difficulties caused the 'missed' enactment of the legal personality of the EU in the Treaty on the EU. The existing introduction may be that only the EC disposed the legal personality and this fact opened the question of representation in the external relations caused by the silence on the legal personality of the EU.<sup>434</sup>

In negative terms, the pillar structure represents one negative aspect of the pillar and policy structure called as *'Europe of bits and pieces'*<sup>435</sup> meaning the fact that all the pillars have own rules and provisions. Having in mind this fact, it is needed to stress the fact that one of the features of the legal personality of the EU (especially) in the foreign policy was resented as a serious obstacle to the EU's foreign policy and the perception of the EU as an international actor.<sup>436</sup> As secondary argument in terms of differentiated legal personality under the legal personality of EU, there were the apparently overlapping powers in external representations causing lower capacity of the EU for unified action and effectiveness of its international action.<sup>437</sup>

The Maastricht Treaty heated pretty much the discussion on the existence of the legal personality of the EU. Principally, there were two schools on this point. The first one, pointed to the fact that the EU does not have the legal personality. The reason of this approach was that there was no equivalent provision to the Article 210 of TEC Treaty contained in the TEU Treaty (in fact, the situation as to the TEU was unique since it was the only EU Treaty not containing a clear provision of the legal personality). Such view was further supported by the fact that the objectives for the creation of the Union were rather political than legal

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<sup>434</sup>R.LEAL-ARCAS, *EU Legal Personality in Foreign Policy?* in Boston University International Law Journal, Volume 24, Number 2, p.199.

<sup>435</sup>Characteristics comes from D.CURTIN, *The Constitutional Structure of the Union: A Europe of Bits and Pieces* in *Common Market Law Review*, Volume 30, Issue 1, 1993, p.17 ff..

<sup>436</sup>K.KOEHLER, *European Foreign Policy After Lisbon: Strengthening the EU as an International Actor in Caucasian Review of International Affairs*, Volume 4, Issue 1, p.57-58.

<sup>437</sup>G.de BURCA, *The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?* in *Washington and Lee Law Review*, Volume 61, Issue 2, Article 2, 2004, p.568.

ones. The negative argumentation of granting the legal personality to the EU may be further summarized according to Carroll as follows:<sup>438</sup>

1. the Maastricht Treaty did not seek to confer on existing European institution any law-making authority in the matters covered by the two new pillars,
2. the Maastricht Treaty did not impose any obligations on signatory states to give effects in their domestic law to any developments, agreements or further treaties which may arise from government cooperation in these matters,
3. to the extent that the Maastricht Treaty creates any legal obligations, these agreements under the two intergovernmental pillars, are binding in international law only between the parties to the Treaty and any such agreements,
4. the EU does not have any international legal personality and is therefore not capable of treaty-making in regard to binding international agreements with other states or organizations of states.

On the other hand, against this approaches was formed equally strong opposition stating that the EU had legal personality. In fact, this argumentation was provided by the scholars having the background of international law.<sup>439</sup> In their view, while considering the legal personality of the EU, there shall be investigated the action of new established institutions, the wording of the treaty and the practice<sup>440</sup> executed within second and third pillar.<sup>441</sup> As further argument speaking in favour of the existence of the legal personality may be mentioned the decision of the German Federal Constitutional Court saying that the reason is the certain level of uncertainty in terms of the use of the term 'Union'. As German

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<sup>438</sup>A.CARROLL, *Constitutional and Administrative Law*, Harlow, 2003, p.66.

<sup>439</sup>Mainly represented by the scholars specialized in international law as J.MALENOVSKÝ in *Mezinárodní právo veřejné, jeho obecná část*, Brno, 2008, p. 108 ff., alternatively J.KLUČKA, *Mezinárodní právo veřejné*, Bratislava, 2011, p.71.

<sup>440</sup>The question of practice was enforced by the fact that the Amsterdam Treaty enforced the TEU in terms of an implied legal personality by allowing the conclusion for the international agreements under the second and third pillar in M.ISENBAERT, *EC Law and the Sovereignty of the Member States in Direct Taxation*, Amsterdam, 2010, p.102.

<sup>441</sup>D.THÜRER, P.Y.MARRO, *The Union's Legal Personality: Ideas and Questions, Lying Behind the Concept* in H.J.BLANKE, S.MANGIAMELI (eds.) *The European Union after Lisbon. : Constitutional Basis, Economic Order and External Action of the European Union*, Berlin, 2011, p.53-54.

Bundesverfassungsgericht decided: “While the term itself is not uncommon in international law, the EU seems to imply a quality that is much greater than a ‘regular’ organization.”<sup>442</sup> Another argumentation in favour of the existence of the legal personality provides Svoboda. He opines that all three existing Communities have clearly set forth the legal personality given to any particular Community. Although it was not the case of the TEU, it does not constitute for the TEU significant obstacle since the EU was a direct addressee of the aims of the CFSP and in addition it was required from the MS to be in consistency with them.<sup>443</sup> Even Eeckhout has no doubts about the legal personality of the EU by saying that the EU has under all doubt the legal personality.<sup>444</sup>

Craig and de Búrca mention three reasons supporting the existence of legal personality of the EU by which they openly advocate its existence. As the first one, mention the way how the objectives of the EU are formulated in the TEC and TEU and how EU by presents itself. Secondly, in their opinion is needed to investigate the real behaviour of the EU in the practice, mainly in the field of CFSP and finally, they refer once again to the advisory opinion in the case ‘*Reparation for Injuries,*’ already analysed on several occasions. Within the case the ICJ recognized the UN as an international organization due to the fact that it was endowed by the functions, obligations and the responsibility which by analogy should have been applied also to the EU.<sup>445</sup>

On the midway (in fact taking into account the understanding by the German Constitutional Court) having an opinion that in the TEU Treaty are some elements from which could be traceable certain partial elements of its legal personality, however, their very existence is not sufficient to make a conclusion

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<sup>442</sup>Judgment of German Federal Constitutional Court 2 BvR 2134/92, 2 BvR 2159/92 Re Maastricht Treaty Decision, 12 October 1993, BVerfG.

<sup>443</sup>P.SVOBODA, *Právo vnějších vztahů Evropské unie*, Prague, 2007, p.23.

<sup>444</sup>P. EECKHOUT, *External Relations of the European Union: Legal and Constitutional Foundations*, Oxford, 2004, p.155.

<sup>445</sup>P.CRAIG, G. de BÚRCA, *EU Law: Text, Cases and Materials*, Oxford, 2008, p.171.



that also the EU possesses the legal personality.<sup>446</sup> Some authors on the other hand perceive these elements (or some of them) as persuasive in granting the legal personality to the EU.<sup>447</sup> In their view, the partial elements of the legal personality concern the following elements:<sup>448</sup>

1. existence of the determined aims of the objectives of the EU, as the economic-social objective on the support of balanced economic and social progress, implementing of the common foreign and security policy, the concept of the EU citizenship etc.,
2. the fact that the EU has own body the European Council, however, nonetheless, also the institutions of the EC are involved in the fulfilment of the objectives and roles of the EC,
3. the EU has a possibility to adopt own unilateral legal acts within the third pillar (common strategies, common actions, joint actions,
4. after the Amsterdam treaty became applicable and enacted the provision of the Article 24 TEU via which the EU may conclude the international agreements in the field of common foreign and security policy,
5. in the TEU, there are enacted the conditions of the membership in the EU, citizenship of the Union.

In terms of further elaboration of the legal personality the TEC in the Maastricht wording contained two important inputs by insertion of the Article 111 and 181 to the Treaty.<sup>449</sup> The first of them, Article 111 was dedicated to the conclusion of the monetary agreements on the exchange rate stability,<sup>450</sup> whereas

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<sup>446</sup>J.KLUČKA, J.MAZÁK, et al.: *Základy európskeho práva*, Bratislava, 204, p.40.

<sup>447</sup>F.HOFFMEISTER, *The Contribution of EU Practice to International Law* in M.CREMONA, *Developments in EU External Relations Law*, Oxford, 2008, p.43.

<sup>448</sup>The standpoint is based under the presumption of the existence of the Amsterdam treaty analyzed in detailed way later on, but systematically appears suitable to add this argument at this place.

<sup>449</sup>In both cases, reference to the numbering of the Articles according to the wording of the Treaty of Nice.

<sup>450</sup>Article 111 (1) (excerpt) Treaty establishing the European Community (Consolidated version 1992) Official Journal C 224 of 31 August 1992 wording as follows: “1. By way of derogation from Article 300, the Council may, acting unanimously on a recommendation from the ECB or from the Commission, and after

Article 181 regulated the cooperation agreements between the EC.<sup>451</sup> Partially, with an aim to foster the relations with the third states, were update also articles 149 (3), 150(3), 151 (3) and 152 (3).<sup>452</sup> Thus, it was given the power to EU to foster cooperation (which presumably) to extend to the conclusion of agreements in the matters of education, vocational training, culture and public health where the EC were given new, narrowly defined powers.<sup>453</sup>

Going back to the Maastricht Treaty and on the way to the Amsterdam Treaty, it seems clear that the legal solution, as provided in the Maastricht Treaty had the features of the temporary solution. However, neither the negotiations, nor the legal enactment in the Amsterdam Treaty provided much more light into the topic like uniform structure and possible fusion of the EC and EU.<sup>454</sup> During the years, upon the entry into power of the Maastricht Treaty became evident that the EU at international scene was capable in policy-making, but not treaty making. The Amsterdam treaty, in reflection of this issue instead of conferring express personality to the EU, introduced a rather '*ingenious solution*,'<sup>455</sup> by which in words

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*consulting the ECB in an endeavor to reach a consensus consistent with the objective of price stability, after consulting the EP in accordance with the procedure in paragraph 3 for determining the arrangements, conclude formal agreements on an exchange-rate system for the ecu in relation to non-Community currencies. ..."*

<sup>451</sup>Article 181 Treaty establishing the European Community (Consolidated version 1992) Official Journal C 224 of 31 August 1992 wording as follows : "*Within their respective spheres of competence, the Community and the MS shall cooperate with third countries and with the competent international organizations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300. The previous paragraph shall be without prejudice to MS competence to negotiate in international bodies and to conclude international agreements.*"

<sup>452</sup>Article 149 (3) - ex Article 126 (3) providing that the Community and the MS shall foster cooperation with third states and international organizations in the field of education ; Article 150(3) - ex Article 127 (3) fostering the cooperation between the MS and the Community in the field of vocational education, Article 151 (1) - ex 128 enforcing the contribution to the flowering of the cultures of the MS while respecting their national and regional diversity and bringing common cultural heritage to the fore, Article 152 (3) - ex 129 stipulating that the Community and the MS shall foster cooperation with third countries and competent international organizations in the sphere of public health, all Articles quoted from Treaty establishing the European Community (Consolidated version 1997), OJ C 340, 10.11.1997.

<sup>453</sup>M.KOSKENNIEMI, *International Law Aspects of the European Union*, Hague, 1998, p.114.

<sup>454</sup>C.W.A.TIMMERMANS, *General Aspects of the European Union and the European Communities in P.J.G.KAPTEYN, The Law of the European Union and the European Communities: With Reference to Changes to be Made by the Lisbon Treaty*, New York, 2008, p.63.

<sup>455</sup>P.KOUNTRAKOS, *Trade and foreign policy within the constitutional order of the EU*, Oxford, 2011, p.31.

of Mazák: “[...] *the new amendment of the Amsterdam Treaty, it began to live its own life.*”<sup>456</sup>

The Amsterdam treaty-making provision for the first time recognized implicitly the legal personality of the EU.<sup>457</sup> For some authors this innovation contributed to the fact that the question of the legal personality lost in significance.<sup>458</sup> By this article the Council became the right to conclude the international agreements in the sphere of foreign and security policy, however with certain reservations.

The ambiguity of the provision of the Article 24 comment Lenaerts and de Smijter in the words that: “[...] *article does not give the EU the possibility to conclude international treaties, but rather aims to facilitate the conclusion by the MS.*”<sup>459</sup> Their reasoning comes from the nature of the Article 300 (228) TCE and rather short wording of the Article 24 TEU. In addition to that comes into play the fact that the MS are not necessarily bound by these international agreements, since they are entitled to reject such an international treaty by unilateral declaration.<sup>460</sup> In the substance this argumentation is confirmed by Bourgeois stating that although the provision at stake is a new provision, it is nothing more than an extension in area of external relations of the formula as it was introduced by the Maastricht Treaty by which the Union is managed by a single institutional framework, without

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<sup>456</sup>J.MAZÁK, M.JÁNOŠÍKOVÁ, *Lisabonská zmluva (Ústavný systém a súdna ochrana)*, Bratislava, 2011, p.28.

<sup>457</sup>Article 24 Treaty on European Union (Consolidated version 1997) Official Journal C 340 of 10.11.1997 reading as follows: “*When it is necessary to conclude an agreement with one or more States or international organizations in implementation of this Title, the Council, acting unanimously, may authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a MS whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them. The provisions of this Article shall also apply to matters falling under Title VI.*”

<sup>458</sup>P.M.DEFARGES, *The View from France: Steadfast and Changing in S.SERFATY (ed.), The European Finality Debate and Its National Dimensions*, Washington, 2003, p.123.

<sup>459</sup>E.FIERRO, *European Union's Approach to Human Rights Conditionality in Practice*, Hague, 2003, p.6.

<sup>460</sup>E.FIERRO, *European Union's Approach to Human Rights Conditionality in Practice*, Hague, 2003, p.6-7.

altering the intergovernmental nature of the common foreign and security policy and the cooperation in the field of JHA.<sup>461</sup>

Significance of the international subjectivity being given to the Union has not been subject exclusively to the treaty making procedures. Certain initiative on this field presented also the EP. The Parliament clearly expressed its opinion to the legal personality in the special report dedicated to the issue of the legal personality which shall be given to the EU. The key point of the Report is the improvement of the perception of the EU and its action-ability.<sup>462</sup>

Following Treaty, amending the existing ones was the Treaty of Nice principally needed to react on the process of accession of non-MS and seeking the membership since 2004.<sup>463</sup> Apart from that the Treaty of made step forwards to the clarification of the analysed provision of the Article 24 (6) by which the treaties concluded on the basis of this article are binding for the institutions of the EU.<sup>464</sup> As Tonnesson and Usher correctly add, such a provision gives effect to the provision of the Titles V and VI of the EU Treaty.<sup>465</sup> In addition to that the Treaty of Nice brought the concept of the enhanced cooperation going out from the provisions of the Articles 43-45 TEU being applicable to all three pillars and the Articles 27a-27e related to the particular provisions dedicated to the CFSP.<sup>466</sup> Evidently, such a provision will not bind the states which excluded the applicability and demonstrated their will not to participate since the enhanced

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<sup>461</sup>J. H.J.BOURGEOIS, *External Relations Powers of the European Community* in *Fordham International Law Journal*, Volume 22, Issue, 6, Article 11, 1998, p.150.

<sup>462</sup>Constitution, improves the Union's image and its capacity to take action by facilitating the Union's political and contractual activities at bilateral and multilateral level on the international stage, and its presence in international organizations, even if different procedures apply internally, and is an essential step towards increasing the coherence, visibility and efficiency of its external action

<sup>463</sup>P.KATZ, *The Treaty of Nice and European Union Enlargement: The Political, Economic and Social Consequences of Ratifying the Treaty of Nice* in *Pennsylvania Journal of International Economic Law*, Volume 24, Issue 1, 2003, p.226.

<sup>464</sup>J.MAZÁK, M.JÁNOŠÍKOVÁ, *Lisabonská zmluva (Ústavný systém a súdna ochrana)*, Bratislava, 2011, p.28.

<sup>465</sup>M.ANDENAS, J.USHER, *The treaty of Nice and beyond: enlargement and constitutional reform*, Oxford, 2003, p.252.

<sup>466</sup>M.CREMONA, *Enhanced Cooperation and the Common Foreign and Security and Defense Policies of the EU*, *EUI Working papers Law 2009/21*, Florence, 2009, p.3.

cooperation shall be based on the agreed common position or joint action.<sup>467</sup> The Treaty of Nice has brought most significant changes in terms of the CCP, amending the provisions of the Article 133 (3) and (5) TEC and provisions of the article 181a (3) TEC dedicated to the Economic, financial and technical cooperation with third countries.

#### 4.3.1 EU Legal Personality after Lisbon Treaty

The legal regulation on the legal personality has changed since the entry into power of the Lisbon Treaty.<sup>468</sup> Doing so, the EC was transformed directly to the EU, and ceased to exist the dualism between the EC and EU. In fact, the elimination of the dualism of legal personality was subject to the preparatory works of the Working Group III on Legal Personality working on the Treaty establishing a Constitution for Europe.<sup>469</sup> Thus, it may not wonder that the need of the provision of the legal personality appeared also in the Conclusion of the European Council in December 2007 leading to the discussion on the new Treaty amendment resulting in Lisbon Treaty.<sup>470</sup>

Reflecting these facts, it can be agreed with Biondi, Eeckhout and Ripley explaining the system of the Treaties in the following way concisely way: *“Prior the coming into force of the Lisbon Treaty the EU was essentially based on two treaties and three pillars; the Constitutional Treaty would have simplified matters by replacing these with two treaties and one pillar (ostensibly); we may call this ‘two treaty solution’.”*<sup>471</sup> In

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<sup>467</sup>M.CREMONA, *Enhanced Cooperation and the Common Foreign and Security and Defense Policies of the EU*, *EUI Working papers Law 2009/21*, 2009, p.3.

<sup>468</sup>Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306 of 17 December 2007.

<sup>469</sup>The European convention, The Secretariat, Final report of Working Group III on Legal Personality, Brussels, 1 October 2002 (02.10) (OR. fr) CONV 305/02 WG III 16.

CONV 305/02, Final Report of Working Group III on Legal Personality, Brussels, 1 October 2002.

<sup>470</sup>Brussels European Council of 14 December 2007, Presidency conclusions, Brussels, 14 February 2008, 16616/1/07, REV 1, CONCL 3 reading in its paragraph 2 as follows: *“We aim at shaping globalization in the interests of all our citizens, based on our common values and principles. For this even the enlarged Union cannot act alone. We must engage our international partners in enhanced strategic cooperation and work together within stronger multilateral organizations. The Lisbon Treaty, in setting a reformed and lasting institutional framework improves our capacity to fulfil our responsibilities, respecting the core principles enshrined in the Berlin declaration. It will bring increased consistency to our external action.”*

<sup>471</sup>M.CREMONA, *The Two (or Three) Treaty Solution: The New Treaty Structure of the EU* in A.BIONDI, P.EECKHOUT, S.RIPLEY, *EU Law after Lisbon*, Oxford, 2012, p.41.

reference to the temple structure of the EU, it appeared obvious that from Lisbon Treaty there are no longer two entities, since the Treaty created just one actor - the EU, consequence of which is that it absorbs three pillars in fact into a single one.<sup>472</sup> However, it is not fully true. The policy area covered by original third pillar Police and Judicial Cooperation in Criminal matters moved to the reformed EC Treaty - actually TFEU, however, the CFSP preserved a particular regime TEU.

Therefore, it might not be stated that the pillar structure was removed, but rather modified and confirming that the second pillar de facto remains in place.<sup>473</sup> As to the single perception of the legal personality it might be quoted Cremona stating: *"The CFSP provision remain in the TEU but alongside provisions establishing the institutional framework for the Union as a whole and a set of general provisions establishing the institutional framework for the Union as a whole and a set of general provisions which govern all external policy. There will be one legal personality for the Union and one legal order, albeit with differing decision-making provisions. The presumption is that all Treaty provisions apply to the CFSP unless there is a specific exclusion."*<sup>474</sup>

As Mazák states, now the problem of the existence of the legal personality of the EU seems to be solved and is even unquestionable, since it is officially expressed in the Article 47 TEU.<sup>475</sup> Similar opinion may be identified in the text book of Chalmers, stating that the international legal personality of the EU was enacted directly in the constituent Treaty. Thanks to that, in his view, it was found the sensible balance between the organs of the EU and the MS.<sup>476</sup> Also Svoboda had no doubts about the existence of the legal personality of the EU, since it

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<sup>472</sup>N.VERCOLA, *The New EU Foreign Policy under the Treaty of Lisbon* in F.BINDI, *The foreign policy of the European Union: assessing Europe's role in the world*, Washington D.C., 2010, p.41.

<sup>473</sup>S.KURPAS, S.KRUPAS, *The Treaty of Lisbon – How Much Constitution is left*, CEPS Policy Brief Number 147, 2007, p.2.

<sup>474</sup>M.CREMONA, *Coherence through Law: What difference will the Treaty of Lisbon make?* in *Hamburg Review of Social Sciences*, Volume 3, Issue 1, 2008, p.27.

<sup>475</sup>J.MAZÁK, M.JÁNOŠÍKOVÁ, *Lisabonská zmluva (Ústavný systém a súdna ochrana)*, Bratislava, 2011, p.28.

<sup>476</sup>D.CHALMERS,G.DAVIES,G.MONTI, *European Union Law Cases and Materials*, Cambridge, 2010, p.131.

disposes over competences and powers which enjoy the subjects of the public law, has the competence to issue the legal norms, has permanent staff and own finance. As he further adds the legal personality of the EU as an international organizations is always derived and limited, the EU is based on the principle of the conferred powers, as provided in the Article 3 (1) TFEU.<sup>477</sup>

The Lisbon Treaty has taken over the provision concerning the legal personality as it flowed from the previous provision of the Article 281 TEC. One may not wonder that the wording is the same as it has been the case under the Nice Treaty. While taking into account this provision, it can be agreed with Lenaerts stating that the like the MS, the Union, as a legal person, has the capacity to exercise its rights in international transaction and enter into obligations over the whole field of its objectives however respecting the principle of attribution of the competences.<sup>478</sup>

This means that the Union may, in principle, conclude the agreements with third countries and international organizations and be held liable under international law, if it breaches its obligations and may take action itself where its rights are infringed. If a Union institution concludes an agreement, the agreement will be binding for the Union and it will be liable for its performance. The Union's international capacity is governed by the rules of international law; however the division of powers as between the Union and the MS remains a matter of Union law.<sup>479</sup> Craig in commenting the attribution of the legal personality given to the Union states that this in itself does not represent any competence distribution between the EU and the MS. Nonetheless, the MS felt necessary to append a particular declaration stating that the EU has legal personality;<sup>480</sup> nonetheless, not

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<sup>477</sup>P.SVOBODA, *Právo vnějších vztahů Evropské unie*, Prague, 2010, p.20.

<sup>478</sup>K.LENAERTS, P.Van NUFFEL, R.BRAY, N.CAMBIEN, *European Union Law*, 2011, p.952.

<sup>479</sup>K.LENAERTS, P.Van NUFFEL, R.BRAY, N.CAMBIEN, *European Union Law*, 2011, p.952.

<sup>480</sup>P.CRAIG, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford, 2010, p.387.

allowing the Union to legislate or act beyond the competences conferred to it by the MS in the Treaties.<sup>481</sup>

As it has been showed in the previous part of the dissertation, prior to the adoption of the Lisbon Treaty the legal personality had been spitted between two provisions – provisions of the Article 281 (210) TEC and questionably, the Article 24 TEU. Under the Lisbon Treaty there are no more doubts about the existence of the legal personality of the EU. General doubts about the existence of the legal personality of the Union were refuted by the clear disposition of the Article 47 TEU stating that the Union has the legal personality. Notably, the provision of the Article 47 still differs to the legal personality ECSC and the EURATOM Treaty since it makes no direct reference to the international legal dimension of the legal personality.<sup>482</sup>

Lisbon Treaty has overtaken also the philosophy as set forth by the Constitutional Treaty.<sup>483</sup> Clear specification about the personality of the Union may be derived equally from the wording of the Article 1 of the TEU clearly indicating the fact that the EU is the successor of the EC. These new provisions have been added to the initial provision of the Treaty. In this aspect there is to be said that this changed provision represents also one step forward to the simplification of the structure of the EU, being one of the fundamental purposes of the revision of the primary law. Therefore, this new regulation is the clear outcome of the unifying of the Community and the Union into one single entity.<sup>484</sup>

While accepting this premise that the TEU has a particular character, in regard to the external action, the Union gained a power to conclude the

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<sup>481</sup>Declaration 24 concerning the legal personality of the European Union in Declarations annexed to the Final Act of the Intergovernmental conference which adopted the Treaty of Lisbon, signed on 13 December 2007, OJ EU C 115/335, 9.5.2008.

<sup>482</sup>P.CRAIG, G.de BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2011, p.307.

<sup>483</sup>Article 47 Consolidated version of the Treaty on European Union, OJ EU C 83/13, 30.10.2010, wording as follows: "*The Union shall have legal personality.*"

<sup>484</sup>J.MAZÁK, M.JÁNOŠÍKOVÁ, *Základy práva Európskej únie 1*, Bratislava, 2009, p.29.



international agreements in the following domains<sup>485</sup> - implementation of the CFSP (Article 37 TEU), readmission of third country nationals (Article 79 (3) TFEU), environmental cooperation (Article 191 (4) TFEU), CCP (Article 207 (3-4) TFEU), development cooperation (Article 209 (2) TEU), the achievement of objectives such as the consolidation of democracy, rule of law, human rights and respect for international law; preservation of peace; eradication of poverty in developing countries; international economic integration and environmental protection (Article 21 TEU, Article 209 (2) TEU), economic, financial and technical cooperation with third countries (Article 212 (3) TFEU), humanitarian aid (Article 214 (4)), establishment of an of *'an association involving reciprocal rights and obligations, common action and special procedure (Article 217)'*.

Nevertheless, the linkage between the Union in the CFSP remains well-defined by the Article 21 of the TFEU in the Title V dedicated to the *'General provisions on the Union's external action and specific provisions on the common foreign and security policy.'* Starting with this point is therefore the very first provision of the first section this article, stating that: *"The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."*<sup>486</sup>

Moreover, under Lisbon Treaty there was done significant change from the procedural point of view. Previously, two kinds of the procedures on the conclusion of the international agreements have been replaced by a single one, as set forth by the Article 218 of the TFEU,<sup>487</sup> although with certain particularities

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<sup>485</sup>G.MOENS, J.TRONE, *Commercial Law of the European Union*, Heidelberg, 2010, p.153.

<sup>486</sup>Article 21 Consolidated version of the Treaty on European Union, OJ EU, C 115/13, 9.5.2008.

<sup>487</sup>J.C.PIRIS, *The Lisbon Treaty A Legal and Political Analysis*, Cambridge, 2010, p.87.

with regard to international agreements in the domain of CFSP, while respecting the particular provisions dedicated exclusively to the CFSP.<sup>488</sup>

The general provision of the treaty-making remains the provision of the Article 216 (1), reading as follows: *“The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policy, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”*<sup>489</sup> Nevertheless, it is equally necessary to recall the fact that the agreements concluded by the Union shall be binding of the also upon its MS, as to comes out from the provision of the Article 216 (2) TFEU. The same article nevertheless provides in its previous subsection substantial enlargement of the competences of the Union *‘Agreements, concluded by the Union are binding upon the institutions of the Union and on its MS’*.<sup>490</sup>

As it may concluded while analysing the legal personality of the EU, the exclusivity principle has been significantly enlarged by the provisions dedicated to the conclusion of the international agreements of the Union, further by clear definition of the competences by the Union and its MS and not lastly by the definition of the scope of the aims of the Union. What are the practical consequences of the enactment of the legal personality of the EU? It may be agreed with Paul Craig stating that there is no reason why the enactment of the legal personality of the EU shall have any impact on the competence of the EU.<sup>491</sup>

After all amendments, as enacted by the Maastricht, Amsterdam and Treaty of Nice, the EC/EU did not reach a general treaty-making power. We may agree

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<sup>488</sup>J.WOUTERS, S.BIJLMAKERS, K.MEUWISSEN, *The EU as a Multilateral Security Actor after Lisbon: Constitutional and Institutional Aspects*, Katholieke Universiteit Leuven Working Paper No. 80, 2012, p.80.

<sup>489</sup>Article 216 (1) Consolidated version of the Treaty on the functioning of the European Union, C 83/47, 30.3.2010.

<sup>490</sup>Article 216 (2) Consolidated version of the Treaty on the functioning of the European Union, C 83/47, 30.3.2010.

<sup>491</sup>P.CRAIG, G.de BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2011, p.387.

with Simon, speaking about *'l'effet de clicquet où la consolidation de l'aquis communautaire.'*<sup>492</sup> The idea behind it is that the that the development of the integration and interdependency of the MS not only in economic terms, but as well in terms of the external and political cooperation. The economic integration has for the consequence a series of the legal effects. That is the reason why the EC/EU law may not be understood only in terms of the law having substantially economic nature.<sup>493</sup> The effect of the unification has a positive effect over the rather sectorial approach to the external relations of the EC/EUs which can be perceived.<sup>494</sup>

Maastricht Treaty at the first sight further moved forward the legal personality of the Union while stating clearly about the difference of the EC and the EU. Extend of the legal personality was subsequently developed by the Amsterdam and Treaty of Nice, enforcing international dimension of the EU.

Apart from rather academic perception of the legal personality of the Union is obviously subject to enjoyment of the legal personality in the active way of the appearance of the international legal personality of the Community comport also another attributes being attributes of the international personality of the Union as being active member of international Community and having also the international responsibility. In this sense it must be recalled the principle of the own procedural personality, confirmed clearly in the opinion of the ECJ.<sup>495</sup> The

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<sup>492</sup>D.SYMON, *Le système juridique communautaire*, Paris, 2001, p.23.

<sup>493</sup>D.SYMON, *Le système juridique communautaire*, Paris, 2001, p.23.

<sup>494</sup>Article 26 EC; Common Customs Tariff, Articles 34 (2) EC; Agriculture, Articles 57-60 EC; Capital and Payments, Article 71 (1) (a) EC; Transport, Article 111 EC; Monetary Policy, Articles 131-134 EC; Common Commercial Policy, Article 149 (3) EC; Education, Article 150 (3) EC; Vocational training, Article 151 (3) EC; Culture, Article 152 (3) EC; Public Health, Article 155 (3) EC; Trans-European Network, Articles 164 (b) and 170 EC; Research and Technological Development, Articles 174 (4) EC; Environment, Articles 177-181 EC; Development cooperation, Article 181a EC; Economic, Financial and Technical Cooperation with Third Countries, Articles 302-304 EC; Relations with international organizations, Article 310 EC Association Agreements; according to the wording of Consolidated version of the Treaty establishing the European Community, C 321 E/37, 29.12.2006.

<sup>495</sup>ECJ opinion, 14 December 1991, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, opinion 1/91 [1991] ECR, p.I-6079, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area decided that that in comparison to the EFTA Agreement has on the basis of the of the

ECJ equally admitted that the EC could have been the subject to international responsibility.<sup>496</sup>

The consolidation however did not provide even clear answer to the question on the very nature of the existence of the legal personality of the EU. In terms of the EC, the situation seemed clear since the actual provision of the former Article 281 TEC remained unchanged of permanently defining the legal personality of the EC, obviously with the provision on the internal dimension of the legal personality of the Union.

Despite of all facts the legal personality of the EU made significant changes to the legal personality of the EU concluded by Council in the Article 24 TEU. Despite the general significant and progressive granting of the legal personality however, the legal personality of the Union still remained full of doubts, as regards to the reservation to the international agreements and the reservation of the MS by which it is possible to limit the effects of the international agreements on particular MS.

The EU remained on the half way with its completing having created the system of the EU as intended to have rights, duties, powers and liabilities on the international plane, however, with missing recognized and fully functional legal personality. The question was due to these facts remained very controversial, as it was proved also by experts in EU law.

The Lisbon Treaty consolidated the provisions dedicated to the legal personality of the Union. In fact, it must be taken into account also the fact that the

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international agreement, none the less this international constitutes the constitutional charter of the Community based on the rule of law. The ECJ releases that the Communities treaties established a new order for the benefit of which the States have limited their sovereign firths, in ever wider fields, and the subjects of which comprise not only MS but also their nationals (para 1 of the quoted Opinion), in addition the ECJ decided that: *“The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions.”* (para 3 of the quoted Opinion).

<sup>496</sup>ECJ judgment, 9 August 1994, French Republic v. Commission of the European Communities, case C-327/91 [1994] ECR, p.I-3641.

field of the CFSP preserved its particular character in comparison to the rest of the provisions originally contained in the *'first pillar'* being in force till the entry into force of the Lisbon Treaty.<sup>497</sup> This premise is moreover confirmed by the provision of the TEU covered by the Article 24 (1).<sup>498</sup> In summary, the Lisbon Treaty aimed on the unification of the legal personality of the Union, did not fully make clear all issues on the legal personality of the Union. Nevertheless, it might be still considered as significant move forward and to clearer appearance of the Union in its external relations although non-resolving fully the international legal personality.

#### 4.4 Competences of the EU v. MS

##### 4.4.1 Introduction to the Competences of the Union and MS

Before starting more profoundly the research of the relation between the EU and the MS shall be clarified which notion shall be used. Before adopting the Lisbon Treaty, there was used the term *'powers'* in reference to the Articles 5 (2) and 7 (1) (2) TEU whereas the German linguistic version at the same time speaks about the *'Befugnis'* (meaning rather the *'entitlement'*). In terms of the Lisbon Treaty introduce the notions *'competence'* in English and *'Zuständigkeit'* in German. However, as van Bogdany and Bast state there are in no way any doubts about the meaning and using the terminology, since their content is the same.<sup>499</sup>

While considering the competences of the Union, for the beginning it can appear useful to start with a definition of the notion of the competence themselves. According to the dictionary of EU, these are defined as a term that

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<sup>497</sup>A.DASHWOOD, M.DOUGAN, B.RODGER, E.SPAVENTA, I.DASHWOOD, WAYTT AND DASHWOOD'S, *European Union Law*, Oxford, 2011, p. 900.

<sup>498</sup>Article 24 (1) Consolidated version of the Treaty on European Union, OJ EU C 83/13, 30.3.2010 wording as follows: "*The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defense policy that might lead to a common defense.*"

<sup>499</sup>As von Bogdany and Bast state: "*Neither the terms 'competence' and 'power in the Treaties nor related terms 'empowering provision', 'authorization' and 'legal basis' appear to have distinct legal meanings respectively. All these terms will therefore be used synonymously.*" in A. von BOGDANDY, J.BAST, *The Federal Order of Competences* in A. von BOGDANDY, J.BAST, *Principles of European Constitutional Law*, Oxford, 2009, p.278.

describes the authority of the EC to undertake specific activities. Such an authority is usually based upon a provision of the article of the constituent Treaties.<sup>500</sup> Under this notion may be understood the sector in which the institutions adopt the legal acts, either having legislative nature (regulations, direction) or the general applicability (delegate acts), executive acts, non-binding character, or eventually atypical acts. Why shall be called the dictionary for the aid? The reason is that the Treaties are silent on the definition of the notion of the '*competences*.'

The notion '*competence*' represents quite complicated concept, connected with every single power in the state (entity). The doctrine admits that the notion of '*competences*' may be used in the broader sense, involving competences, roles, entitlements, right or delegation of the power to execute the decisions and moreover involving also judicial powers.<sup>501</sup> Or as Blahož et. al. state, the notion competences of the Union is the ability to have and dispose by the means which come out from the objectives of the Union.<sup>502</sup>

#### 4.4.2 Formation of the Competences between the EU and MS

The history of the competences goes back to the '*stone age*' of the European integration. Once again the founding treaties did not contain any provision dedicated to the relationship between European and national competences, neither any explicit enumeration of the competences.<sup>503</sup> The Treaties were likewise silent on the distinction between the categories of the competences and their very nature.<sup>504</sup>

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<sup>500</sup>D.PHINNEMORE, *A dictionary of European Union*, London, 2008, p.88.

<sup>501</sup>F.C.MAYER, *Kompetenzuberschreitung und Letztentscheidung: das Maastricht-Urteil des Bundesverfassungsgerichts und die Letztentscheidung über Ultra vires-Akte in Mehrebenensystemen : eine rechtsvergleichende betrachtung von Konflikten zwischen Gerichten am Beispiel der EU und der USA*, Munich, 2000, p.22.

<sup>502</sup>J.BLAHOŽ, V.BALAŠ, K.KLÍMA, *Srovnávací ústavní právo*, Prague, 2003, p.133.

<sup>503</sup>There could be identified rather the principle of finality as the enumeration of competences as quoted G.STROZZI, *Diritto dell'Unione europea. Parte istituzionale: dal Trattato di Roma alla Costituzione europea*, Torino, 2005, p.66.

<sup>504</sup>R.SCHÜTZE, *European constitutional law*, Cambridge, 2012, p.162.

The general trend accompanying the competences in the EU had growing trend since the establishment of ECSC, subsequent Treaties and applicability of the EC/EU law.<sup>505</sup> Growing competences of the EC (EU) in confront to the competences of the MS resulted into intense discussion calling for clearer and univocal enactment of the competences and not leaving them to be defined by judicial power of the CJ EU. As a clear example of these efforts may be mentioned the Declaration Nr. 23 attached to the Final act from the intergovernmental conference from which came out the Treaty of Nice. Among the principal aims as formulated in the declaration, was a call for cleared division of the competences between the Union and the MS in accordance with the principle of subsidiarity.<sup>506</sup>

Actually, under the Lisbon Treaty the EU, the EU is characterized as a subject of international law. This appears obvious since the very first provision of the newly TEU that: *“The High Contracting Parties establish among themselves a EU, hereinafter called ‘the Union’, on which the MS confer competences to attain objectives they have in common.”*<sup>507</sup> The EU disposes over those competences which were conferred to the Union. As Týč states, none of the competences of the Union is original one, since all competences are only derived from the competences of the MS.<sup>508</sup> As Svoboda adds to this idea, the EU does not dispose with the possibility to decide unilaterally on the extension of its competences, since it does not have the *‘Kompetenz-Kompetenz’*), to have a competence-making power in terms of internal or external relations of the EU.<sup>509</sup>

The competences of the EU are to the EU attributed by the MS. This means in practice that the MS attributes the legal personality only in specific subject-matter branches.<sup>510</sup> However, these are not entitled for their *‘identification’* by

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<sup>505</sup>P.MANIN, *L'Union européenne : institutions, ordre juridique, contentieux*, Paris, 2005, p.140.

<sup>506</sup>Reference to 23. Declaration on the future of the Union Treaty of Nice - Declaration on the future of the Union, 26 February 2001, C OJ EU 80, 10.03.2001.

<sup>507</sup>Article 1 Treaty on European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>508</sup>V.TÝČ, *Základy práva Evropské unie pro ekonomy*, Prague, 2010, p.47.

<sup>509</sup>P.SVOBODA, *Právo vnějších vztahů Evropské unie*, Prague, 2010, p.21.

<sup>510</sup>V.TÝČ, D.SEHNÁLEK, R.CHARVÁT, *Vybrané otázky působení práva EU ve sféře českého právního řádu*, Brno, 2011, p.21.

interpretation. The TEU further puts forward the answer which body is responsible for the binding interpretation of the EU law, while clearly stating that in case of any doubts on this point: *“The CJ EU shall in accordance with the Treaties: give preliminary rulings, at the request of courts or tribunals of the MS, on the interpretation of Union law or the validity of acts adopted by institutions.”*<sup>511</sup>

Apart from the principle of conferral as the competences, the TEU contains furthermore substantive provisions being fundamental for the limitation of the competences between the EU and the MS, among them are the key ones:

1. Article 3 (6) TEU wording as follows: *“The Union shall pursue its objectives by appropriate means commensurate with the competences which were conferred upon it in the Treaties,”*<sup>512</sup>

2. Article 5 (1) TEU wording as follows: *“The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.”*<sup>513</sup>

These provisions are according to Mazák the main justification of the existing competences and not transferring the new powers to the EU, but making the existing system more transparent. As he adds, the precedent existing system of competences was often criticized since it was not possible to identify unambiguously, if the holder of the powers is the Union or the MS and thus the final word led to the CJ EU and its interpretation. Hence, it shall deny the functional approach to the competences.<sup>514</sup> The legal situation before the Lisbon Treaty would not certainly correspond to the view of the doctrine saying that the competences of international organizations are to be determined or deductible

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<sup>511</sup>Article 19 (3) Treaty on European Union (Consolidated version 2012) OJ C 326, 26.10.2012 wording as follows: *“The CJ EU shall, in accordance with the Treaties: (a) rule on actions brought by a MS, an institution or a natural or legal person; (b) give preliminary rulings, at the request of courts or tribunals of the MS on the interpretation of Union law or the validity of acts adopted by the institutions; (c) rule in other cases provided for in the Treaties.”*

<sup>512</sup>Article 3 (6) Treaty on European Union (Consolidated version 2012) OJ C 326, 26.10.2012.

<sup>513</sup>Article 5 (1) Treaty on European Union (Consolidated version 2012) OJ C 326, 26.10.2012.

<sup>514</sup>J.MAZÁK, M.JÁNOŠÍKOVÁ, *Lisabonská zmluva (Ústavný systém a súdna ochrana)*, Bratislava, 2011, p.120.



from the constituting treaty.<sup>515</sup> The founding Treaties would not consider the provisions of the founding treaties capable to fulfil the doctrinal requirements.<sup>516</sup>

To provide more complex introductory notes may be further the legendary judgment of the ECJ in the case 6/64 clearly saying that: *“The transfer by the states from their domestic legal system to the community legal system of rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights.”*<sup>517</sup>

Historically speaking in reference to this judgment, it was the first judgment referring to the delimitation of the competences. Now, besides the mentioned CJ EU providing the binding interpretation of the EU law, the TEU by itself provides more flexible way as to the increase so as the decrease of the competences. The article 48 TEU lucidly provides that: *“The proposals for the changes of the Treaties]... may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties.”*<sup>518</sup> Such a provision is interesting also for the constitutional courts of the MS permanently controlling the competences of the EU in confrontation to the competences of the MS.<sup>519</sup>

The delimitation of the powers of the international organizations and MS may be as sensitive as the threat of the loose of national sovereignty. For example, Weiler recognizes three types of the possible conflicts, perfectly applicable to the EU-MS relations.<sup>520</sup> Borchardt while considering the nature of the competences of the EU, puts emphasis on the judgments of the CJ EU, which were decided in the

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<sup>515</sup>C.ZANGHI, *Istituzioni di diritto dell'Unione europea: verso una Costituzione europea*, Torino, 2005, p.255.

<sup>516</sup>In this sense it can agree with Belling et al. that the general rule of the international law is that the general competences have the sovereign states and international organizations constitute the exemption from this rule in V.BELLING, J.MALÍŘ, L.PÍTROVÁ, *Kontrola dělby pravomocí v EU se zřetelem ke kompetenčním excesům*, Prague, 2010, p.9.

<sup>517</sup>ECJ judgment, 5 July 1964, *Costa v. ENEL*, case 6/64 [1964] ECR, p.585, para 3.

<sup>518</sup>Article 48 (2) Treaty on European Union (Consolidated version 2012) OJ C 326, 26.10.2012.

<sup>519</sup>The findings of the Czech Constitutional Court, 6 August 2006, case Pl. ÚS 50/04 *Sugar Quotas III*: *“Insofar [...] the development of the EC, or EU would endanger the democratic nature of the state sovereignty of the Czech Republic or any significant elements of the democratic state of law, it would be inevitable to insist that these competences would be given back to the internal organs of the Czech Republic.”*

<sup>520</sup>Walker states that the first of them relates to the external competences, with emphasis on the treaty making power of the central authority. Second one is related to the international capacity of the central authority and the constituent members (MS), and finally last one to the division of the internal implementing competence, as quoted from N.WALKER, *Post-national constitutionalism and the problem of translation* in J.H.WEILLER, M.WIND, *European Constitutionalism Beyond the State*, Cambridge, 2003, p.35-38.

early sixties, actually already legendary judgments forming the very nature of the EU - Van Gend & Loos and Costa vs. Enel.<sup>521</sup> Simon, while commenting the structure of the competences recalls that the division of the competences of the EU v. MS has not satisfactory explicative value. As he adds, the criteria, as founded by the exclusivity or concurrence of the competences have disadvantaged effect to the requirement of the acceptance of the competences as unique system.<sup>522</sup> Daniele in considering the competences of the Union v. MS states that it is suitable to start with the principle of attribution of the competence. As he adds, the Union is not a subject having finality and the general competence. Therefore, it shall act only in the sectors, in which the action is intended by the Treaties and exclusively for the purpose and aims which are provided by the Treaty.<sup>523</sup>

As Canizzaro states, for the appropriate understanding of the system of the competences of the Union, it shall not be paid attention only to the competences themselves. For the evaluation of their content and scope there shall be examined diverse patterns of decision-making, different power-structures between actors involved (MS, Commission, Council, European Council, EP), wide variety of formal and informal, binding and not-binding instruments used, the connections between external policies and between internal and external aspects of the policies. These all are the elements of a complex multi-dimensional construction.<sup>524</sup>

While extending the concept of primarily enacted competences of the original communities, their subsequent expansion may be identified as twofold.<sup>525</sup> First point turns back to the ancient times of the European integration. According to this concept all competences entailed in the treaties were the competences

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<sup>521</sup>K.D.BORCHARDT, *The ABC of European Union law*, Luxembourg, 2010, p.29.

<sup>522</sup>However, the validity of this statement questionable upon the entry in power of the Lisbon Treaty.

<sup>523</sup>L.DANIELE, *Diritto dell'Unione europea : sistema istituzionale, ordinamento, tutela giurisdizionale, competenze*, Milano, 2010, p.356.

<sup>524</sup>L.DANIELE, *Diritto dell'Unione europea : sistema istituzionale, ordinamento, tutela giurisdizionale, competenze*, Milano, 2010, p.356.

<sup>525</sup>E.CANIZZARO, *Unity and Pluralism, Unity and Pluralism in the EU's Foreign Relations Power in C.BAMARD, EU Law Revisited. Assessing the Impact of the Constitutional Debate: Collected Courses of the Academy of European Law*, Oxford, 2007, p.195 ff..

<sup>525</sup>R.SCHÜTZE, *European constitutional law*, Cambridge, 2012, p.163.

having the exclusive nature. The basic presumption of such an approach was that the MS transferred their part of their powers to the EU (EEC, ECSC, EURATOM) and consequently came to the strict separation of competences. Theoretical approach of this idea is further supported by the judgments 30/59 and 6/64. In reference to the judgment 30/59 first one the ECJ decided that: *“In the Community field, namely in respect of everything that pertains to the pursuit of the common objectives within the Common Market, the institutions of the Community have been endowed with exclusive authority.”*<sup>526</sup> Supplementary might be quoted also the judgment 6/64:<sup>527</sup> *“By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and more particular, real powers steaming from a limitation of the sovereignty or a transfer of powers from the States to the Community, the MS have limited their rights, albeit within limited fields and have this created a body of law which binds both their nationals and themselves. As it is evident the ECJ is called to observe and on the safeguard of the attributed competences.”*<sup>528</sup>

Under the Lisbon Treaty, the tendency shows that the priority is given to the competences of the MS however, in any case, can be evident significant spectrum of conflict of competence with reference to the fact which subject had to legislate.<sup>529</sup>

Thus, from the typological point of view, there might be the conflict identified on the three levels with the rule pre-emption having 3 features, mainly as: <sup>530</sup>

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<sup>526</sup>ECJ judgment, 23 February 1961, De gezamenlijke Steenkolenmijnen in Limburg v. ECSC High Authority, case 30/59 [1961] ECR, p.1.

<sup>527</sup>ECJ judgment, 5 July 1964, Costa v. ENEL, case 6/64, [1964] ECR, p.585, para 3.

<sup>528</sup>G.STROZZI, *Diritto dell'Unione europea. Parte istituzionale : dal Trattato di Roma alla Costituzione europea*, Torino, 2005, p.66.

<sup>529</sup>D.CHALMERS,G.DAVIES,G.MONTI, *European Union Law Cases and Materials*, Cambridge, 2010, p.206.

<sup>530</sup>D.CHALMERS,G.DAVIES,G.MONTI, *European Union Law Cases and Materials*, Cambridge, 2010, p.131.

1. '*field pre-emption*' in this case the EU law is considered to have a jurisdictional monopoly over the field, national laws, irrespective of their conflict with EU measures can be enacted only with the authorization of the EU law,
2. '*rule pre-emption*' is characterised by shared jurisdiction over a policy field, national laws can be adopted, but nevertheless, set aside as they conflict with EU law,
3. '*obstacle of pre-emption*' MS are free to adopt national measures, but must not adopt the measures which obstruct the effectiveness of EU policies.

## 4.5 Systematic Redistribution of the Competences

### 4.5.1 Generalities

How to break down the competences in the most tabular way? Certainly, there are several applicable approaches differing from each other. Svoboda provides clear and demonstrative overview, which may serve as starting point for the purposes of this dissertation, respecting the last development of the EU law under the Lisbon Treaty. He goes out from the very last enactment of the competences of the Union in relation to the MS.<sup>531</sup> Hence, it might be identified following categories of competences<sup>532</sup> (for the purposes of the dissertation will be discussed only 3 initially mentioned ones):

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<sup>531</sup>While taking into account the Union as subject having particular features of the Union having according to Svoboda three elements as:1. '*international organization*' of the particular regional nature, semi-open, integration type and supranational, 2. '*confederative*' international foundlings of the EU is changeable only upon approval by all its MS, with emphasis to transfer of the competences, the fundamental changes of the legal order are depending on the MS, 3. '*federative*' among the federative elements meets the requirements of the supranational method of the cooperation, typically applicable for the domain of the exclusive and shared competences with the direct effect of the primary and partially secondary law. Nevertheless, still subjects to certain limits as set forth by the Kompetenz-Kompetenz, rule defining the transfer of the competences between the Union and its MS, quoting P.SVOBODA, *Právo vnějších vztahů Evropské unie*, Prague, 2010, p.29.

<sup>532</sup>In fact the division of the competences is not a novelty, taking into account the previous regulation, jurisprudence to the ECJ and the division of the competences by the ECJ or taking into account the references to the ECJ or mentioned in the previous Treaties. In fact the questionable is the question of the nature of the competition rules, since this has not had exclusive nature at the very beginning – as it appears from the ECJ judgment, 13 February 1969, *Walt Wilhelm and others v. Bundeskartellamt*, case 14/68 [1969] ECR, p.1, nevertheless, in the CJ EU judgment, 14 September 2010, *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, case C-550/07 [2010] ECR, p.I-8301 the Court recalled the fact that competition policy fails

1. division of competences according to the addressee of the competences:

a.) *'vertical'* within which the key issue is the relation between the Union and the MS, giving the answer to the question whether the particular competence has been given to the MS or Union,

b.) *'horizontal'* which defines to which body and in which forms the competences have been attributed.

2. division of the competences according to the principle of conferral:

a.) *'explicit'* meaning their clear provision in the constituent Treaties,

b.) *'implicit or subsidiary'* not clearly defined from the constituent Treaty, but identified by a competent body and related to the functionality of the international organization.

3. division of the competences according to the action of the EU and MS needed:

a.) *'exclusive'* meaning that as the general rule that only the EU can act within the domain which is declared exclusive,

b.) *'shared'* including the action of the MS alongside the EU,

c.) *'coordination, supportive and supplementary'* characterise the competences.

4. division of the competences according to the principles of traditional international law:<sup>533</sup>

a.) diplomacy law,

b.) legacy,

c.) unilateral measures,

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under the scope of the exclusive competences of the Union (it is important to stressed that this judgment was adopted under the entry in power of the Lisbon Treaty).

<sup>533</sup>Not to be analyzed in detailed way within this dissertation, since the three first divisions are the principal and more suitable ones for the purpose of this dissertation.

- d.) conclusion of international treaties,
- e.) international responsibility,
- f.) privileges and immunities.

#### 4.5.2 *Horizontal and Vertical Competences*

Speaking about horizontal separation of powers within the EU, it is spoken about the separation of the powers among the EU institutions between legislative, executive and judicial branch which can recall the traditional separation of powers as it is known from national constitutional law. As Zbíral states to demonstrate the difference, in the EU is separated only judicial power, executed by the CJ EU. Legislative powers are executed by the Commission, EP and the Council, executive is shared by Commission, Council and European Council.<sup>534</sup>

Thus in terms of the EU, in terms of the EU, it may be agreed with Konstandinides saying that the EU institutions do not find an exact institutional counterpart in the national-states clear division of powers,<sup>535</sup> since the EU has created own particular system influenced by three relations:<sup>536</sup>

1. division of powers among the EU and MS,
2. divisions of the competences between the institutions of the EU,
3. complexity of the decision-making procedures between the MS and the EU.

Van Greven stresses that the delimitation of powers between the EU and MS in itself is a most sensitive and disputed matter, and brought much litigation between the MS and EU institutions in which the EU CJ was called to provide a binding opinion as to clear delineation of powers.<sup>537</sup> As a concluding remark in

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<sup>534</sup>R.ZBÍRAL, *Institucionální struktura Evropské unie* in K.KLÍMA (ed.) *Evropské právo*, Plzeň, 2011, p.279.

<sup>535</sup>T.KONSTADINIDES, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States*, Alphen aan den Rijn, 2009, p.51.

<sup>536</sup>V.KARAS, A.KRÁLIK, *Právo Európskej únie*, Prague, 2012, p.58.

<sup>537</sup>W.VAN GERVEN, *The European Union: a polity of states and peoples*, Oxford, 2005, p.19.

regard to division of the competences according to the addressee of the competences may be quoted GA Tesouro saying that: *“The EU legal system is characterized by the simultaneous application of provisions of various origins, international, EU and national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system.”*<sup>538</sup> Hence, the opinion of the CJ EU has a quality of enlargement/reduction of the Community’s (Union’s) competences over the competences of the MS.

Certain approach to the perception of these competences comes out from the principle that these competences have been definitely and irreversibly by the MS by the reason of their straightforward transfer to the Union.<sup>539</sup> However it cannot be forgotten the provisions of the Article 48 TEU. Nonetheless, in generally, the powers of the EU externally further enforces the provision of the Article 3 (2) TFEU by which the Union has exclusive competence for the conclusion of an international agreement when its conclusion is provided for it in a legislative act of the Union and it is necessary to enable the Union to exercise its internal competence or in so far as its conclusion may affect common rules or alter their scope.<sup>540</sup>

Second approach to this kind of distribution of the powers is the presumption that the Union’s powers have as general rule shared nature. Accepting this premise, the MS have only renounced their exclusive rights to act within their territory and permitted to the Union on this territory to exercise the public functions as enacts the provision of the Article 3 of the TFEU. It is suitable to recall the former regulation providing that: *“Each institution shall act within the limits of the powers conferred on it by this Treaty.”*<sup>541</sup> However it must be mentioned

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<sup>538</sup>Opinion GA Tesouro, 13 November 1997, *Hermès International (a partnership limited by shares) v. FHT Marketing Choice BV*, case C-53/96 [1998] ECR, I-3603, para 21.

<sup>539</sup>K.LENAERTS, P.Van NUFFEL, R.BRAY, N.CAMBIEN, *European Union Law*, 2011, p. 152.

<sup>540</sup>This enactment not fully accepted by the doctrine, Dashwood speaks even about *“a somewhat clumsy attempt to codify the previous case law defining when the Union’s competence in the field of external relations is to be considered exclusive”* in A.DASHWOOD, M.DOUGAN, B.RODGER, E.SPAVENTA, I.DASHWOOD, *Wyatt and Dashwood’s European Union Law*, Oxford, 2011, p.101.

<sup>541</sup>Article 7(1) Consolidated version of the Treaty on the functioning of the European Union,

that this provision does not say which powers the institutions of the Union hold.<sup>542</sup> It shall be added to this point that the ECJ excluded the applicability of such powers in the static way but rather interpreting the concrete provision. As the Court said: “[...] *the limits of the powers conferred upon EU Institutions are to be inferred not from the general principle, but from an interpretation of the particular provision in question.*”<sup>543</sup>

In terms of horizontal powers of the EU shall be spoken about the institutional balance. The nature of the institutional balance was confirmed also by the ECJ in the case 9/56 Meroni in which the Court decided that the *‘balance of the powers is characteristic for the institutional structure of the Community.’*<sup>544</sup> In fact, such an outcome was furthermore confirmed by several further judgments and the Court.<sup>545</sup> It might be concluded that to the formation of the horizontal powers, significantly contributed also the ECJ.<sup>546</sup> However, alongside this process is visible the fact that horizontal separation of competences came became less important in the post-Maastricht period, where the co-decision procedure became a standard and involving thus more EP in the decision-making process.<sup>547</sup> This process the doctrine called *‘parlamentarization’* making from EP a full-fledged parliament and the Council a *‘second’* chamber and co-legislator with the EP.<sup>548</sup>

As a general explanation of the main point of the vertical separation of the powers in the EU is the investigation question of the relationship between the MS and the Union. Making initial remarks to the vertical competences might be

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C 83/47, 30.3.2010.

<sup>542</sup>L.CORRIAS, *The Passivity of Law*, Dordrecht, 2011, p. 2.

<sup>543</sup>ECJ judgment, 6 July 1982, France, Italy and United Kingdom v. Commission, joint cases 188-190/80 [1982] ECR, p.2545.

<sup>544</sup>ECJ judgment, 13 June 1958, Meroni v. ECSC High Authority, case 9/56 [1957-1958] ECR, p.133.

<sup>545</sup>E.g. ECJ judgment, 29 October 1980, SA Roquette Frères v. Council of the European Communities, case 179/80 [1982] ECR, p.3623, ECJ judgment, 10 July 1986, Wybot v. Faure and Others, case 149/85 [1986] ECR, p.2391, ECJ judgment, 4 October 1991, Parliament v. Council, case 70/88 [1991] ECR, p.I-4529, ECJ judgment, 6 November 2008, European Parliament v. Council of the European Union, case C-155/07 [2008] ECR, p.I-8103.

<sup>546</sup>V.KARAS, A.KRÁLIK, *Právo Európskej únie*, Prague, 2012, p.58.

<sup>547</sup>G.CONWAY, *Conflicts of Competence Norms in EU law and the Legal Reasoning of the ECJ in German Law Journal*, Volume 11, Number 9, 2010, p.967.

<sup>548</sup>E.O.ERUKSEN, H.E.FOSSUM, *Europea in Search of Legitimacy, Strategies of Legitimation Assessed in International Political Science*, Volume 25, Number 4, 2004, p.446.



quoted van Bogdany and Bast speaking about the interests which are to be protected, saying that the vertical separation of powers concerns the protection of the interests of the MS, whereas the issue of the horizontal separation of powers concerns the efficiency of the process of decision-making in the EU and the further democratization.<sup>549</sup>

Historically, the constituent treaties EC/EU treaty did not contain any provision which would either positively or negatively enumerate which competences are given to the EC/EU institutions by the MS. Thus, the competences of the EC/EU were staked-out functionally, meaning that the EC/EU had staked-out objectives to attain which the EC/EU shall come next.<sup>550</sup> In this sense may be marked the ruling of the ECJ in the case C-301/06 Ireland v. Portugal in which the ECJ ruled that: *“It must be noted that at the outset that the question of the areas of competence of the EU presents itself differently depending on whether the competence in issue has already been accorded to the EU in the broad sense or it has not yet been accorded to it. In the first hypothesis, it is a question of ruling on the division of areas of competence within the Union and more particularly, on whether it is appropriate to proceed by way of a directive based on the EC Treaty or by way of a framework decision based on the EU Treaty. By contrast, in the second hypothesis, it is a question of ruling on the division of areas of competence between the Union and the MS and, more particularly, on whether the Union has encroached on the latter’s areas of competences.”*<sup>551</sup>

Some scholars therefore posed the question whether it was really needed to delimit the competences between the EU and the MS and what would be the right moment for doing so. According to Dashwood: *“[...] there was a time when it would have been considered impolite in Community circles to talk about driving lines at all. That has changed; and I believe the change is healthy, and evidence of the growing maturity of*

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<sup>549</sup>A.von BOGDANDY, J.BAST, *The European Union vertical order of competences in Common Market Law Review*, Volume 39, Issue 2, 2002, p.234.

<sup>550</sup>V.BELLING, J.MALÍŘ, L.PÍTROVÁ, *Kontrola dělby pravomocí v EU se zřetelem ke kompetenčním excesům*, Prague, 2010, p.14.

<sup>551</sup>ECJ judgment, 10 February 2009, Ireland v European Parliament and Council of the European Union, case C-301/06 [2009] ECR, p.I-593 para 54.

*the order.*"<sup>552</sup> Dashwood clearly reflected the development which was experiencing the EC/EU since its history since 1960 that might be characterized as a: "[...] *spectacular growth of policy-making at the European level, so that by the early 1990s, there was virtually no issue area which remained off-limits of the EU.*"<sup>553</sup>

The non-existence of the catalogue of competences had several practical consequences. Giving more examples to this, it may be recalled the provision of the Article 5 (3) TEU providing that the principle of subsidiarity which must have been considered only in relation to areas which do not fall within the exclusive competence of the Union.<sup>554</sup> This provision, together with the provision of the Article 5 TEU (proportionality principle), is according to Craig: "[...] *scant protection for State rights, and little safeguard against an ever-increasing shift of power from the States to the EU.*"<sup>555</sup> As another example may be provided the former Article 43 (d) TEU excluding the possibility to accede to the closer cooperation in certain fields.<sup>556</sup>

Thus, it may be concluded that the competences of the EC/EU till the Lisbon Treaty were not attributed to a determined subject matter but were attributed in regard to the functionality of the EC/EU and were open to a dynamic interpretation given by the ECJ.<sup>557</sup> In fact, till the Lisbon Treaty there was no exhaustive list of the competences of the EC/EU, however the ECJ decided only in two cases on existence of the exclusive competence of the Community – in case of CCP (on the basis of the actual Article 207 TFEU) and in the field of fishery with

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<sup>552</sup>A. DASHWOOD, *The Limits of European Community Powers in European Law Review*, Volume 21, Number 2, 1996, p.128.

<sup>553</sup>M.A.POLLACK, *The End of Creeping Competence? EU Policy-Making Since Maastricht in Journal of Common Market Studies*, Volume 38, Issue 3, 2000, p.521

<sup>554</sup>Actually enacted by Article 5(3) of the Treaty on European Union (TEU) Article 21 Consolidated version of the Treaty on European Union, OJ EU, C 115/13, 9.5.2008 and Protocol (No 2) on the application of the principles of subsidiarity and proportionality, OJ EU, C 115/13, 9.5.2008.

<sup>555</sup>P.CRAIG, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford, 2010, p.156.

<sup>556</sup>Formerly provided in the Article 43 (d) Treaty on European Union (Consolidated version 1997), OJ C 340, 10.11.1997 wording as follows: "*MS which intend to establish closer cooperation between themselves may make use of the institutions, procedures and mechanisms laid down by this Treaty and the Treaty establishing the EC provided that the cooperation: (d) concerns at least a majority of MS.*"

<sup>557</sup>U.EVERLING, *Constitutional Problems of the European Union - A Lawyer's View* in D.SCHMIDTCHEN, R.COOPER (eds.), *Constitutional Law and Economics of the European Union*, Cheltenham, 1997, p.298.

regard to the protection and preservation of biological sources of the sea.<sup>558</sup> As Tokár adds, as further example of the declared exclusive competence can be mentioned the common monetary policy (however not declared by the ECJ),<sup>559</sup> Lenaerts and van Nuffel add that as an exclusive competence of the EC was accepted also the introduction of the common customs tariff.<sup>560</sup>

As another, rather open end-provision was considered the provision of the Article 308 TEC enabling the possibility to make broader the competences of the Community, wording as follows: *“If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall acting unanimously on a proposal from the Commission and after consulting the European Parliament, take appropriate measures.”*<sup>561</sup>

For some scholars, as Schütze, such type of provision represents an open-end possibility for the EU to decide about own competences and implicitly expresses clear doubts about the principle of the attribution of the competences.<sup>562</sup> That position may be confirmed by Zbíral who added that such a provision was in the eighties used for the development of the common policies in environment, support of the regions, development aid which were linked only freely with the common market.<sup>563</sup>

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<sup>558</sup>K.LENAERTS, P.VAN NUFFEL, R.BRAY, *Constitutional law of the European Union*, London, 1999, p.97.

<sup>559</sup>A.TOKÁR, *Členstvo Slovenskej republiky v Európskej únii (Európskych spoločenstvách)* in J.ČORBA (ed.), *Európske právo na Slovensku. Právny rozmer členstva v Európskej únii*, Bratislava, 2002, p.130 and equally The European convention, The secretariat, Description of the current system for the delimitation of competence between the European Union and the Member States, Brussels, 28 March 2002. (OR. fr), CONV 17/02.

<sup>560</sup>K.LENAERTS, P.VAN NUFFEL, R.BRAY, *Constitutional law of the European Union*, London, 1999, p.97.

<sup>561</sup>Article 308 Treaty establishing the European Community (Consolidated version 2006), OJ C 321E, 29.12.2006.

<sup>562</sup>R.SCHÜTZE, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford, 2009, p.152-156.

<sup>563</sup>R.ZBÍRAL, *Institucionální struktura Evropské unie* in K.KLÍMA (ed.) *Evropské právo*, Plzeň, 2011, p.281.

Despite the enactment of the powers between the EU and MS by the Lisbon Treaty the right understanding of the division of the competences is more complex. The enactment of the branches within which can the EU execute the individual powers does not mean the concrete powers are enacted in further provisions of the TEU and the TFEU Treaty. This means in practice that for the direct determination of the subject matter and functional powers of the EU is necessary to determine the real competence of the EU, to be analysed all via the intersection of the provision of the Article 2 TFEU, Article 3-6 with relevant Articles 26-222 TFEU and in case of the domain of CFSP Articles 23-45 TEU.<sup>564</sup> Such understanding of the competences underlines the fact that the powers of the EU are formulated rather as the norms oriented on the finality of every single competence.<sup>565</sup> The logic behind this is that the competences are to be understood as the entitlement for the attainment of a concrete aim and not as an entitlement for a concrete activity.

#### 4.5.3 *Explicit and Implied Powers*

##### 4.5.3.1 *Explicit Powers*

As Craig and de Búrca state: *"The existence and scope of EU competences were key elements in the reform process that culminated in the Lisbon Treaty."*<sup>566</sup> From this short introductory view could be think that this issue was not open-ended one. If the attentive reader recalls the Chapter III, dedicated to the analyses of the features of the international organizations, while speaking about the international organization, one of the key elements is the enactment of the competences in the constituent acts is the formulation of the competences of every international organization. Doctrinal approach was reflected also in the advisory opinion of the ICJ, stating that: *"[...]...the powers conferred on international organizations are*

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<sup>564</sup>J.SYLOVÁ, L.PÍTROVÁ, H.PALDUSOVÁ (et. al.), *Lisabonská smlouva*, Prague, 2010, p. 200.

<sup>565</sup>T.BŘICHÁČEK, *Je vymezení pravomocí EU ohraničené, rozpoznatelné a dostatečně určité?* in *Právník*, Issue 6 2010, p.581.

<sup>566</sup>P.CRAIG, G.de BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2011, p.307.

*normally the subject of an express statement in their constitutional instruments.*<sup>567</sup> These principles are also obvious for the Union containing the provision of the conferral of the powers: *“The Union shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”*<sup>568</sup> Subsequently, the provision insisting on the acting within the powers given to the institution at stake: *“Each institution shall act within the limits of the powers conferred upon it by the Treaty.”*<sup>569</sup>

In order to make the above mentioned advisory opinion complete, it must be furthermore stressed that the international organizations must have certain autonomy: *“But the constituent instruments organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice are all elements which may deserve special attention when the time comes to interpret these constituent treaties.”*<sup>570</sup>

It might be obviously agreed that the powers of international powers of the organizations do not limit to those which are explicitly attributed by the MS and thus grant to the international organizations. The ‘*solution*’ in such a situation comes out of the solution the theory of the implied powers being analysed in detailed way in the following subchapter.

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<sup>567</sup> Advisory opinion of ICJ, Legality of the use by a state of nuclear weapons in armed conflict, 8 July 199, General List No.93, para 64.

<sup>568</sup> Article 5 (2) Treaty on European Union (Consolidated version 2008), OJ C 115, 9.5.2008, wording as follows: *“Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the MS in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the MS.”*

<sup>569</sup> Article 5a and Article 7, Treaty establishing the European Community (Consolidated version 1997) OJ C 340, 10.11.1997.

<sup>570</sup> Advisory opinion ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996 (I.C.J. Rep. 1996 p.66).

#### 4.5.3.2 Implied powers

As Brkan states express attribution of the powers can be labelled as 'formalist approach' according to which the competences are conferred when they are determined by the treaty, when a treaty delimits them in terms of the level of the entity to which competences are conferred and the level of the states conferring them.<sup>571</sup> Thus, the main point is quite simple, and at the same time difficult one.

The implied theory powers '*reconnaissance des pouvoirs impliqués*' came to existence by the US Supreme Court which admitted that the institutions dispose by the powers which are necessary for dully execution of the objectives which were given to them by constitutional treaties.<sup>572</sup> The doctrine of the implied powers appeared shortly after the adaptation of ECSC, EU, EEC although the doctrine does not very often reflect the very first judgments related to this point.<sup>573</sup> From the doctrinal point of point of view, the principle of their appearance may be inferred from the more-detailed development of principle of the effectiveness - an international legal instrument must be intended to achieved an objective, and an interpretation that would make a text ineffective in achieving the objective should be considered as prima facie suspect of '*ut res magis valeat quam pereat*'.<sup>574</sup>

As the theoretical definition clearly defining the explicit powers may be provided Frid's one saying that (in reference to the EU) as a term related to the provision of the EU Treaty which explicitly grant powers to the EU.<sup>575</sup> Nonetheless, the issue of the competences in case of the EC/EU was and still is

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<sup>571</sup>M.BRKAN, *Exploring EU competence in CFSP: Logic or Contradiction?* in *Croatian Yearbook of European Law & Policy*, Volume 2, 2006, p.180.

<sup>572</sup>D.SIMON, *Le système juridique communautaire*, Paris, 2001, p.107.

<sup>573</sup>The author is referring to the first cases, dealing with the implied powers doctrine, as ECJ judgement, 16 July 1956, *Fédéchar v. High Authority of the European Coal and Steel Community*, case 8/55 [1956] ECR, p.292, ECJ judgment, 15 July 1960, *Government of the Italian Republic v High Authority of the European Coal and Steel Community*, case 20/59 [1960] ECR, p.325, ECJ judgment, 12 July 1962, *Kingdom of the Netherlands v High Authority of the European Coal and Steel Community*, case 9/61 [1962] ECR, p.213.

<sup>574</sup>G.De BAERE, *Constitutional Principles of EU External*, Oxford, 2008, p.17.

<sup>575</sup>R.FRID, *The relations between the EC and international organizations: legal theory and practice*, Boston, 1995, p.59.

very sensitive issue, not only from the point of view that the MS tend to maintain the powers which were transferred (or shall be transferred) to the EU, but the problem is furthermore enlarged by the fact that the CJ EU keeps ranging the international agreements free from procedural constraints positioned above secondary legislation which causes further rang of difficulties since the international agreements may invalidate secondary legislation.<sup>576</sup>

The initial appearance of the implied powers goes back to the late sixties and early seventies. This period represented an era, with strong need of establishment of the customs union, when should have been put into practice the fundamentals of common agricultural policy and competition policy. As Weiler states, the reasons were quite pragmatic, saying that: *“The full realization of many EC internal policies clearly depended on the ability of the Community to negotiate and conclude international treaties with third parties. As is the case with MS, the problems facing the Community do not respect its internal and territorial and jurisdictional boundaries. The Treaty itself was rather sparing in granting the Community treaty-making power, limiting it to a few specified cases.”*<sup>577</sup> From the point of view of external relations of the Community, the external relationship were perceived in terms of the need to achieve a CCT at the external borders of the Community together with earliest regulations dealing with valuation and origin of imports.

Originally, the express powers of the EC (EEC) externally were rather fragmented and limited.<sup>578</sup> Among the most notable ones in external policy were especially the part three of the Treaty covering the areas to which the EC Treaty vesting on the institutions extensive internal powers for the regulation of these areas. Among those may be mentioned CTP, CAP, provision on the free

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<sup>576</sup>C.DARCIS, P.VILLALTA, *The development of European Union implied external competence: The Court of Justice and Opinion 1/03* in *Anuario de Derecho Internacional*, Volume 25, 2009, p.503.

<sup>577</sup>J.H.H.WEILER, *The Transformation of Europe* in *Yale Law Journal*, Volume 100, Number 8, p.2416.

<sup>578</sup>Actually, the problem seems to be more-less resolved since the EU Treaty contains list of activities as well as competences.

movement and the competition rules, paradoxically, in terms of the external dimension of them the Treaties remained silent.<sup>579</sup>

However, it became inevitable the development of the internal policies externally. The problem was that the Treaty of Rome, enacted the external powers only in two fields, Article 113 providing the legal basis for the conclusion of agreements relating to the CCP and the Article 238 providing the background for the conclusion of the conclusion of the agreements with more States or international organizations, known as '*Association Agreements*'.<sup>580</sup>

These types of agreements were over the time accompanied by the provisions of the Articles 170 (on cooperation in research, technological development and demonstration) and 174 (4) on environmental protection,<sup>581</sup> the TEU added the Articles 111 on monetary policy and Article 181 on development cooperation, Amsterdam Treaty introduced the modification of the Article 133 (5) allowing to the Council by unanimity to extend the application of the Article 133 (1-4), dedicated to the CCP, Amsterdam Treaty moved the visas, asylum, immigration and other policies related from the third pillar to the first one. Lastly, the Treaty of Nice gave to the EC the competence to enter in economic cooperation and agreements in economic, financial and technical cooperation with third countries and modifying the Article 133 (5) expanding thus the scope of CCP to trade in services and commercial aspects of intellectual property.<sup>582</sup> Duke in addition alleges that the international dimension of the EEC has been important factor giving the EC power to enter into international agreements as set forth in the Article 300 (ex-article 228) providing the provisions on the treaty-making.<sup>583</sup>

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<sup>579</sup>R.HOLDGAARD, L.HOLDGAARD, *External relations law of the European Community: legal reasoning and legal discourses*, Alphen aan den Rijn, 2008, p.113.

<sup>580</sup>S.V.KONSTADINIDIS, M.D.EVANS, P.CAPPS, *Asserting jurisdiction: international and European legal perspectives*, Portland, 2003, p.85.

<sup>581</sup>The Single European Act, OJ No L 169, 27.06.1987.

<sup>582</sup>R.HOLDGAARD, L.HOLDGAARD, *External relations law of the European Community: legal reasoning and legal discourses*, Alphen aan den Rijn, 2008, p.23.

<sup>583</sup>S.DUKE, *Areas of Grey: Tensions in EU External Relations Competences in EIPASCOPE*, Volume 1, 2006, p.22.



#### 4.5.4 AETR Doctrine

The solution to this key question (to the existence of the external powers) has been given once again decided by the ECJ in the ruling AETR ruling. The Court decided that an express attribution of powers was not required for the EC to act on the international plane.<sup>584</sup>

In this judgment was at stake the division of the competences between the MS and the EEC. The question has arisen from the simple situation, regarding the work condition of the crews working in the international road transport. At the outset was the AETR agreement which was signed at the auspices of the UN Economic Commission for Europe. As to the signature, the MS intended to conclude it by themselves. However, on the other part of was the EC which found this act as non-consistent with the EC law in power at that time. The issue at stake was to be decided by the ECJ by the preliminary ruling on the question. The principal question was if the EC may conclude an international agreement in the branch of transport, in case that this competence was not explicitly enacted.

On practical level, the Commission asked the ECJ to nullify the proceeding of the Council deciding that the MS shall be those subjects which are responsible for the negotiation and conclusion of European agreement on work of crews of vehicles engaged in international road transport.<sup>585</sup> It must be recalled the known fact that the EEC at that time did not dispose clear provision on its international legal personality.

As the first crucial point of the ECJ argumentation is quite clear argument that in case of the lack of clear disposition granting the Community the power to conclude the international treaties, one must turn back to the general system of the EU - third countries relations. That means in practice that the EC enjoys the full

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<sup>584</sup>ECJ judgment, 31 March 1971, *Commission v. Council*, case 22/70 [1971] ECR, p.263.

<sup>585</sup>R.HOLDGAARD, L.HOLDGAARD, *External relations law of the European Community: legal reasoning and legal discourses*, Alphen an den Rijn, 2008, p.97.

capacity to establish contractual links between the EC in order to fulfil the objectives as defined in Part one of the Treaty, supplementing its Part six.

This part of the Court's argumentation the doctrine evaluates as the effort of the Court to avoid the prospective of uncoordinated external representation of the EC by its MS in fields in which they had adopted common internal policies.<sup>586</sup> Conway perceives this part of the judgment that the ECJ considered the absence of an express provision on the conferring an international a legal personality as a big issue, since it do not prevent a conclusion of the treaties. His argumentation comes out of the judgment *Van Gend en Loos and Franz Grad*.<sup>587</sup> In addition, the ECJ provided in its reasoning that there may not overlook the structure of the Treaty in its complexity. Giving emphasis on the whole structure of the Treaties the ECJ has given the preference to rather systematic interpretational approach.

The clear affirmation of implied powers of the Community was mentioned in the paragraph 16 of the Court's argumentation. As the Court said "*Such authority [to enter into contractual obligations in international relations] arises not only from an express conferment by the Treaty – as is the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for associations agreements – but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provision, by the Community institutions.*"<sup>588</sup> Wyatt and Dashwood state on this point, the usage of the term '*authority*', since it in their view the term authority is a contrasting one to the term capacity. The term authority shall in their view indicate the application of the principle of conferral linked strictly to existence of the relevant legal basis, not as a universal entitlement.<sup>589</sup>

As the Court continued in the paragraph 17 of the judgment: "*Once the Community has laid down common rules common rules in whatever form, the MS 'no*

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<sup>586</sup>P.CRAIG, G.de BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2011, p.173.

<sup>587</sup>G.CONWAY, *The Limits of Legal Reasoning and the European Court of Justice*, Cambridge, 2012, p.32.

<sup>588</sup>ECJ judgment, 31 March 1971, *Commission v. Council*, case 22/70 [1971] ECR, p.263, para 16.

<sup>589</sup>A.DASHWOOD, M.DOUGAN, B.RODGER, E.SPAVENTA, I.DASHWOOD, *Wyatt and Dashwood's European Union Law*, Oxford, 2011, p.912.

longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope.”<sup>590</sup> As it adds further: “As and when such common rules come into being, the Community is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal order. With regard to the implementation of the provisions of the Treaty the system of internal Community measures may not be therefore be separated from that of external relations.”<sup>591</sup>

Doing so, the Court opened the way towards the doctrine of parallelism, meaning the co-existence of the competences of the Community externally, and in the same the internally, or putting it in more clear way, as the system within which the internal Community measures may not be separated from that of external relations.<sup>592</sup> The doctrine apart from Dashwood and Wyatt perceives the judgment as the way towards absolute powers of the EC to act internationally. Hill and Smith state that: “The principle is called the AETR-formula providing the open-end enlargement of the treaty-making competence over the whole applicability of the EC Treaty.”<sup>593</sup> Similar opinion has also Zanghi, claiming there were adopted common rules by the MS, however, only the Community in the same matters may negotiate and adopt the eventual international obligations having the effect towards all MS.<sup>594</sup> Interesting argument was raised also by Berry and Hargreaves saying that as to the outcome of the judgment, once the Community has taken action, it has exclusive competence in that area and can act regardless of the principle of subsidiarity.<sup>595</sup> As the doctrine further confirms, the nature of the implied external powers comes into play as far as internal competences (by adopting legislation on that field) have been exercised.<sup>596</sup> As Chalmers and Szyczak state, the doctrine of

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<sup>590</sup>ECJ judgment, 31 March 1971, Commission v. Council, case 22/70 [1971] ECR, p.263, para 17.

<sup>591</sup>ECJ judgment, 31 March 1971, Commission v. Council, case 22/70 [1971] ECR, p.263, para 18-19.

<sup>592</sup>C.J.HILL, M.SMITH, *International Relations and the European Union*, Oxford, 2005, p.354.

<sup>593</sup>L.MÜNCH, *Die gemeinsame Aktion als Mittel der Gemeinsamen Außen- und Sicherheitspolitik*, Berlin,1997, p.173.

<sup>594</sup>C.ZANGHI, *Istituzioni di diritto dell'Unione Europea : verso una Costituzione europea*, Torino, 2005, p.327.

<sup>595</sup>E.BERRY, S.HARGREAVES, *European Union Law*, Oxford, 2007, p.44.

<sup>596</sup>A.BIONDI, P.EECKHOUT, *EU Law after Lisbon*, Oxford, 2012, p.397.

parallelism, as appeared via the judgment AETR, the EC has gained corresponding external competence in any field within which it has internal competences and thus effectively removes the distinction between the express and implied powers.<sup>597</sup> Nonetheless, according to the narrow formulation, the existence of a given powers implies also the existence of any other power which is reasonably necessary for the exercise of the explicit ones, according to the wide formulation, the existence of a given objective or function implies the existence of any power reasonably necessary to attain it.<sup>598</sup> Finally, it might be agreed with Rossam that with regard to the implied powers theory the Court in fact decided that conferral of internal competence could be sufficient in this respect.<sup>599</sup>

In any case, the outcome of the judgment AETR is the recognition of the implied powers of the Community under the condition that there was already internal legislation in the place and it was necessary to attain the internal objectives. In the view of Eeckhout the judgment represents a strong constitutionalist approach to the EC external relations law and labelled it as activist and supportive for European integration.<sup>600</sup> It might be fully agreed with Cremona's view that the judgement was: "[...] a crucial step in the evolution of Community's external relations, enabling the development of an external dimension to policies that might otherwise have remained purely internal, broadening the possibilities for Community interaction with other international actors and allowing the Community to participate in international law-making,"<sup>601</sup> which in consequence contributed indirectly that the CCP became over the years the core part of the integrated external relations system. It is without doubt that the Court's decision may be considered 'gelockerte AETR Rechtsprechung des Gerichtshofs' through which the EC

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<sup>597</sup>D.CHALMERS, E.SZYSZCZA, *Towards a European polity ?*, Aldershot, 1998, p.164.

<sup>598</sup>T.C. HARTLEY, *The Foundations of European Community Law*, Oxford, 1994, p.112.

<sup>599</sup>J.W van ROSSEM, *Interaction between EU law and international law in the light of Intertanko and Kadi: The dilemma of norms binding the Member States but not the Community*, Hague, 2009, p.11.

<sup>600</sup>P.EECKHOUT, *Bold Constitutionalism and Beyond* in M.P.MADURO, L.AZOULAI (eds.), *The Past and Future of EU Law: the Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, Oxford, 2010, p.218.

<sup>601</sup>M.CREMONA, *Evolution of EU Law* in P.CRAIG, G.de BÚRCA, *The Evolution of EU law*, Oxford, 2011, p.223.

competences were even more enlarged.<sup>602</sup> Such opinion shares also Klabbers saying that the ECJ in this decision tends to the broader perception of the competences and not searching for the justification of the effect utile of the legal act itself, but rather giving the preference to the fulfillment of one of the objectives of the Treaty.<sup>603</sup>

The logic of the judgment was in fact transformed into the provision of the Article 216 (1).<sup>604</sup> Upon the changes in the Lisbon Treaty the Article 216 (1) reads as follows: *“The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”*<sup>605</sup> It may be posed the question whether such a provision converted into the Lisbon Treaty is consistent or even wider going to as the principle of the parallelism. It might be mentioned the opinion of Schütze stating that in the past the external powers were derived from the internal ones and the treaty did not attributed the treaty-making power to pursue the internal objective. Being enacted the provision of the Article 216 (1) is clearly disconnected the Union’s external competences from the internal ones.<sup>606</sup>

#### 4.5.5 Kramer Doctrine

Further step forward in understanding of the implied powers is the judgment Kramer in joined cases 3,4 and 6/76 Cornelis Kramer<sup>607</sup> by which the ECJ was asked to provide an interpretation of the EEC Treaty and the Act concerning the conditions of accession and the adjustment of the Treaties and regulation

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<sup>602</sup>T.OPPERMANN, *Europarecht : ein Studienbuch*, Munich, 1999, p.660.

<sup>603</sup>J.KLABBERS, *An Introduction to the International Institutional Law*, Oxford, 2005, p.71.

<sup>604</sup>D.CHALMERS, G.T.DAVIES, G.MONTI, *European Union law: cases and materials*, Oxford, 2010, p.640.

<sup>605</sup>Article 216 (1) Consolidated version of the Treaty on the functioning of the European Union, C 83/47, 30.3.2010.

<sup>606</sup>R.SCHÜTZE, *European Constitutional Law*, Cambridge, 2012, p.196.

<sup>607</sup>ECJ judgments, 14 July 1976, Cornelis Kramer and others, joined cases 3,4-6/76 [1976] ECR, p.1279.

providing the background for the common structural policy for the fishing industry.

The reasoning of the Court in terms of the implied competences is clear from the very beginning: *“To establish in a particular case whether the Community has authority to enter into international commitments, regard must be had to the whole scheme of Community law no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty, but may equally flow implicitly from other provisions of the Treaty, from the Act of Accession and from measures adopted, within the framework of those provisions, by the Community institutions.”*<sup>608</sup>

The ECJ went further as in the previous ruling, however, holding that the existence of implied external power flowed from express internal power and was no necessarily depended upon the adoption of internal rules and stressed that such a provision may implicitly flow from other provisions of the Treaty, Act of Accession or any other measured adopted on their basis. So, the judgment Kramer may be perceived as further Court’s contribution to the parallelism already mentioned in the former case.<sup>609</sup>

However, there are some further points to be referred to. The Court clearly mentioned that there was no specific provision of the Community to enter international commitments in the sphere of the biological resources of the sea. However, the Court explicitly pointed to the fact that if there is an explicit provision missing, attention shall be given to the sphere of external relations of the Community.<sup>610</sup>

As the ECJ has decided, the only way to ensure the conservation of the biological resources of the sea both effectively and equitably is to do so through a

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<sup>608</sup>ECJ judgments, 14 July 1976, Cornelis Kramer and others, joined cases 3,4-6/76 [1976] ECR, p.1279, para 19-20.

<sup>609</sup>A.OTT, R.WESSEL, *The EU’s external relations regime: multilevel complexity in an expanding Union* in S. BLOCKMANS, A.LAZOWSKI (eds.), *The European Union and its Neighbours*, Hague, 2006, p.26.

<sup>610</sup>ECJ judgments, 14 July 1976, Cornelis Kramer and others, joined cases 3,4-6/76 [1976] ECR, p.1279, para 16.

system of rules binding on all the states concerned, including non-MS. Under these circumstances it flows from the very duties and powers which Community law has established and assigned to the institutions of the Community on the internal level that the Community has authority to enter into international commitments for the conservation of the resources of the sea.<sup>611</sup>

According to Labouz, it seems that by the ruling in the case Kramer seems to abandon the requirement of precedent execution of the measures on the internal plain (adoption of internal measures) in order to found the external implicit competence.<sup>612</sup> The judgment provided once again rather an open-end approach towards the possible conclusion of the treaties for the realization of the internal competences, having for consequence enormous growth of the external competences of the Community which subsequently became the engine of the growth of the external powers of the Community and subsequently also the internal ones. As Bluman and Dubois state the ECJ became: “[...] *le moteur de l’expansion du domaine des compétences externes...ouvrant ensuite la voie à l’édication de législations internes.*”<sup>613</sup>

#### 4.5.6 ECJ Opinion 1/76

Further development of the parallelism represented the opinion of the ECJ 1/76, being in doctrinally perceived as the ‘*second phase of the parallelism.*’<sup>614</sup> By this opinion the ECJ was asked about the existence of competence given to the Community to conclude an agreement regulating the particular fund European fund for inland waterway vessels.

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<sup>611</sup>ECJ judgments, 14 July 1976, Cornelis Kramer and others, joined cases 3,4-6/76 [1976] ECR, p.1279, para 30-33.

<sup>612</sup>M.F.LABOUZ, *Droit communautaire européen général*, Bruxelles, 2003, p.239.

<sup>613</sup>C.BLUMANN, L.DUBOIS, *Droit institutionnel de l’Union Européenne*, Paris, 2004, p.328 state that the ECJ became the motor of the expansion of the external powers, opening the way for the construction of the internal ones.

<sup>614</sup>Starting from the opinion of the Court given in the Opinion 1/76 the parallelism led to the extreme consequences of the external competences, even in the absence of the internal legal regulation with an aim not to intervene into the potential internal powers, in C.CURTI GIALDINO, *Codice dell’Unione Europea Operativo - TUE e TFUE commentati articolo per articolo*, Roma, 2013, p.86.

The ECJ in its reasoning stressed the principle of *'effect utile,'* since the attainment of the objective as determined by the Treaty only by the introduction of internal Community legislation. This approach was further supported by the fact that there are some vessels from Switzerland which shall be also included in the scheme of the Agreement.<sup>615</sup>

Going out from the material conditions of the international Treaty from the very beginning, it may be no wonder that the Court decided the case as follows: “[...] authority to enter into international commitments may not only arise from an express attribution by the Treaty, but equally may flow implicitly from its provisions. The Court has concluded *inter alia* that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection.”<sup>616</sup> As the Court continues: “This is particularly so in all cases in which internal power has already been used in order to adopt measures which come within the attainment of common policies.”<sup>617</sup> The above mentioned part of the Court’s opinion seems to be just confirmation of the existing jurisprudence of the ECJ. As e.g. Groux states doing so, the ECJ affirmed in the clear way the existing parallelism between the external and internal competences.<sup>618</sup>

Nonetheless, the Court in the paragraph 4 develops further this idea. As the Court continues: “It is, however, not limited to that eventuality. Although the internal community measures are only adopted when the international agreement is concluded and made enforceable ... the power to bind the Community vis-a-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal

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<sup>615</sup>ECJ opinion, 26 April 1977, pinion given purusant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels', opinion 1/76 [1977] ECR p.741, para 1-2.

<sup>616</sup>ECJ opinion, 26 April 1977, pinion given purusant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels', opinion 1/76 [1977] ECR p.741, para 3.

<sup>617</sup>ECJ opinion, 26 April 1977, pinion given purusant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels', opinion 1/76 [1977] ECR p.741, para 4.

<sup>618</sup>J.GROUX, *Le parallélisme des compétences internes et externes de la CEE* in *Cahiers de Droit Européen*, Volume 14, 1978, p.18.



*power and in so far as the participation of the Community in the international agreement is ... necessary for the attainment of one of the objectives of the Community.*"<sup>619</sup>

The opinion gave an impetus for a rich discussion on its appropriate interpretation among the scholars. Mengozzi in commenting this opinion tried to find the parallels to the AETR judgment and alleges that it uses '*slightly cautious language*.'<sup>620</sup> In his view, however, the ECJ did not insisted properly on the condition of necessity, maybe surprisingly the question of the necessity was not fully examined, without paying attention to the ordinary analysis of the fact whether the commitments as they arise from the Treaty could have been undertaken by the MS or stating that this agreement is inextricably linked to the Community objectives.<sup>621</sup> Cremona perceives the opinion as enforcing of the exclusivity principle, excluding the national participation which led to repetitive criticism calling for a continued role of the MS in international organizations as EU is.<sup>622</sup>

One of the most straight forward opinions presented Kovar, stating that such a decision suppressed any necessary links between the attribution of the external competences to the Community and pre-emptive precedent internal acts of the institutions of the EU, meaning in the practice that the only condition of the necessity of the action was the realization of one of the objectives of the Treaty.<sup>623</sup> It appears to be close to true since the Opinion 1/76 confirmed the existence the independence of implied external powers from the presence of secondary law.<sup>624</sup>

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<sup>619</sup>ECJ opinion, 26 April 1977, pinion given purusant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels', opinion 1/76 [1977] ECR p.741, para 4.

<sup>620</sup>P.MENGOZZI, *The EC External Competencies: From the ERTA Case to the Opinion in the Lugano Convention* in L.M.POIARES MADURO, L.AZOULAI, *The past and the future of the EU law*, Oxford, 2010, p.213.

<sup>621</sup>P.MENGOZZI, *The EC External Competencies: From the ERTA Case to the Opinion in the Lugano Convention* in L.M.POIARES MADURO, L.AZOULAI, *The past and the future of the EU law*, Oxford, 2010, p.213.

<sup>622</sup>E.g.M.CREMONA, *External Relations and External Competence: The Emergence of an Integrated Policy* in P.CRAIG, G. de BÚRCA, *The Evolution of EU Law*, 1999, Oxford, p.137.

<sup>623</sup>R.KOVAR, *La Contribution de la Cour de Justice au Développement de la Condition Internationale de la Communauté Européenne* in *Cahiers de Droit Européen*, Volume 14, 1978, p.538.

<sup>624</sup>R.SCHÜTZE, *From Dual to Cooperative Federalism: The changing Structure of European Law*, Oxford, 2010, p.239.

Labouz perceives the opinion as the express sanctification of the principle *'in foro interno, in foro externo'*, meaning that if there is a Community competence (even implicit and not executed one), it was given the right to the Community to conclude international agreements which cannot be attained by the adoption of common rules.<sup>625</sup>

Accepting this premise, it could be thinkable that this opinion certainly contributed to the clarification (if not overcoming of the AETR doctrine). As Pescatore states: *"[the opinion] put an end to the uncertainty inherent to the AETR judgment as to whether an external competence may be recognized also in cases where the Community, though having jurisdiction, has not yet covered the field by internal measures. ... The opinion 1/76 makes clear that the existence of a virtual capacity is sufficient in this respect, even if it has not yet been exercised for internal purposes."*<sup>626</sup>

Thus, the implied competence to enter into the international commitments is explained by the fact that such an entrance into international commitments represents a necessary element of the internal competence flowing from the relevant legal basis. Therefore, the designation of such type of the competences is can be labelled as *'complementary competences.'*<sup>627</sup> It cannot be however forgotten that their very existence avoids the MS to act autonomously. As Dovuyt says that: *"1/76 doctrine means that when the Community has conferred upon the Community institutions internal powers for the attaining a specific objectives, the Community can enter into the international commitments necessary for the attainment of that objective. On the other hand the very existence of the promulgated Community rules is that MS cannot act within the framework within which the Community institutions assume*

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<sup>625</sup>R.SCHÜTZE, *From Dual to Cooperative Federalism: The changing Structure of European Law*, Oxford, 2010, p.239.

<sup>626</sup>P.PESCATORE, *External Relations in the Case-Law of the Court of Justice of the European Communities in Common Market Law Review*, Volume 16, 1979, p.621.

<sup>627</sup>The decisive factor of the complementary competence is that it does not have effect of extending the substantive scope of the expressly conferred competence by adding to the range of things the Union is authorised to do, however, it is the recognition of the possibility for the Union to conclude international agreements in cases where competence to act was not given expressly, in: A.DASHWOOD, M.DOUGAN, B.RODGER, E.SPAVENTA, I.DASHWOOD, *Wyatt and Dashwood's European Union Law*, Oxford, 2011, p.916-917.

obligations, which might affect those rule or alter their scope.”<sup>628</sup> Perception of the opinion as supplementary and exceptional was at the end confirmed by the ECJ in the opinion 2/92.<sup>629</sup>

Not all authors share the same opinion. I.e. Svoboda identifies 4 reasons of the existence of the implied powers reflecting the existence of the opinion 1/76. In his view, for the existence of the implied powers there are essential the following conditions 1. a specific aim given by the Community, 2. the necessity of the external negotiation for its attainment, 3. predominant existence of the internal regulation 4. untouchability of the system of the Community law.<sup>630</sup>

When speaking about the AETR doctrine being materialized in the provisions of the Article 216 (1), the outcome of the Opinion 1/76 is its codification in the article 3 (2) TFEU reading as follows: *“The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.”*<sup>631</sup>

#### 4.5.7 ECJ Opinion 2/91

The content of the notion of the urgent need in sense of ‘*necessity – necessary*’ remained nevertheless unclear and needed to be clarified. The ECJ was provided

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<sup>628</sup>Y.DEVUYST, *The European Union's Constitutional Order -Between Community Method and Ad Hoc Compromise* in *Berkeley Journal of International Law*, Volume 18, Issue 1, Article 1, 2000, p.13.

<sup>629</sup>It is true that, as the Court stated in ECJ opinion, 26 April 1977, Opinion given pursuant to Article 228 (1) of the EEC Treaty - 'Draft Agreement establishing a European laying-up fund for inland waterway vessels', opinion 1/76 [1977] ECR, p.741., the external competence based on the Community's internal powers may be exercised, and thus become exclusive, without any internal legislation having first been adopted. However, this relates to a situation where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of autonomous rules (see Opinion ECJ , 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, reference to ECJ opinion, 15 November 1994, Opinion of the Court of 15 November 1994. - Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty, opinion 1/94 [1994] ECR, p.I-5267, para 54.

<sup>630</sup>P.SVOBODA, *Právo vnejších vztahů Evropské unie*, Prague, 2007, p.54.

<sup>631</sup>Article 3 (2) Consolidated version of the Treaty on the functioning of the European Union, C 83/47, 30.3.2010.

more light into this question in the Opinion 2/91. The opinion represented the further test of efficiency of the AETR doctrine that the MS cannot assume obligations which 'affect those rules or alter their scope'<sup>632</sup> meaning those of the EC/EU.

The question at stake was the competence of the Community to conclude the Convention of the ILO No. 170. From the factual point of view, the ILO was an agency, having a character of UN specialized agency being oriented on labour conditions of the employees mainly against harmful effects of the chemicals at the workplace.

It is important to stress also the fact that the legal regulation at stake (working conditions of the employees) has been subject to the harmonization rules having different nature. However, it must be recalled also the fact that the Agreement did not concern the Community directly, since it was not a member of the Organisation and unlike the case 12/86 the ECJ was called to rule on the Agreement to which the Community was not a party.<sup>633</sup> Thus the ILO agreement had a particular status. From a formal view, it was not a mixed agreement '*stricto sensu*' since the Community could not formally become accepted to this agreement, since the accession to this agreement was limited only to the States, nonetheless, from the subject-matter point of view, the subject-matter was falling into the competence as MS than the EC.<sup>634</sup>

From the very beginning the Court presented the sources of the inspiration in terms of competences while saying: "*The exclusive or non-exclusive nature of the Community's competence does not flow solely from the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which have been adopted by the*

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<sup>632</sup>N.LAVRANOS, *Protecting European Law from International Law in European Foreign Affairs*, Volume 15, 2010, p.275.

<sup>633</sup>D.O'KEEFFE, A.BAVASSO, *Judicial review in European Union law*, Hague, 2000, p.212.

<sup>634</sup>R.LEAL ARCAS, *United we Stand, Divided we Fall - The European Community and its Member States in the WTO Forum: towards greater Cooperation on Issues of Shared Competence?* in *European Political Economy Review*, Volume 1, Number 1, 2003, p.67.

*Community institutions for the application of those provisions and which are of such a kind as to deprive the MS of an area of competence which they were able to exercise previously on a transitional basis.*"<sup>635</sup>

Secondary, the Court made clear that the general principle contained in the judgement AETR still remains the relevant one for the case law of the ECJ. As the Court states: *"The authority of the decision in that case (AETR) cannot be restricted to instances where the Community has adopted Community rules within the framework of a common policy. In all the areas corresponding to the objectives of the Treaty, Article 5 requires MS to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. The Community's tasks and the objectives of the Treaty would also be compromised if MS were able to enter into international commitments containing rules capable of affecting rules already adopted in areas falling outside common policies or altering their scope.*"<sup>636</sup>

The key question was the determination of the subject entitled to conclude this agreement. From the argumentation of the Court are crucial paragraphs 17-18, nonetheless, it cannot be overlooked the fact that according to the 118a of the EEC Treaty MS were under not very clear and concrete obligation to adopt certain concrete measures in the field of social policy.<sup>637</sup>

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<sup>635</sup>Opinion ECJ, 19 March 1993. Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, [1993] ECR, p. I-1061, para 9.

<sup>636</sup>Opinion ECJ, 19 March 1993. Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, [1993] ECR, p. I-1061, para 10-11.

<sup>637</sup>Opinion ECJ, 19 March 1993. Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, [1993] ECR, p. I-1061, para 17-18 wording as follows: *"MS shall pay particular attention to encouraging improvements, especially in the working environment, as regards the health and safety of workers, and shall set as their objective the harmonization of conditions in this area, while maintaining the improvements made. In order to help achieve the objective laid down in the first paragraph, the Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the MS. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. The provisions adopted pursuant to this Article shall not prevent any MS from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty."*

According to the ECJ: *“Under Article 118a of the Treaty, MS are required to pay particular attention to encouraging improvements, especially, in the working environment, as regards the health and safety of workers, and to set as their objective the harmonization of conditions in this area, while maintaining the improvements made. In order to help achieve this objective, the Council has power to adopt minimum requirements by means of directives.”*<sup>638</sup>

However, using the ‘*more mindful language*’<sup>639</sup> in considering the competences of the EU and MS must be investigate to which extend the subject-matter has been already covered by the rules, adopted by the EU and within which the MS cannot undertake the commitments outside of the framework of the Community institutions.<sup>640</sup> The ECJ comments this type of investigation in the following way: *“The Community thus enjoys an internal legislative competence in the area of social policy. Consequently, Convention No. 170, whose subject-matter coincides moreover, with that of several directives adopted under Article 118c, which falls within the Community’s area of competence.”*<sup>641</sup>

Further on might be mentioned the principle of the cooperation between the MS and the EC, where Court decided: *“[...] when it appears that the subject-matter of an agreement or contract falls in part within the competence of the Community and in part within that of the MS, it is important to ensure that there is a close association between the institutions of the Community and the MS both in the process of negotiation and conclusion and in the fulfillment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the*

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<sup>638</sup>Article 118a Treaty establishing the European Community (Consolidated version 1992) Official Journal C 224 of 31 August 1992.

<sup>639</sup>P.MENGOZZI, *The EC External Competencies: From the ERTA Case to the Opinion in the Lugano Convention* in L.M.POIARES MADURO, L.AZOULAI, *The past and the future of the EU law*, Oxford, 2010, p.213.

<sup>640</sup>ECJ opinion, 19 March 1993, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, opinion 2/91[1993] ECR, p. I-1061, para 25.

<sup>641</sup>ECJ opinion, 19 March 1993, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, opinion 2/91[1993] ECR, p. I-1061, para 16-17.

*international representation of the Community.*"<sup>642</sup> Schütze perceives this part of the Court's opinion as '*triumph of parallelism*' (in terms of the shared powers) arguing by the fact that the Court provided syllogistic reasoning in relation to the existence of implied external powers and thus '*encapsulates the doctrine of parallelism in its purest form.*'<sup>643</sup> As subsidiary argument for that may be also the remark of the Court saying that an agreement may be concluded in the area where the competence is shared between the Community and the MS where the negotiation and implementation require a joint action by the Community and the MS.<sup>644</sup>

In any case, the judgment has risen significant attention of the scholars in EU law.<sup>645</sup> The ECJ again adjudicated that there shall be once again applied the principle of the parallel competences - internal and external competences.

However, the opinion expressed in the case ILO clearly stated that there will be no exclusive EU competence if and when EU shapes the minimum standards, as ILO conventions usually provide. By the argumentation ex-contra may be argued that the EU is assumed to have exclusive competence when EU directives are to take the form of total harmonization.<sup>646</sup> Such opinion is shared also by Kellerbauer, stating that with the use of the Community competences will be done by the sufficient degree of the Community subject-matter legislation without the necessity that the final legal form would be enacted by Community

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<sup>642</sup>ECJ opinion, 19 March 1993, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, opinion 2/91[1993] ECR, p. I-1061, para 36.

<sup>643</sup>R.SCHÜTZE, *From Dual to Cooperative Federalism: The changing Structure of European Law*, Oxford, 2010, p.239.

<sup>644</sup>ECJ opinion, 19 March 1993, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty - Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, opinion 2/91[1993] ECR, p. I-1061, para 12.

<sup>645</sup>For instance Dashwood and Hillion, propose upon this judgment for existence of implied competences a test of the treaty-making competences of the Communities. The key issue is the answer on the question, if the Community needs the treaty-making power to ensure the optimal use, over time, of its expressly conferred competences. Therefore, they go out from the logic of the facilitation rather than indispensability. Priority of the facilitation over the exclusivity of external powers is derived by the fact that: Facilitation is a concept, with regard to the necessity, the exclusivity of implied powers is governed by a stricter concept of necessity and therefore the linkage between the internal and external competences must be inextricable, quoted A.DASHWOOD, C.HILLION, *The General Law of E.C. External Relations*, Cambridge, 2000, p.16.

<sup>646</sup>P.NEDERGAARD, *The European Union at the ILO's International Labour Conferences: A 'double' principal—agent analysis* in K.E.JØRGENSEN (ed.)*The European Union and International Organizations*, New York, 2008, p. 157.

regulation (in sense of the legal act).<sup>647</sup> However, she has some doubts on the use of the term of '*sufficiency of the harmonization*'.<sup>648</sup> The vague argumentation as given by the ECJ met with the criticism as being considered as '*a relaxation of the conditions of the AETR principle and constituting thus a uncertainty*'.<sup>649</sup> For McGoldrick is in similar situation hard to predict under which circumstances the MS would be deprived of their rights to act autonomously in the international sphere.<sup>650</sup>

#### 4.5.8 ECJ Opinion 1/94

Next analyses will have two stage impacts, since the subject-matter of the opinion concerns not only the question of the competences but also the question of the accession of the EU accession to the WTO principally linked to the main argument of the dissertation. The Court's Opinion 1/94 resolves a dispute between the European Commission and the Council on determination of the competence to enter into WTO. Actually, it will be analysed the technical part, meaning exclusively the competence issue, the subject-matter analyses will be provided later on, in the Chapter V.

As to demonstrate the complexity of the issues covered by the opinion, this is far more reaching than it is covered by the Article 133 (ex-Article 113, actually Article 207 TFEU, on CCP) of the TEC especially in regard to the trade in services, intellectual property falling outside of the CCP at that time.<sup>651</sup> Moreover, the value of the opinion at later stages concerns the evaluation of the latest developments of

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<sup>647</sup>M.KELLERBAUER, *Von Maastricht bis Nizza, Neuf Formen differenzierter Integration*, Berlin, 2003, p.122.

<sup>648</sup>M.KELLERBAUER, *Von Maastricht bis Nizza, Neuf Formen differenzierter Integration*, Berlin, 2003, p.122.

<sup>649</sup>A.DASHWOOD, M.DOUGAN, B.RODGER, E.SPAVENTA, I.DASHWOOD, *Wyatt and Dashwood's European Union Law*, Oxford, 2011, p.927.

<sup>650</sup>D.MCGOLDRICK, *International Relations Law of the European Union*, London, 1997, p.74.

<sup>651</sup>T.TRIDAMAS, P.NEBBIA, *European Union law for the twenty-first century : rethinking the new legal order*, Oxford, 2004, p.322 mentions several articles of the Treaty on European Communities affected by the Opinion as Articles 37, 44,47,55,71, 80 (2),93, 94, 95 and 308 Treaty establishing the European Community (Consolidated version 1997), OJ C 340, 10.11.1997, affected by the Opinion.



the treaty-making power of the EC and the analysis of its consequences for the conduct of external economic relations of the EU.<sup>652</sup>

From the point of view of the Commission, there was little doubt that the Court would back its stance and confirming thus the enlarged sphere of competences even to new issues, nonetheless remained necessary to test the Court's view on the competences in the post-Maastricht era.<sup>653</sup>

Thus, the European Commission addressed a request to the ECJ concerning two principal questions. First of them was whether the EC had a competence to conclude all parts of the Agreement establishing the WTO concerning the trade in services (GATS) and the trade-related aspects of intellectual property rights including trade in counterfeit goods (TRIPs) on the basis of the EC Treaty, more particularly on the basis of Article 113 EC alone or with combination of other provisions of the WTO agreement. Furthermore, the Commission asked whether the EC had a competence to conclude the WTO in regard to products and services in terms of the ECSC and EAEC Treaties. To make it brief, the key point was whether the Community was entitled to conclude all the above mentioned agreements what Bourgeois called the '*cronica de la muerte anunciada*.'<sup>654</sup>

As Corrias states, the Opinion 1/94 was a special case in comparison to the Opinion 1/76 since the Opinion 1/76 came out in case of the situation when an objective could have been attained '*with the help of the international agreement*.'<sup>655</sup> More to this, also the AETR doctrine was been modified and '*interpreted*' in different way as till the Opinion 1/94. Antoniodis speaks even about the

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<sup>652</sup>F.MANCINI, *Democracy and Constitutionalism in the European Union: Collected Essays*, Oxford, 2000, p.231.

<sup>653</sup>S.MEUNIER, *Trading Voices: The European Union in International Commercial Negotiations*, Princeton, 2005, p.26.

<sup>654</sup>J.H.J.BOURGEOIS, *External Relations Powers of the European Community in Fordam international law journal*, Volume 22, Issue 6, Article 11, 1998, p.159.

<sup>655</sup>L.CORRIAS, *The passivity of law: competence and constitution in the European Court of Justice*, Dordrecht, 2011, p.10.

'overturning of the AETR doctrine.'<sup>656</sup> The 'correction' might be perceived several two ways.

First of all, the ECJ excluded the existence of the external competences in case when an internal power to harmonized was not exercised in the specific field<sup>657</sup> or whenever the Community has included in its internal legislative acts (in terms of the treatment of nationals of non-MS) or expressly conferred on its institutions powers to negotiate with non-MS acquires the external competences over whole area covered by such acts,<sup>658</sup> and lastly where the Community has achieved complete harmonization of the rules in case that the common rules could be affected in case the MS retained freedom to negotiate with non-member countries.<sup>659</sup>

From the opinion may be retained several conclusions. First of all, the Court confirmed that the criteria for the competences in the Opinion 1/76 are not absolutely applicable in case of the non-existence of any prior internal legislation.<sup>660</sup> As Craig said, the ECJ clearly adjudicated that (in relation to GATS) the general exclusive external competences depended on actual factual exercise of internal powers and not on their mere existence,<sup>661</sup> and conditioned them by adoption of some level of enactment on the EC level.<sup>662</sup> Thus, the necessary condition is the existence of the competence is a precedent existence of real act, since the existence of competence in itself is not sufficient.<sup>663</sup>

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<sup>656</sup>A.ANTONIADIS, *The EU's Implied Competence to Conclude International Agreements after the Reform Treaty. Reformed Enough?* in F.LAURSEN, *The EU in the Global Political Economy*, Brussels, 2009, p.76.

<sup>657</sup>ECJ opinion, 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty, opinion 1/94, [1994] ECR p. I-5267, para 88.

<sup>658</sup>ECJ opinion, 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty, opinion 1/94, [1994] ECR p. I-5267, para 95.

<sup>659</sup>ECJ opinion, 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty, opinion 1/94, [1994] ECR p. I-5267, para 96.

<sup>660</sup>M.CREMONA, *External Relations and External Competence of the European Union: the Emergence of an Integrated Policy* in P.CRAIG, G.de BÚRCA, *Evolution of EU Law*, Oxford, 2011, p.245.

<sup>661</sup>P.CRAIG, *EU administrative law*, Oxford, 2012, p.413.

<sup>662</sup>S.HELD, *Die Haftung der EG für die Verletzung von WTO-Recht*, Tübingen, 2005, p.63.

<sup>663</sup>F.KAISER, *Gemischte Abkommen im Lichte bundesstaatlicher Erfahrungen*, Tübingen, 2009, p.21.

The Court has equally restricted the applicability of the 1/76 principle to the Article 235 TCE: *“Save where internal powers can only be effectively exercised at the same time as external powers, internal competence can give rise to exclusive external competence only if it is exercised.”*<sup>664</sup>

Thus, the Court has in fact determined the three pre-conditions as a test of the attribution of the exclusive competences to the EU. As to Mengozzi, these conditions are the following ones :<sup>665</sup>

1. if it has included in its internal legislative acts provisions relating to the treatment of nationals of non-MS or expressly conferred on its institutions powers to negotiate with non-MS,
2. if the area has been the object, on a Community level, of a complete harmonization,
3. if, in the absence of such a harmonization, the conclusion of the agreement from the Community is *‘intrinsically linked’*, and therefore, absolutely indispensable for the attainment of the objectives of the Community.

It might be agreed with Craig and de Búrca that the Opinion 1/94 represents the first high-profile shift by the Court away from its expansive case-law on the exclusive nature of the EC’s implied external competences.<sup>666</sup> As Nettesheim states, the ECJ by this judgment significantly changes his case-law from the seventies providing the imagination of the balanced and counterweighted division of the competences between the EU and the MS while relativizing the axiom of the need of delimitation of competences.<sup>667</sup> Thus, upon the Opinion 1/94, it could have

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<sup>664</sup>ECJ opinion, 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty, opinion 1/94, [1994] ECR p. I-5267, para 89.

<sup>665</sup>P.MENGOZZI, *The EC External Competencies: From the ERTA Case to the Opinion in the Lugano Convention* in L.M.POIARES MADURO, L.AZOULAI, *The past and the future of the EU law*, Oxford, 2010, p.214.

<sup>666</sup>P.CRAIG, G.de BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2011, p.314.

<sup>667</sup>A.von BOGDANDY, *Europäisches Verfassungsrecht : theoretische und dogmatische Grundzüge*, Berlin, 2003, p.437.

seemed that the scope of the exclusive competences extremely limited to the cases when there is almost physical necessity.<sup>668</sup>

#### 4.5.9 ECJ Opinion 2/94

The existence of the competences in a domain of human rights was the principal one in examining the possible accession of the EC/EU to the ECHR and than a mere accession of the EU to the ECHR. Since the Treaties were silent on the existence of the competence of human rights, the Court had to answer the question how the human rights are included in the legal order of the EC/EU. The doctrine recalled, that this question shall be answered with urgency, since the EC/EU significantly interfered the sphere numerous aspects, having the human rights background. Such an opinion expressed e.g. Eeckhout stating that the questions of the enactment and protection of fundamental rights has even constitutional quality. As he says: “[...] *the question of the scope and nature of the EU’s powers in the area of the protection of human rights is central to European constitutionalism. As the EU grows into an ever more blooded polity, with a correspondingly rich legal system it gets involved in an increasing number of areas which may affect basic rights of citizens and non-citizens, such as immigration, asylum, non-discrimination and criminal law.*”<sup>669</sup>

The Court has declared the request for opinion admissible as far as it concerns the conclusion of the Convention, however, rejected part of the opinion by which was called to rule on examination of the compatibility of the Convention with the Treaties.

In regard to the competences, the Court recalled the principle of conferral being equally applicable to the external and internal action of the Community.<sup>670</sup>

Further on, the Court recalled that the Community basically operates on the basis

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<sup>668</sup>P.J.G.KAPTEYN, *The Law of the European Union and the European Communities, With Reference to Changes to be Made by the Lisbon Treaty*, Hague, 2008, p.1280.

<sup>669</sup>P.EECHOUT, *EU External Relations Law*, Oxford, 2011, p.95.

<sup>670</sup>Meaning in fact that the implied powers have certain limit as Ott and Wessel state, or as decided the ECJ in the Opinion 1/94, reference to A.OTT, R.WESSEL, *The EU’s external relations regime: multilevel complexity in an expanding Union* in S. BLOCKMANS, A.LAZOWSKI (eds.), *The European Union and its Neighbors*, Hague, 2006, p.24.

of the principle of the express powers, but in the same time admits that in absence of the express attribution of powers may the competences come out of the implied powers.<sup>671</sup> This seems to be logical point, since no Treaty enacts the rules on human rights or conclusion of international convention in this field.<sup>672</sup>

In the practice the EC institutions applied practically the principle of '*functional human rights competence*'<sup>673</sup>, meaning that the respect for human rights was considered a condition for lawfulness of the Community legal acts, meaning that the institutions have a duty to make sure that their acts do not violate fundamental rights.<sup>674</sup> To be even more objective to the EC/EU, the EP as early as in the year 1989 adopted the Declaration of Fundamental Rights and Freedoms,<sup>675</sup> doctrinally considered the first important step towards the EC codification of rights and freedoms.<sup>676</sup>

Despite of these indications, the Court decided that the enacted human rights would have an impact of the Community and the MS having '*constitutional significance*', thus the accession would be possible only via the Treaty amendment and in consequence ruled that there is no Competence for the EC/EU to conclude the ECHR.<sup>677</sup> The Court similarly excluded the applicability of the Article 235 TCE, since this shall be applied in accordance with the system of conferral and while

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<sup>671</sup>ECJ opinion, 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, opinion 2/94 [1996] ECR p.I-1759, para 25-26.

<sup>672</sup>ECJ opinion, 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, opinion 2/94 [1996] ECR p.I-1759, para 27., however, as as Fierro states, the Community was bound by the human rights at least as the result of the international customary law, in E.FIERRO, *The EU's approach to human rights conditionality in practice*, New York, 2003, p.247.

<sup>673</sup>As defined by EECKHOUT referring to P.EECKHOUT, *The EU Charter of Fundamental Rights and Federal Question in Common Market Law Review*, Volume 39, 2002, p.984.

<sup>674</sup>P.EECHOUT, *EU External Relations Law*, Oxford, 2011, p.99.

<sup>675</sup>*Declaration of Fundamental Rights and Freedoms*, OJ C 120, 16.5.1989, p. 51.

<sup>676</sup>M.RYNKOWSKI, *Freedom of Religion in the European Union* in A.BODNAR, *The emerging constitutional law of the European Union : German and Polish perspectives*, Berlin, 2003, p.74.

<sup>677</sup>De Búrca points to the fact that it is the issue of the subsidiarity, requiring the cooperation between the EU and the MS in working out on the constitutional implication of submission to an external legal order, as the Court has insisted on the need for formal treaty amendment, involving national constitutional procedures as pre-condition for accession to the ECHR. Reference to G. de BÚRCA, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor in Journal of Common Market Studies*, Volume 36, Issue 2, 1998, p.225.

staying within the scope of the Treaty which was not recognized to the system of ECHR.<sup>678</sup>

In conclusion the Court came to the *'evasive and laconic'*<sup>679</sup> conclusion that: *"It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention."*<sup>680</sup>

Thus, the practical consequence of the opinion and ensuring the compatibility with the primary law with the opinion would be to: *"[...] amend the EC Treaty to provide the authority for EC accession to the ECHR because the belief in and protection of human rights must be in core of a thriving constitutional system."*<sup>681</sup> Thus, the Opinion 2/94 together with the Passenger Name Record Agreement remained as rather exceptional examples of explicit denial of the EU external competences.<sup>682</sup>

#### 4.5.10 ECJ judgment *Open Skies*

Open Skies judgement represents a complete set of judgments delivered by the ECJ with regard to the external aviation policy. The judgment in its nature clarified the separation of powers between the MS and the EU in terms of international air services, a domain which was principally regulated on the basis of bilateral agreements between states. The principal point of the dispute was the completing of the internal market and the proper functioning of the market and combatting the possible distortion in case of the MS could have a right to conclude the international agreements in this field (or better said already concluded ones). To be correct, it is needed to be said that there was several secondary legislation adopted by the institutions as Council Regulation (EEC) No 2407/92 of 23 July

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<sup>678</sup>G.De BAERE, *Constitutional Principles of EU External*, Oxford, 2008, p.30.

<sup>679</sup>D.OLIVER, *The Singularity of the English Public Private Divide* in D.O'KEEFFE, A.BAVASSO (eds.), *Judicial review in European Union law*, Hague, 2000, p.328-329 called the judgment as *'evasive and laconic'* and mentions in reference to further doctrine the possible fear of the Court of increasing competences of any external institutions.

<sup>680</sup>Opinion ECJ, 28 March 1996, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, case 2/94 [1996] ECR p.I-1759, para 36.

<sup>681</sup>T.C.STEVER, *Protecting Human Rights in the European Union: An Argument for Treaty Reform* in *Fordham International Law Journal*, Volume 20, Issue 3, Article 10, 1996, p.927.

<sup>682</sup>D.B.HOLLIS, *The Oxford Guide to Treaties*, Oxford, 2012, p.123.

1992 on licensing of air carriers, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services, Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems, Council Regulation (EEC) No 3089/93 of 29 October 1993 and Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports.

As a Court decided, while repeating the already existing case-law, the external competence may arise when international commitments fall under the scope of the common rules, if the subject-matter is already covered by such rules and whenever the Community has included in its internal legislative acts the provision dedicated the treatment of its nationals.<sup>683</sup>

#### *4.5.11 ECJ Opinion 1/03*

Lastly while analysing the theory of implied powers; it is worth to mention the Opinion 1/03, significantly defining the implied powers of the Community. The question at stake was once again the determination of the competent subject to conclude the Lugano Convention, new convention on jurisdiction and recognition and enforcement of judgements in civil and commercial matters intended to the replace the old Lugano convention. Principally, the competence of the Community has not been put into doubts, since the Community was the contractual party of such the old agreement, however it remain questionable the extent of the competences.

Naturally, the aim of the necessity is the completion of the system of recognition and enforcement of the judgments recalls also Baume in his reflection of the judgment, taking into account the relationship between the Community

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<sup>683</sup>ECJ judgment, 5 November 2002, Commission of the European Communities v. Federal Republic of Germany, case C-476/98 [2002] ECR, p.I-9855, para 102-103, 108-109.

regulation and its counterparts represented by the international agreement.<sup>684</sup> Doctrinally and also practically, the judgement can be divided into two parts, firstly, the examination and determination of the exclusive competences of the Community to conclude international agreements and secondly, the examination of the competence of the Community in regard to the conclusion of the Lugano Convention.<sup>685</sup> According to Eeckhout both legal acts are complex legal instruments full of detailed and technical provisions on the jurisdiction in civil and commercial matters.<sup>686</sup>

First of all, the Court declared request of the opinion admissible, even the situation of the situation when the situation at stake was concentrated on the division of the competences between the Community and the non-MS.<sup>687</sup> The key argumentation of the Court in terms of the recognition of the competences contains two principal paragraphs 115-116.<sup>688</sup>

As the Court stated in the paragraph 115, the competence is exclusive when the objectives of the Union cannot be attained without the contemporary use of the external and internal competences.<sup>689</sup> Secondly, as provided in the paragraph 116, the competence is exclusive in case that in the sector which is subject to the agreement have been already adopted the 'Community norms' under that condition, the MS has no more power to conclude the agreements with third states

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<sup>684</sup>T.BAUMÉ, *Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006* in *German Law Journal*, Volume 7, Number 8, 2006, p.682.

<sup>685</sup>F.POCAR, *The external competence of the European Union and private international law: the EC court's opinion on the Lugano Convention: proceedings of the round table held at Milan University on 16 September 2006*, Padova, 2007, p.8.

<sup>686</sup>P.EECKHOUT, *EU External Relations Law*, Oxford, 2011, p.110.

<sup>687</sup>ECJ Opinion, 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, case 1/03 [2006] ECR p. I-1145, para 112.

<sup>688</sup>A.ADINOLFI, *Materiali di diritto dell'Unione Europea*, Torino, 2011, p.256.

<sup>689</sup>ECJ opinion, 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, opinion 1/03 [2006] ECR p. I-1145, para 115.



which are in conflict with those norms in order to assure the coherence of the normative action of the Union.<sup>690</sup>

The Court has confirmed the existence of the exclusive competences in case when the conclusion of an agreement by the MS would be incompatible with the unity of the common market and uniform application of Community law, or when the nature of the existing Community provisions, such as legislative measures contained the clauses related to the treatment of national of non-MS or to the complete harmonization of a particular issue, any agreement in that area would affect the Community rules.<sup>691</sup> As the Court stated the Community enjoys the exclusive competence, however there is a need of: “[...] *specific analysis of the relationship between the agreement envisaged and the Community law in force and from which it is clear that the conclusion of such an agreement is capable of affecting the Community rules.*”<sup>692</sup> In the analysis it is necessary to examine the: “[...] *area which is covered to a large extend of the Community rules,*” which meant: “[...] *not only the actual of the current development of the Community law but also its future development.*” Thus, the key aspect remains to ensure a uniform and consistent application of Community law.<sup>693</sup>

At the final stage, mentions the Court the test of the competences to be declared exclusive: “[...] *account must be taken not only the area covered by the Community rules and by the provisions of the agreement envisaged, insofar as the latter are known, but also of the nature and content of those rules and those provisions, to ensure*

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<sup>690</sup>ECJ opinion, 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, opinion 1/03 [2006] ECR p. I-1145, para 116.

<sup>691</sup>ECJ opinion, 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, opinion 1/03 [2006] ECR p. I-1145, para 122.

<sup>692</sup>ECJ opinion, 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, opinion 1/03 [2006] ECR p. I-1145, para 124.

<sup>693</sup>ECJ opinion, 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, opinion 1/03 [2006] ECR p. I-1145, para 125-126.

*that the agreement is not capable of undermining the uniform and consistent application of the Community rules and the proper functioning of the system they establish.”*<sup>694</sup>

What is the outcome of the judgment? Ringbom states that the Court has abandoned the rule, insisting on the extend of harmonization internally, as not ruling out the applicability of AETR principle of exclusivity,<sup>695</sup> being confirmed by the reference to the particularities of the situations as adjudicated in the Open Skies judgment and the Opinion 1/94.<sup>696</sup> However, Cremona provides rather that the case is a confirmation of the existing principle of distribution of powers providing the clear distribution of powers between the EC and the MS is determined not only by the scope of Community powers but also by its very nature.<sup>697</sup> For Cremona, there are five principal elements to be mentioned. As the first point, the Court affirmed that the implied external powers may be exclusive or shared. In her view the Court laid to the rest the doubts as they have arisen from the Opinion 2/91. Secondly, although not confirmed clearly, the Opinion 1/76 still continues the theoretical existence as a basis for exclusive competence even being enforced since the court *‘forgets’* to refer to *‘inextricable link’* between the Community objective and the conclusion of the international agreement. Thirdly, the AETR test is striking, ensuring uniform and consistent application of the Community law and the proper functioning of the system. Thus, it is a purpose of the exclusive competences to be emphasized rather than make reference to the *‘only examples’* of restriction of exclusive competences. As the fourth argument mentions the *‘disconnection clauses’* designed for the protection of the autonomy of the Community legal order, meaning that in relation between the EU MS as parties to an international agreement, the relevant provisions of Community law

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<sup>694</sup>ECJ opinion, 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, opinion 1/03 [2006] ECR p. I-1145, para 133.

<sup>695</sup>H.RINGBOM, *The EU maritime safety policy and international law*, Leiden, 2008, p.68.

<sup>696</sup>ECJ Opinion, 7 February 2006, Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, opinion 1/03 [2006] ECR p. I-1145, para 121.

<sup>697</sup>C. HILLION, *Tous pour un, Un pour tous!* in M.CREMONA, *Developments in EU External Relations Law*, Oxford, 2008, p.26.

shall apply. Lastly, this case represents a pilot judgment in terms of the existence of an opt-out, referring to opt out clause of Denmark, not participating in the Title IV of the EC Treaty.<sup>698</sup>

On the other hand, Koutrakos identifies partially other principles. As the first one, appreciates that the judgement in the clearest way underpins the implied powers which may exist and not being exclusive, secondly emphasizes the fact that for the exclusivity play significant role the uniformity, consistency of the EC rules, thirdly, shares the view of the requirement of duly assessment of the competence while testing the premise of that: “[...] *the area shall be already covered to a large extent by Community law.*”<sup>699</sup>

As it comes out of the Opinion, the Opinion 1/03 seems to be resisting on the safeguarding the uniformity and effectiveness of the Community law and thus supporting the open-end perception of the AETR judgment and refusing ‘*discontinuity clause*’ as a guarantee that the Union rules have not been affected, but rather vice versa.<sup>700</sup> From all arguments comes out that the Court turned back to its precedent case-law and provided rather open-end than restricted approach towards the AETR principle. Finally, the Court has clarified the issue of the existence of the competences and their nature. It must be agreed with De Baere stating that the Court left behind unanswered the question of the ‘*large coverage*’ by the legislation and the very notion ‘*area*’ being the key points for the determination of the external competences of the Union.<sup>701</sup> Apart from that, the judgment may be considered as a turnover from the formalistic-quantitative approach towards the ‘*in concreto*’ one, meaning that in examination whether the international

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<sup>698</sup>M.CREMONA, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, Number 22, 2006, p.7 ff..

<sup>699</sup>J.McMAHON, P.KOUTRAKOS, *External Relations in International and Comparative Law Quarterly*, Volume 59, Issue 2, 2010, p.482.

<sup>700</sup>P.EECKHOUT, *EU External Relations Law*, Oxford, 2011, p.112.

<sup>701</sup>G.De BAERE, *Constitutional Principles of EU External*, Oxford, 2008, p.50.

agreements are likely to affect the unity and the uniform application of the EU law considering also the future foreseeable development of the EU law.<sup>702</sup>

Thus, it does not appear surprising fact that as an outcome of the Opinion, only the EU became the contractual party of to the new Lugano Convention<sup>703</sup> consequence of which is that the competences of the MS in the field of private international law *'were drastically curbed.'*<sup>704</sup> As it has been shown above, the ECJ has significantly enlarged the scope of the exclusive powers by recognition of the competences of the EC/EU in relation to its MS.

#### 4.5.12 *Division of Competences according to their Enactment*

##### 4.5.12.1 *General Remarks*

Historically speaking, as was mentioned, the EU did not have any precise catalogue of the competences. Thus, it was not clear at the first sight from the Treaties in which precise policy areas the Union may legislate and in which the MS retain the power to legislate.<sup>705</sup> The Treaties contained the determination of the EU objectives (contained in the Article 4 TEU) and the subject matter within which the EC could have potentially executed its activities, thus it must be spoken about two different types of issues.

However, also the formulation of the objectives is not without importance. As Pescatore stated, rejecting the idea that the enumeration as not legally binding is not true, since it provides a basis important source for the interpretation of the Treaty since they express the ratio for the acting for the Community institutions.<sup>706</sup>

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<sup>702</sup>G.VILLALTA PUIG, C.DARCIS, *The development of European Union implied external competence: The Court of Justice and Opinion 1/03* in *Anuario de Derecho Internacional*, Volume 25, 2009, p.510-511.

<sup>703</sup>F.HOFFMEISTER, *The European Union and the Peaceful Settlement of International Disputes* in *Chinese Journal of International Law*, Volume 11, Issue 1, 2012, p.85.

<sup>704</sup>Th.M. de Boer, *Living apart together: The relationship between Public and Private International Law* in *Netherlands International Law Review*, Volume 57, Issue 2, 2010, p.195.

<sup>705</sup>J.SHAW, L.HOFFMANN, *Constitutionalism in the Future of Europe, Debate: The German dimension* in *German Politics*, Volume 13, 2004, p.634.

<sup>706</sup>P. PESCATORE, *Les Objectifs de la Communauté européenne comme principe d'interprétation dans la jurisprudence de la Cour de Justice*, Bruxelles, 1972, p.325.

They represent thus the direction that must be followed for fulfilment of these objectives.<sup>707</sup>

However, the determination of the objectives does not mean the attribution of the competences, since the indication of the objectives does not correspond to the recognition of the powers of the Community of necessary for their realization.<sup>708</sup> The further shortcoming of the Article 4 was that this only enumerated the areas which may provide a place for the execution of the Community competences, however without defining its extend to the competences which attain the MS.<sup>709</sup>

#### 4.5.12.2 *Exclusive Competences*

Speaking about the competences, as it was presented in last subchapter, it seems to be the premise of the fact that the division of competences of the EC (Union) – MS, tended to be decided in favour of their increase in favour of the former ones. In other words, such kind of interpretation of the ECJ may lead to their perception as rather interpretation being extensive.

Exclusive competences, as Schütze claims, are double-edged provisions. Their positive side entitles one authority to act, whereas their negative side is that they exclude from acting the MS autonomously within its scope.<sup>710</sup> Certain authorities label the exclusive competences '*draconic*,<sup>711</sup> or are characterized them as powers which have been definitely and irreversibly forfeited by the MS by reason their straightforward transferred to the Community.<sup>712</sup> Strozzi recalls the fact that the exclusive competences were not explicitly contained in the Treaty itself, nevertheless might have been derived only from the content and the text of

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<sup>707</sup>ECJ judgment, 21 February 1973, *Europemballage Corporation and Continental Can Company Inc. v. Commission of the European Communities*, case 6/72 [1973] ECR, p.215.

<sup>708</sup>A.TIZIANO, *Lo sviluppo delle competenze materiali delle Comunità europee* in *Rivista di diritto europeo*, 1981, p.144.

<sup>709</sup>V.M.SÁNCHEZ et al., *Derecho de la Unión Europea*, Barcelona, 2010, p.29.

<sup>710</sup>R.SCHÜTZE, *European constitutional law*, Cambridge, 2012, p.164.

<sup>711</sup>D.CHALMERS, G.DAVIES, G.MONTI, *European Union Law Cases and Materials*, Cambridge, 2010, p.188.

<sup>712</sup>K. LENAERTS, P. VAN BUFFEL, *Constitutional Law of the European Union*, London, 2005, p. 95.

the normative text (original or the derivative one) and the finality of the legal acts and not lastly, précised by the CJ EU which has on various occasions ruled on the nature of the competences of the Union.<sup>713</sup>

Thus, the principle of exclusive competences therefore follows also from the case-law of the CJ EU encompassing the conclusion of international agreements, when it is provided in by a legislative act of the Union or is necessary to enable the Union to exercise its internal competence or in so far as the conclusion may affect common rules or alter their scope.<sup>714</sup>

In fact, their contemporary legal enactment is a result of anchoring of the explicit basis for the EU policies by 1. adding the explicit legal basis in the TFEU Treaty, 2. reflection of the interpretation of the CJ EU to the existing Treaty provisions.<sup>715</sup> The ECJ provided in the case 804/79 *Commission v. United Kingdom* in the sector of the biological resources a guideline for determination of the nature of the competences. Court evidently decided that the competence to adopt the legal acts destined for the conservation of fish falls fully and definitively to the Community and therefore, the MS have not anymore the right to execute the autonomous power in terms of the conservation, being thus an exclusive competence of the Community.<sup>716</sup> As to the possibility to act for the MS, the Court added that the acting from the MS is conditioned by special authorisation of the Community.<sup>717</sup>

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<sup>713</sup>G.STROZZI, *Diritto dell'Unione europea. Parte istituzionale*, Torino, 2009, p.57 while making reference to the point that the real concept of the exclusive competence appeared since the Maastricht treaty containing in its original Article 3b Treaty on European Union (Maastricht Treaty) OJ C 191, 29.07.1992, principle of the attribution of powers, the principles of subsidiarity and proportionality.

<sup>714</sup>A.WEBER, *The Distribution of Competences between the Union and the Member States* in J.B.HERMANN, S.MANGIAMELI (eds.) *The European Union after Lisbon: constitutional basis, economic order and external action*, Heidelberg, 2012, p.318.

<sup>715</sup>G.De BAERE, *The Framework of EU external competences for developing the external dimensions of EU asylum and migration policy* in Working Paper No. 50, Leuven, 2010, p.7.

<sup>716</sup>ECJ judgment, 5 May 1981, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, case 804/79, [1981] ECR p.1045.

<sup>717</sup>ECJ judgment, 15 December 1976, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs*, case C-41/76 [1976] ECR, p.1921.

The exclusive competences represent those, which were transferred to the EU, from which no more powers remained to the MS. From the positive law enumeration of the competences comes out that these represent those competences which are necessary to ensure the univocal position of the EU in the economic and monetary integration where any divergent positions would not be desirable. The MS cannot adopt any legal acts in the domain of the exclusive competences since they apply exclusively the EU law.

To end up with all uncertainty, the Lisbon Treaty having a clear purpose to eliminate the overlap between the law-making powers of the EU and its MS.<sup>718</sup> More to that, the clear division of the competences shall distinguish their proper functioning and give clear rules in regard to the MS, taking into account the consequences derivative from the particular competence.<sup>719</sup> However, the delimitation itself is not an automatic solution. According to Craig, the creation of the categories of competences inevitably brings problems related to the demarcating borders between their different categories between the exclusive and shared competences.<sup>720</sup>

Actually, the exclusive competences are characterized doctrinally as having 4 elements: <sup>721</sup> 1. the existence of the power to adopt the legislative acts having binding nature only in the name '*in capo*' of the EU, 2. the absence of the powers of the MS to adopt the legal acts, even in case of the non-action of the EU, 3. limited powers of the MS to act, acting exclusively in the situations (if authorized by the Union) or they concern the legal acts aimed on the execution of the Union acts and

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<sup>718</sup>However, as Ravluševičius states, some some potential conflicts may arise in the sphere of non-exclusive competences of the EU, reference to P.Ravluševičius, *The Enforcement of the primacy of the European Union Law: Legal doctrine and practice in Europaos Sajungos teises virsebubes igyvendinimas, Jurisprudencija*, Volume 18, Issue 4, 2011, p.1371.

<sup>719</sup>R.ADAM, A.TIZZANO, *Lineamenti di diritto dell'Unione europea*, Torino, 2010, p.36.

<sup>720</sup>P.CRAIG, *EU administrative law*, Oxford, 2012, p.372.

<sup>721</sup>L.DANIELE, *Diritto dell'Unione europea: sistema istituzionale, ordinamento, tutela giurisdizionale, competenze*, Milano, 2010, p.363.

4. as Draetta adds, the MS preserve only the competence to issue legal non-binding acts as recommendations, opinion etc..<sup>722</sup>

Considering the competences having exclusive character, they are enacted by the Article 3 TFEU. The subject-matter covers the areas of customs union, establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the MS whose currency is euro, the conservation of maritime biological resources under the common fisheries policy and finally common commercial policy.<sup>723</sup> Apart from the 'classical' exclusive powers as contained in the Article 3 TFEU, Craig furthermore adds a concept of the conditional exclusivity, referring to the provisions of the Article 3 (2) which shall be read in conjunction with the article 216 of the TFEU, wording as follows (reference to the AETR principle): *"The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope."*<sup>724</sup> However the doctrine perceives this provision as coming close to eliding to act via an international treaty with exclusivity of that power.<sup>725</sup> Unclear nature of this provision comments de Baere as being of: *"[...] little use in ex-ante clarifying the extent of the Union's exclusive competences because the criteria listed appear to be liable to contestation and hence in need of judicial clarification."*<sup>726</sup>

It remains to analyse whether the Union's MS disposes by any kind of the jurisdiction in these matters. Recalling the judgement on Fisheries Conservation it

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<sup>722</sup>U.DRAETTA, *Elementi di diritto dell'Unione Europea / Parte istituzionale : ordinamento e struttura dell'Unione Europea*, Torino, 2009, p.58.

<sup>723</sup>Article 3 Consolidated version of the Treaty on the functioning of the European Union, C 83/47, 30.3.2010.

<sup>724</sup>Article 3 (2) Consolidated version of the Treaty on the functioning of the European Union, C 83/47, 30.3.2010.

<sup>725</sup>P.CRAIG, G.de BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2011, p.80.

<sup>726</sup>G.De BAERE, *Constitutional Principles of EU External*, Oxford, 2008, p.80 rises several points to the discussion, like not precise wording of the of which legal act shall be used as the basis, not precise and wording of necessarily to enable the Union to exercise its internal competence and it is not without doubts also the third sentence, insofar its conclusion may affect the common rules or alter their scope, is also perceived as being too general, and in fact excluding the mixed agreements, in fact, as it was analyzed in the precedent subchapters, the criteria of the CJ EU are already known.



was decided that the MS may be authorized by the EEC to adopt necessary regulatory measures acting as trustees of the common interest, provided that they act in close consultation and co-operation with the Commission.<sup>727</sup>

However, the MS are not fully autonomous within the competences which do not fall within the framework of the exclusive ones. The CJ EU did not admit the full autonomy of the MS in the following way: *“Whilst it is not in dispute that EU law does not detract from the powers of the MS [recognized in particular in the areas of direct taxation, social protection, education, attribution of nationality, civil status or persons], the fact remains that, when exercising those powers, the MS must comply with EU law.”*<sup>728</sup> According to Azoulai, such a formulation means that the scope of the applicability extends also beyond the subject-matters within which it was given the competence to the EU.<sup>729</sup>

However, the far reaching scope of competences is not an expression of the Kompetenz-Kompetenz granted to the EU. We may agree with Strozzi considering the competences of the Union as exceptional in regard to the national competences, while confirming the derivative character of the competences of the Union, of their no-originally character, based on the will of the MS competent to transfer them upon it.<sup>730</sup>

#### 4.5.12.3 Shared Competences

The fundamental principle of the shared competences is enshrined in the Article 2 (2) of the TFEU, reading as follows: *“When the Treaties confer on the Union a competence shared with the MS in a specific area, the Union and the MS may legislate and adopt legally binding acts in that area. The MS shall exercise their competence to the*

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<sup>727</sup> ECJ judgment, 5 May 1981, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, case 804/79 [1981] ECR, p.1045.

<sup>728</sup> CJ EU judgment, 13 April 2010, Nicolas Bressol and Others and Céline Chaverot and Others v Gouvernement de la Communauté française, case C-73/08 [2010] ECR, p. I-2735, para 28.

<sup>729</sup> L.AZOULAI, *The ‘Retained Powers’ Formula in the Case Law of the European Court of Justice: EU Law as Total Law?* in *European Journal of Legal Studies*, Volume 4, Issue 2, 2011, p.193.

<sup>730</sup> G.STROZZI, R.MASTROIANNI, *Diritto dell’Unione europea. Parte istituzionale*, Torino, 2011,p.66.

*extent that the Union has not exercised its competence. The MS shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.*"<sup>731</sup>

Thus, as Reinisch says, in the area of shared competences a specific act may be adopted both by the EU and its MS. Where the former has exercised its shared powers, the MS are not permitted to act which is doctrinally called '*pre-emption effect*'.<sup>732</sup> Conversely, where the EU has ceased to exercise them, the MS may act again.<sup>733</sup> The pre-emption can be also characterized as geometrical image of the competences – the MS may only legislate in that part which the EU has not entered yet.<sup>734</sup> The pre-emption effect '*Sperrwirkung*' in German, means the blocking efficiency can only apply within the shared competences, taking into account the fact that the posterior exercise of a shared competence cannot alter the system of allocated exclusive competences.<sup>735</sup> However, the: "[...] *domain appears to be deemed automatically pre-empted from action of the MS in case the Union has exercised its power.*"<sup>736</sup> The doctrine recalls the difficulty to identify whether and to which extent exists the pre-emption of the EU, since this is as being very fable.<sup>737</sup>

The shared competences are perceived as a standard rule of the EU competences<sup>738</sup> in comparison to the competence provisions as listed in the Article 3 and 6 TFEU. Taking into account the principle of subsidiarity, the EU may intervene only under the condition when the EU can attain the objectives in comparison to the MS, more to that the action of the EU must further respect the

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<sup>731</sup>Article 2 (2) Consolidated version of the Treaty on the functioning of the European Union, C 83/47, 30.3.2010.

<sup>732</sup>E.g. Eeckhout comes out from the provision of the Article 2 (2) that in the areas of shared competences the MS shall exercise their competence to the extent that the Union has not exercise its competence, reference to P.EECKHOUT, *EU External Relations Law*, Oxford, 2011, p.171.

<sup>733</sup>A.REINISCH, *Essentials of EU law*, Cambridge, 2012, p.43.

<sup>734</sup>The geometrical approach as the result of the Protocol Nr. 25 annexed to the Lisbon Treaty with reference to Article 2 TFEU on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area, reference to Protocol (No 25) on the exercise of shared competence, attached to Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>735</sup>A.WEBER, *The Distribution of Competences Between the Union and the Member States* in H.J.BLANKE, S.MANGIAMELI, *The European Union after Lisbon: Constitutional Basis, Economic Order and External Action of the European Union*, Berlin, 2011, p.318.

<sup>736</sup>R.SCHÜTZE, *An introduction to European law*, Cambridge, 2012, p.79-80.

<sup>737</sup>P.MANIN, *L'union européenne : institutions, ordre juridique, contentieux*, Paris, 2005, p.146.

<sup>738</sup>R.STREINZ, *Europarecht*, Heidelberg, 2012, p.59.

principle of proportionality.<sup>739</sup> Such a principle may be derived also from the provision of the Article 25 TFEU saying that the action of the EU: “[...] shall not exceed what is necessary to achieve the objectives of the Treaties.”<sup>740</sup> Moreover to that, these principles are further confirmed in the Declaration Nr. 18 on the delimitation of the competences.<sup>741</sup> The modus operandi of the shared competences is in the doctrine perceived as a form of cooperative federalism with shared responsibility of the both actors to realize a common policy.<sup>742</sup>

In some branches, the nature of the shared competences determines by itself that the harmonization can be only by done in the way of minimal standards.<sup>743</sup> However, it cannot be underestimated the theoretical remark mentioned by Adam and Tizzano that in case of the existence of full regulation of given domain; the theoretically existing shared competence becomes practically difficultly executable and tends to exclusivity.<sup>744</sup>

As Cremona recalls, the CJ EU has applied to shared competences two approaches. As to the first one, the existence of the legislation whether or not adopted within the framework of a common policy, is based on the pre-emption of the existing EU law. As to the second one, it is based on the existence of the Union’s objective for the attainment of which Treaty-based powers may be complemented by the by external powers. In such a situation we may speak about the ‘*effect utile*,’ meaning that the implication of the powers are necessary to achieve a particular aim.

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<sup>739</sup>A.KACZOROWSKA, *European Union law*, Milton Park, 2011, p.174.

<sup>740</sup>Article 25 Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>741</sup>24.Declaration concerning the legal personality of the European Union, attached to Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>742</sup>D.CHALMERS,G.DAVIES,G.MONTI, *European Union Law Cases and Materials*, Cambridge, 2010, p.208.

<sup>743</sup>Articles 153 (2) (b), 169, 191 Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>744</sup>R.ADAM, A.TIZZANO, *Lineamenti di diritto dell'Unione Europea*, Torino, 2010, p.38.

Another point for the discussion is whether the competences as enumerated in the Article 4 TFEU represents the fully enumerative approach to these competences, containing in the subject-matter way the following categories the internal market, social policy, cohesion policy, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, freedom, security and justice, and common safety concerns in public health matters. The Article 4 TFEU may be perceived as encountering certain level of insecurity though.

According to its wording, among the share competences shall belong such competences which do not fall into the scope of enumeration as referred in the Article 3 TFEU (dedicated to the exclusive competences) and Article 6 TFEU (dedicated to the complementary competences).<sup>745</sup> Due to this fact certain authorities designate these competences as '*ordinary*'.<sup>746</sup>

Within one field, either the EU or the MS can exercise their share competence. In addition to the listed categories above there are further categories regarding the research, technological, space the Union shall have the competence to carry out activities to define this in these programs; equally the same approach for the development cooperation and humanitarian aid. These competences are designated as '*parallel*' competences within which the EU exercises the autonomous policy without making obstacles to the MS to execute their competences.<sup>747</sup> However, having in mind this presumption, it shall be equally noted that the MS are not in their execution fully autonomous, being thus bound by the principle of the loyal cooperation obligation.<sup>748</sup>

In order to make sure and disperse any doubts on the nature of the shared competences, it was adopted the Protocol Nr. 25 on the execution on the execution

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<sup>745</sup>Therefore, are these competences perceived as residual, as referred in R.ZBÍRAL, *Rozdělení kompetencí mezi Evropskou unií a členskými státy* in K.KLÍMA (ed.) *Evropské právo*, Plzeň, 2011, p.235.

<sup>746</sup>R.SCHÜTZE, *An introduction to European law*, Cambridge, 2012, p.166.

<sup>747</sup>Article 4 (3) and (4) Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>748</sup>G.STROZZI, R.MASTROIANNI, *Diritto dell'Unione europea : parte istituzionale*, Torino, 2011, p.68.

of the shared competences by making a clear that Union acts exclusively in one sector. This means that the acts of the Union cover only those matters and the extent to which the EU has executed the competence and the sphere which was covered by the acts of the Union and making univocal statement that those do not extend over the whole subject-matter. Thus, shared competences represent the most important category and their '*flexibility*' of applicability in their proper *modus operandi* as an expression of the cooperative bunch between the EU and the MS.

#### 4.5.12.4 Support, Coordinate and Supplementary Competences

Third category of the competences represents the suite of the supporting, coordinating or supplementary competences. The basic philosophy of their functioning is that they allow the EU to take action to support, coordinate or supplement the actions of the MS, without thereby superseding their competences in these areas and without entailing harmonization of MS law.<sup>749</sup>

This provision in the practice means that the Union may take certain action, however, the real competence of the Union is may not entail the harmonization of the MS laws or regulations.<sup>750</sup> Thus, if MS do not adopt the rules that conflict with the provisions of Union law (principle of primacy), the Union's action does not to restrict the MS' regulating power in the areas concerned. In this type of competences do not apply the principle of pre-emption, nonetheless it is applied the principle of sincere cooperation.<sup>751</sup> It is obvious that the MS will not adopt the measures which would endanger the uniform application of the EU law.<sup>752</sup>

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<sup>749</sup>Article 2 (5) Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>750</sup>Article 2 (5) Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>751</sup>K.LENAERTS, P.Van NUFFEL, R.BRAY, N.CAMBIEN, *European Union Law*, 2011, p. 130.

<sup>752</sup>Case 293/83 in which the Court decided that the vocational training does not fall into the category of the exclusive competences, however, in connection with the prohibition of the discrimination the Court declared the breach of the Treaty obligations by Belgium, as referred to the case ECJ judgment, 13 February 1985, *Françoise Gravier v City of Liège*, case 293/83 ECR [1985], p.593.

Good example of their *modus operandi* provide Wyatt and Dashwood, saying that: “[...] *the Union’s role is typically to adopt broad guidelines or incentive measures, or to facilitate the exchange of information about best practice. Where it is given power to adopt legally binding acts, these are not capable of harmonizing national laws or having pre-emptive effect vis-à-vis domestic competence. Therefore, the regulatory powers, remains in the MS’ hands; Union action merely complements domestic policies.*”<sup>753</sup>

Actually, the corpus of these competences involves protection and improvement of human health, industry, culture, tourism, education, vocational training and sport, civil protection, administrative cooperation.<sup>754</sup> It may be stated the possible vague reach of their scope. According to her view, the meaning of supporting, coordinating, or supplementary action varies in the different areas listed in the Treaty, but it is clear that the EU has a significant degree of power in these areas, albeit falling short of harmonization. The Treaty nevertheless, assumes the respect for the enumerative approach in these terms. The issue of these competences may arise since the CJ EU has never attempted to give neither comprehensive definition of the powers retained by MS, nor has given a comprehensive definition of the powers retained by the MS. It defines these powers without the demonstration if they shall have a specific status.<sup>755</sup>

#### 4.5.12.5 *Specified Forms of Union’s Competence*

The specified forms of Union competence appear to be a supplementary concept to the competences being exclusive, shared and supporting. Systematically, they appear in the Article 2 (3) and Article 2 (4) of the TFEU. The wording of the Article 2 (3) contains a brief provision that: “*The MS shall coordinate their economic and employment policies within arrangements as determined by the TFEU,*

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<sup>753</sup>A.DASHWOOD,M.DOUGAN,B.RODGER, E.SPAVENTA, I.DASHWOOD, *Wyatt and Dashwood's European Union Law*, Oxford, 2011, p. 105.

<sup>754</sup>Article 6 Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>755</sup>L.BOUCON, *Deconstructing Federalism through Retained Powers of States: The European Court of Justice Middle Ground Approach Analyzed in the Light of the American Federal Experience* in L.AZOULAI, L.BOUCON, F.X.MILLET, *Deconstructing EU Federalism through Competences*, EUI Working Paper LAW 2012/06, Florence, 2012, p.32.

*which the Union shall have competence to provide.*"<sup>756</sup> It does not go without saying that the importance of this provision is that economic coordination responds to various aims as implementation of the monetary policy having for the effect also price stability, and pursuing the aims of the EU but in the same time offering sufficient leeway for the MS.<sup>757</sup> Anyhow it would be axiomatic, an explicit provision on the legal effect of such a provision is missing. However, as to Craig, the effects of such a provision can be derived from the Article 5 TFEU.<sup>758</sup> For Cremona, the linkage can be found, taking into account the relevant treaty provisions as Article 5 (1) and (2) TFEU, furthermore 120-126 TFEU and 145-150 TFEU.<sup>759</sup>

Furthermore, the wording of the Article 2 (4) sets the background to the fact that Union shall have competence, in accordance with the TEU, to define and implement a common foreign and security policy, including the common framing of common defence policy.<sup>760</sup> Unlike the provision of the Article 3 (2) TEU, this provision may be considered being the suggestion of an independent Union policy, but which does not confer the right to exclusivity. Thus, the EU foreign and security policy sits alongside the national one, albeit the commonality implies that the latter must operate within its framework,<sup>761</sup> formed principally by TEU.

As Dashwood and Wyatt state, these competences are certain form of the shared competence making thus reference to the provision of the Article 4 (1) TFEU that the shared competences apply to all areas apart from the provisions of

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<sup>756</sup>Article 2 (4) Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>757</sup>L.PUCCIO, *The pressures inflicted by the financial crisis on the euro area: de facto creating an EU 'economic government' despite the status quo maintained in the Lisbon Treaty?* in M.TRYBYS, L.RUBINI, *The Lisbon Treaty and the future of European law and policy*, Cheltenham, 2012, p.77.

<sup>758</sup>P.P.CRAIG, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, Oxford, 2010, p.180-181.

<sup>759</sup>M.CREMONA, *The Two (or Three) Treaty Solution: The New Treaty Structure of the EU* in A.BIONDI, P.EECKHOUT, S.RIPLEY, *EU law after Lisbon*, 2012, p.47.

<sup>760</sup>Article 4 (4) Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>761</sup>D.CHALMERS,G.DAVIES,G.MONTI, *European Union Law Cases and Materials*, Cambridge, 2010, p.210.

the Articles 3 and 6 TFEU.<sup>762</sup> This position is practically confirmed also by Craig and de Búrca considering the creation of a separate category of competences which could be called '*political*,' since there would have been strong opposition against involving these competences among the shared ones with the risk of applicability of the principle of pre-emption.<sup>763</sup>

## 4.6 Sources of EU Law

### 4.6.1 Generalities

When thinking to any juridical system, the first element it must be considered relates to the sources of the law. This becomes even more appropriate, talking about the CCP and the way in which the EU pursues.

Generally speaking, under the system of law is to be understood a system of legal rules, constituting a system, i.e. representing certain level of organization and coherence.<sup>764</sup> However, it remains questionable, how to characterize such a controversial legal system as the system of the EU law is, being neither the system of international law, nor of the internal legal system including the federal legal system

The system of EU has developed own system of the sources, norms, addresses, secondary sanctions and own interpretative mechanism autonomous in regard to the public international law or the national law of the MS.<sup>765</sup> However, the ECJ has subordinated the execution of the legal norms of the EU to the general international law.<sup>766</sup> It must be certainly agreed with Tesouro that the legal nature of the constituent treaties and conventional modifications represent a sort

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<sup>762</sup>A.DASHWOOD, M.DOUGAN, B.RODGER, E.SPAVENTA, I.DASHWOOD, *Wyatt and Dashwood's European Union Law*, Oxford, 2011, p.105.

<sup>763</sup>P.P.CRAIG, G.De BÚRCA; *EU law: text, cases, and materials*, Oxford, 2011, p.88.

<sup>764</sup>C.BLUMANN, L.DUBOIS, *Droit institutionnel de l'Union Européenne*, Paris, 2007, p.415.

<sup>765</sup>U.DRAETTA, *Elementi di diritto dell'Unione Europea*, Milano, 2009, p.242-243.

<sup>766</sup>In reference to the ECJ judgments in the cases Kadi, C-402/05 P and C-415/05 P in which the ECJ decided that the Competences of the EC (EU) must be executed with respect to international law and in the light of the pertinent norms of the international law, in reference to ECJ judgments, 3 September 2008, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, joined cases C-402/05 P and C-415/05 P [2008] ECR, p.I-6351.



international law the clearly linked to the Vienna conventions as 1969 and 1986 having for consequence that among the sources of the interpretation appear also these conventions applicable to *'standard international agreements'*.<sup>767</sup>

Without going into detailed analyses it would be sufficient to characterize the legal system of the EU law as *'system of law sui generis'*<sup>768</sup> between *'the national law of the EC (EU) MS and the public international law'*.<sup>769</sup>

Doctrinally, the system of the sources of the EU law is perceived in various ways. As Verilli et. al. state: *"The Community legal system is composed by the set of norms which regulate the organization and development of EC and the relations between them and the MS."*<sup>770</sup> On the other hand, Lenaerts prefers certainly more dynamic approach, encompassing more actors within the EU law, saying that: *"Union law encompasses rules which arise as a result of action both by MS and by the Union institutions and bodies."*<sup>771</sup> Gialdino et al. acknowledge that the EU law contains the written and in the same time unwritten system of law, divided into primary law (treaties and the assimilate acts), general principles having and unwritten system of law (although part of it has been already inserted into primary law), Charter of fundamental rights and finally secondary law.<sup>772</sup>

What causes the difficulties in the grasping methodologically the notion *'sources of EU law'* is the fact that the EU (EC) system of law is constituted by the set of norms, aimed on assurance of the realization of the objectives, contained in the treaties, in which some of them enter into the legal order of the EU in broad

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<sup>767</sup>G.TESAURO, *Diritto dell'Unione europea*, Padova, 2010, p.89.

<sup>768</sup>Tesauro mentions as those particular features in three fields 1. principle of specialty, referring to the point that to an international organizations are attributed the competences for the MS and the international organization itself, 2. to the organization are given the competences for the realization of own objectives as the realization of the common market, 3. the legal norms as come out from the agreement have direct and immediate effect on the legal situation, reference to G.TESAURO, *Diritto dell'Unione europea*, Padova, 2010, p.89-90.

<sup>769</sup>T.OPPERMANN, *Europarecht : ein Studienbuch*, Munich, 2005, p.139 accentuated the fact that the system of law was originally based on public international law and subsequently moved towards the autonomous legal order.

<sup>770</sup>A.VERRILLI, *Diritto dell'Unione europea : aspetti istituzionali e politiche comuni*, Napoli, 2005, p.167.

<sup>771</sup>K.LENAERTS, P.Van NUFFEL, R.BRAY, N.CAMBIEN, *European Union Law*, 2011, p.817.

<sup>772</sup>C.CURTI, *Codice dell'Unione Europea operativo : TUE e TFUE commentati articolo per articolo, con la carta dei diritti fondamentali dell'Unione Europea*, Napoli, 2012, p.234-235.

sense, other ones, contained in the agreements concern also the sphere of international law. That is the reason, why there is a lack of their collocation and their exact enumeration.<sup>773</sup>

Sources of EU law are usually classified though a dichotomous distinction - primary and secondary law,<sup>774</sup> though the existence of a third category (supplementary law) is sometimes pointed out, with reference to the '*general principle of law*' worked out by the Court. Somebody prefers otherwise drawing a distinction among primary, intermediate and secondary law, classifying into the intermediate category both general principles and international agreements. Some authorities even speak about tertiary sources of law,<sup>775</sup> meaning the legal acts as adopted on the basis of the secondary law destined for the appropriate execution of secondary law.<sup>776</sup> This theoretical approach is not fully accepted by all scholars.<sup>777</sup>

The difficulty causes the fact that not all sources of law are contained in the primary or secondary law, the system of the EU legal system is full of the phenomenons and para-normatives, to which can be ascribed the formal notion of the sources of law.<sup>778</sup> The EU legal system operates as an autonomous legal system integrating within the legal orders of the MS, according to the jurisprudential construction which was confirmed by the CJ EU. This way of understanding distinguishes the EU legal system to the legal system of public international law.<sup>779</sup>

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<sup>773</sup> F.LAURIA, *Manuale di diritto delle Comunità europee*, Torino, 1988, p.215.

<sup>774</sup> G.TESAURO, *Diritto dell'Unione europea*, Padova, 2012, p.81.

<sup>775</sup> R.STREINZ, *Europarecht*, Heidelberg, 2012, p.152.

<sup>776</sup> H.W.ARNDT, K.FISCHER, T.FETZER, *Europarecht*, Heidelberg, 2010, p.42.

<sup>777</sup> E.g. HORSPOOL and HUMPREYS give preference to the division of the sources into primary legislation, secondary legislation and other sources of law (containing international agreements, general principles of law - as recommendations and options, soft law, memoranda, circulars, statements and resolutions, reference in M.HORSPOOL (ed.) , *European Union Law*, Oxford, 2010, p.104.

<sup>778</sup> R.ADAM, A.TIZZANO, *Lineamenti di diritto dell'Unione europea*, Torino, 2010, p.109.

<sup>778</sup> V.M.SÁNCHEZ (ed.), *Derecho de la Unión Europea*, Barcelona, 2010, p.142.

<sup>779</sup> The most important is the ECJ judgment, 15 July 1964, Flaminio Costa v. ENEL, case 6/64 [1964] ECR, p.585.

#### 4.6.2 *Written LError! Not a valid bookmark self-reference.aw*

##### 4.6.2.1 *Constituent Treaties, Amending treaties, including Annexes and Protocols*

The system of primary law consist of various sources of law, however, uniform in its rang and character<sup>780</sup> being on the top of the hierarchy of legal norms, representing the fundamental act of the of the EU. It represents an acts which regulate EU's competences its functioning and equally the principles and fundamental substantial provisions within which the institutions execute their competences.<sup>781</sup> The legal situation in the EU is rather more complex, since in the EU does not exist the hierarchic structure, although some indications are evident.<sup>782</sup>

In Laerants view, system of these sources of law represent '*constituent authority*' meaning in the first place the EU Treaties and the Treaties amending or supplementing them, including the Accession Treaties and the annexed Acts of Accession and involving into this system also the fundamental rights and represent the constitutional provisions of the EU law.<sup>783</sup>

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<sup>780</sup>V.M.SÁNCHEZ (ed.), *Derecho de la Unión Europea*, Barcelona, 2010, p.153.

<sup>781</sup>R.ADAM, A.TIZZANO, *Lineamenti di diritto dell'Unione europea*, Torino, 2010, p.109.

<sup>782</sup>Valvo mentions as examples the relation between the existence of the international organization and the legal acts, anticipated in their statutes, and adds the provision of the Article 263 (2) TFEU reference in A.L.VALVO, *Lineamenti di diritto dell'Unione europea. L'integrazione europea oltre Lisbona*, Padova, 2011, p.179, Balarino perceives the question of hierarchy at three fields 1.as the particularly character of the constitutive treaties referring thus to the judgments ECJ judgment, 23 April 1986, Parti écologiste "Les Verts" v. European Parliament, case 294/83 [1986] ECR, p.1339 and ECJ opinion, 14 December 1991, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty, opinion 1/91 [1991] ECR, p.I.6079 and 2.that the agreements of the Community prevail over secondary legislation as comes out from the judgments that the Community agreements prevail over the secondary legislation, reference to ECJ judgment, 30 April 1974, R. & V. Haegeman v. Belgian State, case 181/73 [1974] ECR, p.449 and ECJ judgment, 10 March 1992, NMB (Deutschland) GmbH and NMB Italia Srl and NMB (UK) Ltd v. Commission of the European Communities, case C-188/88 [1992] ECR, p.I-1689, doctrinal reference T.BALLARINO, L.BELLODI, *Diritto dell'Unione europea*, Padova, 2010, p.98-100.Moreover, it is needed to be recalled the principle of the primacy of the Treaties over the international law, where the ECJ may deliver its opinion on the possibility of the conclusion of the Treaty and if the Treaty was concluded, the Court may dismiss the conclusion of such a Agreement, as did in the case, ECJ judgment, 9 August 1994, French Republic v. Commission of the European Communities, case C-327/91 ECR [1994], p.I-3641 and ECJ judgment 10 March 1998, Federal Republic of Germany v. Council of the European Union, case 122/95 [1998] ECR, p.I-973.

<sup>783</sup>K.LENAERTS, P.Van NUFFEL, R.BRAY, N.CAMBIEN, *European Union Law*, 2011, p.819.

The system of primary law stands on the top of the pyramid of the EU legal system, being given a constitutional quality, '*charter constitutionnelle de base*'<sup>784</sup> or the '*charte constitutionnelle d'une Communauté de droit*'.<sup>785</sup> According to Strozzi, commenting on these opinions, the Court has by this opinion set up the hierarchy of the provisions, saying that some norms cannot be subject to revision, where the task to reveal which concrete norms that are to be determined by the ECJ.<sup>786</sup> The constitutional presumption was confirmed further also by Gerkrath, claiming that although there is not Constitution, the EU development experiences emerging '*European constitutional law*'.<sup>787</sup>

The constituent Treaties<sup>788</sup> represent the system of the strongest legal power in the hierarchical structure of the EU. As it has been already mentioned, their nature comes out from the public international law and stipulate the very nature of the EU, as institutional structure, competences of the bodies and the subject-matter of the single policies. Historically appeared in the early fifties as ECSC Treaty, logically, over the years they have been subject to several modifications. Actually, the main part of the corpus of the constituent Treaties is build-up on the constituent treaties TEU, TFEU (according to the provision of the Article 1 (3) having the same legal value) and actually also Euratom Treaty. Although the treaties preserve certain degree of own autonomy (TEU, TFEU v. Euratom Treaty),

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<sup>784</sup>ECJ judgment, 23 April 1986, Parti écologiste "Les Verts" v. European Parliament, case 294/83[1986] ECR, p.1339 and Opinion ECJ, 14 December 1991, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty, opinion 1/91 [1991] ECR, p.I.6079 and 2.that the agreements of the Community prevail over secondary legislation as comes out from the judgments.

<sup>785</sup>ECJ opinion, 14 December 1991, Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty, opinion 1/91 [1991] ECR, p.I.6079.

<sup>786</sup>A.ADINOLFI, G.STROZZI, *Diritto dell'Unione europea : parte speciale*, Torino, 2005, p.183.

<sup>787</sup>J.GERKRATH, V.CONSTANTINESCO, *L'émergence d'un droit constitutionnel pour l'Europe : modes de formation et sources d'inspiration de la constitution des Communautés et de l'Union européenne*, Bruxelles, 1997, p.141-143.

<sup>788</sup>The exhaustive list is the following one: This system is actually built up following Treaties having the Constitutive nature – the Treaty establishing the European Coal and Steel Community (ECSC), the Treaty establishing the European Economic Community (EEC), the Treaty establishing the European Atomic Energy Union (Euratom), the Convention on Certain Institutions Common to the European Communities, signed at the same time as the EEC and Euratom Treaties and providing for a single Parliamentary Assembly and a single ECJ to serve all three Communities, the Merger Treaty, establishing a single Parliamentary Assembly and a single ECJ to serve all three Communities, the Merger Treaty, establishing a single Council of Ministers and a single Commission for the three Communities; the Budgetary Treaties; single European Act, Treaty on European Union, Agreement on European Economic Area, the Treaty of Amsterdam, Treaty of Nice, Treaty of Lisbon.

historically, the ECJ has rejected the application of analogy of the ECSC in the legal order of the EU<sup>789</sup>, however later on ECJ confirmed the coherency of the system of Community law, creating thus '*single legal order*'.<sup>790</sup>

The Treaties as sources of law are direct expression of the will of the MS which have negotiated and ratified them and thus gave the birth to the EU, still being subordinated to the regime of public international law in terms of their conclusion, validity, efficiency and interpretation.<sup>791</sup> Their change may be effectuated exclusively by the means which are presumed directly by the Treaties, actually, according to the provisions of the Article 48 TEU distinguishing between the ordinary and simplified revision procedure.<sup>792</sup>

According to the provision of the Article 51 TEU, the Protocols<sup>793</sup> and Annexes<sup>794</sup> form the integral part of the Treaties<sup>795</sup> and falling under the notion '*Treaties*' whereas the declarations, attached to the Treaties not submitted for the ratification of the MS have exclusively interpretative power to the provisions to which they refer<sup>796</sup>. Nonetheless, those which come out from the ensemble of the MS may dispose a political authority and trace the line of action of the Union in the certain domain.<sup>797</sup>

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<sup>789</sup> ECJ judgments, 14 December 1963, Confédération nationale des Producteurs de Fruits et Légumes v. Council, joined cases 16-17/62 [1963] ECR, p.471.

<sup>790</sup> ECJ judgment, 10 February 1983, Grand Duchy of Luxembourg v European Parliament, case 104/83, [1983] ECR, p.255.

<sup>791</sup> A.L.VALVO, *Lineamenti di diritto dell'Unione europea. L'integrazione europea oltre Lisbona*, Padova, p.186.

<sup>792</sup> Article 48 Treaty on European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>793</sup> As the ECJ stated in various occasions judgment, the protocols have the same legal value as the primary law, consult e.g. ECJ judgment, 10 July 1986, Roger Wybot v. Edgar Faure and others, case 149/85 [1986] ECR, p.2391, ECJ judgment, 22 October 1987, Foto-Frost v. Hauptzollamt Lübeck-Ost, case 314/85 [1987] ECR, p. 4199.

<sup>794</sup> The ECJ has confirmed that the that the annexes attached to the Acts on Accession have the same legal value as the primary law, unless otherwise provided, reference to ECJ judgments, 28 April 1988, Levantina Agricola Industrial SA (LAISA) and CPC España SA v. Council of the European Communities, joined cases 31 and 35/86 [1988] ECR, p..2285 and ECJ judgment, 11 September 2003, Republic of Austria v. Council of the European Union, case C-445/00 [2003] ECR, p.I-8549.

<sup>795</sup> Article 51 Treaty on European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>796</sup> U.DRAETTA, *Elementi di diritto dell'Unione europea : parte istituzionale, ordinamento e struttura dell'Unione europea*, Milano, 2009, p.249.

<sup>797</sup> C.BLUMANN, L.DUBOUIS, *Droit institutionnel de l'Union Européenne*, Paris, 2004, p.426.

#### 4.6.2.2 *Charter of Fundamental Rights*

The original constituent Treaty did not contain any specific provision on the protection of fundamental rights which could have constituted an appropriate legal basis for the judicial control of the fundamental rights.<sup>798</sup> Since the already analysed Opinion 2/94 did not allow the Community to accede to ECHR the EC/EU has prepared own catalogue of fundamental rights.<sup>799</sup> One of the shortcomings of the catalogue was that it had exclusively proclamatory effects, i.e. it was deprived of binding legal effects, although became the instrument of interpretation for the judicial instances in the EU. Unlike the project of the Constitution, the text of the Charter was not included in the full wording to the text of Constitution, (neither as a protocol, nor declaration being thus damaged its visibility), but became binding as it was proclaimed in Strassbourg in December 2007.

Nonetheless, as confirm by the Article 6 (1) TEU having the same legal value as the constituent Treaties. Being in force upon, the Charter fulfils several roles as 1.criterion of interpretation, 2. parameter of the investigation of the legitimacy of the acts of the institutions, 3. parameter of the legitimacy of some kinds of state behaviour, 4. the connection of the behaviour between the MS and the EU law.<sup>800</sup>

#### 4.6.2.3 *Changes and Supplements of the Constituent Treaties (Constitutional Acts)*

Under this category belong so-called constitutional acts represent particular category of the legal acts and are regarded as primary law of the Union since their entry into force depends on the MS, which means whether they are adopted by the

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<sup>798</sup>G.TESAURO, *Diritto dell'Unione europea*, Padova, 2010, p.129.

<sup>799</sup>The works on the own catalogue of fundamental rights initiated on the basis of the summit in Cologne, held 3-4 June 1999 with an aim of redaction of own catalogue of fundamental rights, subsequently it was established the Convent (15-16 October 1999) with and task to prepare such a catalogue, being 13-14 October 2000 approved as Charter of fundamental rights of the EU in Biarritz, being politically proclaimed at the summit in Nice 7 December 2000, reference to Presidency Conclusions - Cologne 3 and 4 June 1999, 150/99 REV 1, CAB.

<sup>800</sup>L.DANIELE, *Diritto dell'Unione europea: sistema istituzionale, ordinamento, tutela giurisdizionale, competenze*, Milano, 2010, p.183-187.

MS in accordance with the requirements as anticipated by their constitutions. As the ECJ in its judgment confirmed, the provision of such an agreement may be subject of the general principles of law.<sup>801</sup> As an example, it can be mentioned e.g. the Decision of 20 September 1976 on direct elections to the EP.

#### 4.6.2.4 *Acts on Accession*

Also Accession Treaties form an integral part of the substance of primary law, stipulating the conditions between the acceding State and the MS, being enacted in the detailed way in the Accession treaty. The Acts on Accession relate to any round of enlargement. The First Treaty of Accession (Denmark, Ireland, United Kingdom), the Second Treaty of Accession (Greece), the Third Treaty of Accession (Spain and Portugal), Fourth Treaty of Accession (Austria, Finland and Sweden), Fifth Treaty of Accession (Estonia, Latvia, Lithuania, the Czech Republic, Slovakia, Slovenia, Hungary, Poland, Cyprus and Malta), Sixth Treaty of Accession (Bulgaria and Romania), Seventh Treaty of Accession (Croatia). In terms of legal power, they have the same legal status as the provisions of original Treaties.<sup>802</sup>

#### 4.6.3 *Unwritten Primary Law*

##### 4.6.3.1 *General Principles of EU Law*

The general principles of EU law represent the '*system*' of original principles of the EU which are distinct to those which arise from the international law, and also the national one, although they might in the moment of their application correspond to those of the legal order of the EU<sup>803</sup>. For Valvo represent the general principles of EU law the unwritten principles of the '*Pretoria*' origin because they do not derive from any specific provisions but from the jurisprudence – '*creatività*'

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<sup>801</sup>ECJ judgment, 31 March 1992, Council of the European Communities v. European Parliament, case C-284/90 [1992] ECR, p.I-2277, para 31.

<sup>802</sup>K.LENAERTS, P.Van NUFFEL, R.BRAY, N.CAMBIEN, *European Union Law*, 2011, p.828.

<sup>803</sup>G.STROZZI, R.MASTROIANNI, *Diritto dell'Unione europea. Parte istituzionale*, Torino, 2011, p.274.

della Corte di giustizia' which does not concern with the specification of their origin or basis/<sup>804</sup> As Simon states the 'identification' of the general principles of EU law as being twofold process:

1. identification of the principle which could be erected as principle of Community law (French term '*érigé en principe général du droit communautaire*'), being done in the eclectic and pragmatic way from the international and internal law and the Community law.

2. attribution of such a principle the quality of the general principle of Community law, under the presumption that these are compatible with the legal order by the selective acceptance (using the term '*filtrage*') designated on avoidance of the affecting of the Community system.<sup>805</sup>

This process needs the strict and recognized method by the finding of the principle and has invented so-called '*wertenden Rechtsvergleichung*'.<sup>806</sup> avoiding the finding the only the least common denominator from the legal orders of the MS, but rather finding a best solution which is at disposal taking into account the national legal orders.<sup>807</sup>

The theory of the EU law distinguishes between various categorizations of the general principles of law in the legal order of the Union and the source of inspiration. However, for the purposes of this dissertation it is sufficient to break them down only in four categories – principles derived from the national legal orders<sup>808</sup>, principles derived from the international law, principles derived from the legal order of the Union and the principles derived from the protection of

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<sup>804</sup>A.L.VALVO, *Lineamenti di diritto dell'Unione europea : l'integrazione europea oltre Lisbona*, Padova, 2011, p.180-181

<sup>805</sup>D.SIMON, *Le système juridique communautaire*, Paris, 2001, p 358-359.

<sup>806</sup>T.OPPERMANN, *Europarecht : ein Studienbuch*, Munich, 2005, p.144.

<sup>807</sup>ECJ judgment, 11 December 1973, Gebrüder Lorenz GmbH v. Federal Republic of Germany et Land de Rhénanie-Palatinat, case 120/73 [1973] ECR, p.1471.

<sup>808</sup>Containing the principle of legality, right to defense, right to contradictory proceeding, legal security principle, prohibition of retroactivity of legal acts, principle of legitimate expectations, as referred by E.NATALE, A.VERRILLI, *Compendio di Diritto dell'Unione europea (Diritto comunitario) : aggiornato al Trattato di Lisbona (in vigore il 1. dicembre 2009) : riferimenti dottrinali e giurisprudenziali : quesiti di verifica*, Santarcangelo di Romagna, 2010, p.162-163.



fundamental rights. As of today, the general principles of law appear not only in the single provision of the TFEU Treaty.<sup>809</sup>

#### 4.6.3.2 *Customary Law of the Union*

Thus, the primary law system consists of the constituent treaties, the Charter of Fundamental Rights, the general principles of law and the customary law of the Union.<sup>810</sup> As the general rule, the customary law of the source of the EU law. For the validity of the customary law of the EU law is necessary its real execution and in the same time the general legal persuasion in the first line via the institutions of the Union and secondary of the MS. On the duration of the existence of the customary law are not set any particular requirements.<sup>811</sup> The existence of the customary law of the Union is based on the presumption that any international legal order cannot survive without the existence of the customary law. As the examples the doctrine mentions exemplary the Luxembourg compromise<sup>812</sup>, or the possibility of the representation of the MS in the Council by the Secretaries of the State or the very existence of the COREPER without officially enacted in the primary law.<sup>813</sup>

#### 4.6.4 *International Agreements in the EU Law*

##### 4.6.4.1 *Generalities*

In approaching the notion for international agreement under international law, there is much leeway to do so. The choice might be done within the academic and rather practical approach as it results from the achievement of the

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<sup>809</sup>As the examples might be mentioned the principle of subsidiarity (Article 5 (3)) TEU European Union (Consolidated version 2012) OJ C 326, 26.10.2012, principle of non-discrimination, the prohibition of the discrimination on the basis of the nationality, the principle of free movement of goods (Article 28 ff. of the TFEU, Treaty on the Functioning of the European Union (Consolidated version 2012), OJ C 326, 26.10.2012.

<sup>810</sup>H.W.ARNDT, K.FISCHER, T.FETZER, *Europarecht*, Heidelberg, 2010, p.42.

<sup>811</sup>S.HOBE, M.L.FREMUTH, *Europarecht*, Munich, 2012, p.92.

<sup>812</sup>S.HOBE and M.L.FREMUTH state when in the cases that the qualified majority would be sufficient, however, the in case of vital state interest at stake, it must be negotiated further, reference to S.HOBE, M.L.FREMUTH, *Europarecht*, Munich, 2012, p.92.

<sup>813</sup>M.SCHWEITZER, W.HUMMER, *Europarecht*, Neuwied, 1996, p.6.

international law, crowned by the Vienna Convention on Law of Treaties. The fact is that the inexistence of the institutional legislative power in the international Community has given to the international treaty the primordial importance as a mean for the creation and codification of the non – written legal norms.<sup>814</sup> As the simplest version of the definition of the international agreement can be characteristics of the international agreement as the agreement among states or international organizations by which are constituted, changed or cancelled their mutual rights and obligations in accordance with international law.<sup>815</sup>

Thus, the start point maybe Vienna Convention according to which is understood by the notion agreement, an act concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and regardless its particular designation.<sup>816</sup> Nevertheless, there shall be paid attention to the fact that the Vienna Convention does not represent of full complexity the general international law, although it might be still considered as the instrument of the importance of the development of customary international law.<sup>817</sup> The meaning of the notion is to be governed by international law which means that the agreement is subject to operation of applicable international rules made up by rules labelled the '*law of treaties*.'<sup>818</sup>

To such a doctrinal approach to the definition the doctrine adds the particularity which comes out of the principle '*pacta sunt servanda*', having particular importance in international law of treaties. In regard to the applicability of this principle within the international law, it might come to the following definition of international treaty: "*The treaty is an international agreement, imputable*

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<sup>814</sup> M.D.de VELASCO VALLEJO, *Instituciones de derecho internacional público*, Madrid, 2005, p.153.

<sup>815</sup> M.POTOČNÝ, J.ONDŘEJ, *Mezinárodní právo veřejné : zvláštní část*, Prague, 2011, p.206.

<sup>816</sup> Article 2 Vienna Convention on the Law of Treaties, 23 May 1969.

<sup>817</sup> A.CASSESE, P.GAETA, *Diritto internazionale*, Bologna, 2003, p.181.

<sup>818</sup> J.KLABBERS, *The concept of treaty in international law*, Hague, 1996, p.38-39.

*to two or more subjects of the international law, by which are the contracting parties bound and are under obligation to execute the international treaty bona fide.*"<sup>819</sup>

From the terminological point of view, the notion of an international agreement covers the Treaties, Conventions, an Exchange of Notes, a Memorandum of Understanding, a Covenant and Charter, or any other suitable name. It is merely a matter of style, with the more august titles being given to the more important agreement.<sup>820</sup> In conclusion, notion treaty represents only one of the denominations of the legal acts in the practice of international law.<sup>821</sup>

In addition to the doctrinal approach, there might be recalled the case decided by the Court of Justice in 1931 on the customs regime between Germany and Austria. The Court has decided that from the point of view of obligatory character of the international obligation may come out the treaties, conventions, declarations, agreements, protocols or exchanges of notes. In conclusion to the brief analyses of the international treaty, the notion '*treaty*' covers broader scale of act of international law, concluded in written form, governed under international law, embodied in a single instrument or in two or more whatever would be its designation.

The doctrinal approach to treaties breaks down the international treaties according to following categories:

1. according to the number of contractual parties,

The international law makes the differences between the treaties stipulated between two subjects of international law (bilateral treaties) or among broader subjects of international law (multilateral treaties). In addition to this classification it might be added the treaties reserved to the closed number of the states or general ones, with the reference to the universality.

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<sup>819</sup>J.COMBACAU, S.SUR, *Droit international public*, Paris, 2010, p.76.

<sup>820</sup>A.V.LOWE, *International law*, Oxford, 2007, p.64.

<sup>821</sup>T.TREVES, *Diritto internazionale: problemi fondamentali; continuazione del Diritto internazionale di Mario Giuliano*, Milano, 2005, p.316.

2. according to the degree of openness and participation,

This division to certain degree copies the approach as indicated in the first division. According to this division it can be distinguished between the open treaties which are open also for the states, which were not present in the process of the creation of the treaty itself. Furthermore, there can be distinguished particular group of semi-open treaties. This type of the treaties refers to the fact that other states may be parties of the treaty only under certain conditions, deciding in the internal rules of such a treaty. The last category falling into these ones are the closed treaties.

3. according to the subject-matter of the treaties,

While attributing the Treaty to particular category under subject-matter we might distinguish certain typology of the regulation matter of the treaty – political, economic, humanitarian types of treaties.

4. according to the nature of the subjects, participating on the conclusion of the treaty,

This typological approach depends on the determination of the subjects, which concluded – as states, international organizations or other subjects of international law.

5. according to the duration of the treaties

Takes into consideration of time matter of the treaties within which there shall be discussed the issues. Determines the time-matter of the international treaties, their entry into power and possibly the recall of the agreement,

6. according to the form of the treaties

The considering this aspect of the international agreement means the understanding of the procedural way of the conclusion of the international treaties. The standard form for that is their conclusion in the way is the written

international treaty; however, the international law admits the conclusion also the conclusion in the simplified forms, as via the exchange of the notes or personal letter.

#### 4.6.4.2 *International Agreements and their Position in the Legal Order of the EU*

International agreements represent important and inseparable component of the external relations of the EU. EU as any other subject of international law cannot survive without establishing and maintaining the relations with external world finding its legal basis in the Part V of the TEU labelled '*External Relations*'. Thus, by international agreements the EU regulates its external action. In concretely under the international agreements within the EU are meant the international agreements, concluded between the EU on one side and the international organizations or non-MS on the other.<sup>822</sup>

Besides system of the traditional sources EU law, belong among important source of EU law also the international agreements. Naturally, it is necessary to make the clear distinction between the agreements having the constitutive nature and those international agreements concluded by the Union on one side, and third subject on the other including thus the states or international organizations. For this kind of treaties the doctrine uses the notion '*external agreements*.'<sup>823</sup> The legal basis of such agreements represents the Vienna Convention on Law of the Treaties, since one of the parties to the agreement is another state or the international organization. The EU stipulates the mechanism and the legal basis for the international agreements contained actually in the provision of the Article 216 (1) TFEU.

International agreements are thus not only the source of the international law, however, in the same time represent significant source of the EU law.

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<sup>822</sup>J.STEINER, C.TWIGG FLESNER, L.WOODS, *EU law*, Oxford, 2006, p 347.

<sup>823</sup>P.SVOBODA, *Právo vnejších vztahů EU*, Prague, 2010 p. 35 states that the notion '*external agreements*' as the agreements concluded by the EU (Euratom), possibly with the MS on one side and third states (international organizations) on the other, representing bilateral or multilateral legal act, having binding character, concluded in the written form presenting identical will of both parties.

Therefore, the key question is, where to position the international agreements within the legal order of the EU and logically the related questions of their applicability within the legal order of the EU. The answer to the first question gives the provision of the Article 216 (2) TFEU. The simplest implication of this provision is that international agreement must be in accordance with primary law and second effect is that cannot be in the contradiction with the external treaties.<sup>824</sup>

The international agreements in the legal order of the EU have a particular position. As to Hartley, the international agreement are '*anomalous source of the Union law*', since they have their origin outside of Union legal order, and are in part acts of non-MS.<sup>825</sup> As the consequence, the international agreement they have two dimensional effects, firstly causing the legal effects on the plane of international law. Such an agreement is binding on the level of international law and questions of the interpretation or effect may at some stage be submitted to an international judicial organ. Secondly, the international agreements may also produce effects in internal legal order of the State or organization concluding such agreements.<sup>826</sup>

The fundamental principles of the investigation of the effects of the international agreements within the legal order of the Union might be derived from the judgment of the ECJ in the case Kupferberg. Within the judgment the ECJ clearly made that the effect of the international agreement within the legal order of the Community cannot be determined without taking into account the principles of the public international law. Thus, going out from the principles of public international law, the contracting parties shall determine what effects the

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<sup>824</sup>Also in this aspect may be recalled several judgments ECJ judgment, 7 February 1973, I. Schroeder KG v. the Federal Republic of Germany, case 40/72 [1973] ECR, p.125, ECJ judgment, 24 October 1973 Carl Schlüter v. Hauptzollamt Lörrach, case 9/73 [1973] ECR, p.1135, ECJ judgments, 12 December 1972, International Fruit Company NV and others v Produktschap voor Groenten en Fruit, joint cases 21-24/72, [1972] ECR, p.1219 can be traced the codification of the existing case-law.

<sup>825</sup>T.HARTLEY, *The foundation of European Union law*, Oxford, 2010, p.158.

<sup>826</sup>ECKHOUT, *EU External relations law*, Oxford, 2011, p. 267.

provisions of the agreement shall have within their legal order.<sup>827</sup> The investigation of the legal effects of the international agreements within the legal order of the Union does not apply the presumption of the direct effect as in the case of primary and secondary law, but rather is necessary to investigate the subject, nature, objectives of the international agreement and also the intention of contractual parties.

#### 4.6.4.3 *Legal Effects of the International Agreements*

From the hierarchical point of view, the primary law has superior position in regard to the secondary law. It can be stated that the international agreements represent the vincula between the primary and secondary law. Originally, their position was not fully clear, but the ECJ gave in the cases *Schröder KG v. Germany* case 40/72, *Carl Schlüter v. Hauptzollamt Lörrach* case 9/73, or *International Fruit Company NV et. Other v. Produktschap voor Groenten en Fruit* case 21-24/72 clarified position this point.

The key provision governing the position of the international agreements within the legal order of the EU is the provision of the Article 216 (2) TFEU. As Týč et. al. comment the nature of this provision, the binding character of the international agreement by organs of the Union is needed to be reflected also by the adoption of legal acts of secondary law.<sup>828</sup> Thus, if there is adopted an act of secondary law, adopted in contradiction to the international agreement binding, could be a reason for a nullification action. The provision binds the MS which are not party to such an agreement, however, which gave their approval for them.<sup>829</sup>

Direct effect in terms of international agreements oscillates around the formulation that the international agreement is admissible, if in regard to its

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<sup>827</sup>Judgment ECJ, 26 October 1982, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, case 104/81 [1982] ECR, p.3641.

<sup>828</sup>V.TÝČ et al., *Vybrané otázky působení práva Evropské unie ve sféře českého právního řádu*, Brno, 2011, p.135.

<sup>829</sup>V.TÝČ et al., *Vybrané otázky působení práva Evropské unie ve sféře českého právního řádu*, Brno, 2011, p.136.

wording, purpose and nature of the agreement, contains clear and precise obligation which does not require the adoption any other act.<sup>830</sup>

Legal order on the direct effect of the international agreement was built up on several judgments of the ECJ. As it was already mentioned, the very first one was the International Fruit Company. Apart from that judgment the decision basis form further the judgment Haegeman.<sup>831</sup> The principal question of the judgment was the investigation of the binding effect of the Act on Accession with Greece. The Court clearly adopted the approach that: “ [...] *the act since its entry into power forms integral part of the Community law.*” *Such an approach can be understood as clear preference given to the monist understanding of monism and did not set any requirement of the incorporation to the legal order of the Community.*”

The monism principle of furthermore deepened by the judgment Bresciani, where the Court even recognized the direct effect to the Act on Association in part when its gave up the importers the duty to pay the customs or a fee having equivalent effect which can be invoked even against the provision of national legislation.

Lastly, the judgment in the case Kupferberg<sup>832</sup> in which the Court recognized the direct effect also of common bilateral free trade agreement, provided they contain the unconditional and precise obligation which do not need any further intervention. Such an intervention cannot be changed by the structure of the international treaty.

Thus, there are two tests necessary for the investigation of the direct effect of the concrete international agreement is to be applied two hold tests - it is not excluded by the nature and structure of the external agreement and also the

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<sup>830</sup>ECJ judgment, 15 July 2004, Syndicat professionnel coordination des pêcheurs de l'étang de Berre et de la région v Électricité de France (EDF), case C-213/03 [2004] ECR, p. I-07357, para 39.

<sup>831</sup>ECJ judgment, 30 April 1974, R. & V. Haegeman v. Belgian State, 30 April 1974, case 181/73 [1974] ECR, p.449.

<sup>832</sup>ECJ judgment, 26 October 1982, Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A., case 104/81 [1982] ECR, p.3641.



concrete provision of the international agreement. The direct effect is moreover granted to the relevant provision of the international law, if the Union directly executes such a provision of an international act<sup>833</sup>, or in case that the secondary law refers to the relevant provision of the agreement.<sup>834</sup>

#### 4.6.5 Secondary Law

##### 4.6.5.1 Generalities

Under the notion ‘secondary law’ is to be understood the law-making acts of the Union bodies which result in a body of law generated by the Union itself in its quasi-autonomous capacity.<sup>835</sup> Methodologically, can be broken down into the categories according to their labelling, according to the procedure used to adopt them and finally, they can be differentiated in accordance to their effects they shall have.<sup>836</sup> The Lisbon Treaty brought into life much more clarity into the sources of law.<sup>837</sup>

Secondary law is formed by all those acts finding their legitimacy in the primary law,<sup>838</sup> in turn divided into conventional and unilateral acts. The former include international agreements, agreements between MS and inter-institutional

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<sup>833</sup>ECJ judgment, 7 May 1991, Nakajima All Precision v Council, case C-69/89 [1991] ECR, p.I-2069.

<sup>834</sup>ECJ judgment, 1 March 2005, Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB), case C-377/02, [2005] ECR p. I-1465.

<sup>835</sup>D.LASOK, J.W.BRIDGE, *Law and institutions of the European Communities*, London, 1992, p.125.

<sup>836</sup>T.HARTLEY, *The foundation of European Union law*, Oxford, 2010, p.105.

<sup>837</sup>As Piris state, the EU contained numerous sources of law, including regulations, directives, four types of decisions (EC, CFSP, JHA and sui generis), recommendations and opinions, framework decision, conventions between the MS, principles and general guidelines, common strategy, two types of common positions (CFSP and JHA), joint action, reference to J.C.PIRIS, *The Lisbon Treaty: A Legal and Political Analysis*, Oxford, 2010, p.93; Siman, Slašťan, Ivanová-Žiláková recognize more to these acts also mention unbinding legal acts like decisions ( in German ‘*Beschluss*’), inter institutional agreements, announcements, resolutions, conclusions, declarations, programs which cannot be applied directly but can serve as a background for the interpretation of the EU law by the ECJ, in M.SIMAN. M.SLAŠŤAN, D.IVANOVÁ-ŽILÁKOVÁ, *Primárne právo Európskej únie*, Bratislava, 2006, p.57. As an example of an act having unbinding nature, however, being applied as a source of interpretation may be mentioned the cases ECJ judgment, 9 June 1977, Ufficio Henry van Ameyde v S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI) S.r.l., case 90/76, [1977] ECR p.1091 and ECJ judgment, 13 December 1989, Salvatore Grimaldi v Fonds des maladies professionnelles, case C-322/88 [1989] ECR, p.4407.

<sup>838</sup>The primacy of the treaties on secondary legislation can also be inferred from article 263 Treaty on the Functioning of the European Union (Consolidated version 2012) OJ 326, 26.10.2012 which entitles the Court to have jurisdiction in actions brought on ground of ‘*infringement of the Treaties or of any rule of law relating to their application.*’

agreements. The latter is divided into two subcategories. From one side, the so-called typical acts: regulations, directives, decisions, opinions and recommendations, listed in Article 288 TFEU. From the other side, atypical acts sometimes referred to as soft law, not listed in the abovementioned Article: communications, recommendations, white papers, green papers<sup>839</sup>, guide lines etc. Typical acts can then be divided into binding (regulations, directives and decisions) and non-binding acts (recommendations, opinions).

The fact, that the Article 288 enumerates certain acts (typical ones), however there is a vast variety of the acts which can be defined as atypical being thus different to those ones, as presumed by the Article 288<sup>840</sup>, it concerns the collection of the acts '*sui generis*' sometimes even deprived of any specification or even the univocal denomination.<sup>841</sup> It goes without saying that the requirement of the legal security must respect the appropriate legal basis and the form of the legal act concerned.<sup>842</sup>

The attention will be paid exclusively to the typical acts, since they represent the majority of legal acts adopted in the legal ambience of the EU.

The Article 288 TFEU enumerates the following typology of the legal acts:

#### 4.6.5.2 Regulations

Regulations shall have general application. It shall be binding in its entirety and directly applicable in all MS. The principle of general applicability means that their addresses are on one hand the Union and its institutions, on the other one the MS and their organs and the natural persons and corporations<sup>843</sup>. From the territorial point of view it is applicable within the all territory, covered

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<sup>839</sup>On the category of atypical acts, consult for detailed information P. DE LUCA, *Gli atti atipici nel diritto dell'Unione europea*, Torino, 2012. After a thorough overview of the number of atypical acts that can be found in the EU Law and of the related case law, the author pinpoints some crucial issues.

<sup>840</sup>U.VILLANI, *Instituzioni di Diritto dell'UE*, Bari, 2013, p.265.

<sup>841</sup>G.FIENGO, *Gli atti atipici della comunità europea*, Naples, 2008, p.111.

<sup>842</sup>ECJ judgment, 16 June 1993, French Republic v. Commission of the European Communities, case C-325/91 [1993] ECR, p.I-3298.

<sup>843</sup>S.HOBE M.LYSANDER FREMUTH, *Europarecht*, Munich, 2012, p.94.

by the territorial application of the Treaties, meaning the territory of the MS<sup>844</sup>. The regulation incorporates *'die wahre europäische Befugnis'* is granting the Union the right to adopt the immediately effective system of law to the MS and the EU without any need of specific transformation.<sup>845</sup> Although, originally it was not fully clear the right connotation of the notion *'directly applicable'* the ECJ has clearly confirm the idea that the regulation is intended to provide the right to the individuals to invoke the rights through national courts as well.<sup>846</sup>

#### 4.6.5.3 Directives

Another typical act, being mentioned in the Article 288 TFEU is the directive. According to the provision of the Article 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each MS to which it is addressed, but shall leave to the national authorities the choice of form and methods.<sup>847</sup> The concrete forms and means destined for the fulfilment of its aims depends upon the discretion of the MS.<sup>848</sup> The MS are obliged to inform the European Commission on the measures adopted on the implementation of the directive and to synchronize the internal legislation with the provision of the directive.<sup>849</sup>

The doctrine characterizes the directive as *'method legislative a double détente'*, being act of derivative act, ensuring the *'subtil équilibre'* between the will to ensure the uniform application of the EU law and the institutional and procedural

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<sup>844</sup>ECJ judgment, 16 February 1978, Commission v. Ireland, case 61/77 [1978] ECR, p.417.

<sup>845</sup>T.OPPERMANN, *Europarecht : ein Studienbuch*, Munich, 1999, p.207.

<sup>846</sup>P.CRAIG, G.de BÚRCA, *EU Law: Text, Cases, and Materials*, Oxford, 2011, p. 105-106 in reference to the legendary case 26/62 (ECJ judgment, 5 February 1963, case 26/62, Van Gend en Loos v. Administratie der Belastingen [1963] ECR p.1) “ [...] *the Community constitutes a new legal order of international law for the benefit of which the state have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only MS but also their nationals. Independently of the legislation of MS, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by the reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as the MS and upon the institutions of the community.*”

<sup>847</sup>Article 288 Treaty on the Functioning of the European Union (Consolidated version 2012) OJ 326, 26.10.2012.

<sup>848</sup>P.COLOTKA, *Systém inštitúcií EÚ a prameňov európskeho práva* in J.ČORBA (ed.) *Európske právo na Slovensku*, Bratislava, 2002, p.93.

<sup>849</sup>J.KLUČKA, J.MAZÁK, *Základy európskeho práva*, Bratislava, 2004, p.135.

autonomy of MS.<sup>850</sup> However, in case that the directive is detailed one, it leads to the limitation of the appreciation and tends to the direct applicability.<sup>851</sup>

The directive and its applicability was recognized by the ECJ, in two directions. In the judgment *Marleasing* the ECJ recognized the indirect application, which regardless to the direct effect of the directive. Within that the individual may require the interpretation of the directive in accordance with a principle of the euro conform interpretation. Moreover, the ECJ has recognized the principle of the direct applicability under the conditions that the individual's rights come out directly out of the directive.<sup>852</sup>

#### 4.6.5.4 *Recommendations and Opinions*

The very last subparagraph of the Article 288 TFEU provides, the recommendations and opinions do not have binding force. Moreover, they can have open-end of the addresses or can be destined for all MS.<sup>853</sup> The true is that these legal act, do not dispose any possible direct effect; however the ECJ may review these acts in terms of the interpretation or validity.<sup>854</sup> The aim of recommendation and opinions is to advise the MS without binding them and persuading the MS about the need of certain type of behaviour.<sup>855</sup>

#### 4.6.5.5 *Applicability of the EU Law*

Adhering to the first grouping theory, following which also unwritten general principles belong to the primary law, this first category counts also the

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<sup>850</sup>C.DENIZEAU, *Le contrôle par le juge administratif de l'application des directives européennes* in *Zbornik radova Pravnog fakulteta u Splitu*, Volume 50, Issue 2, 2013, p.315.

<sup>851</sup>KRÁL, RICHARD, *Transpozice a implementace smernic ES v zemích EU a CR*, Prague, 2002, p.1-2.

<sup>852</sup>Judgment ECJ, 4 December 1974, *Yvonne Van Duyn v. Home Office*, case 41/74 [1974] ECR, p. 1337 was further developed by the ECJ, specifying the conditions of the conditions of the direct effect as elapsing of the transposition period, the fact that the transposition was not done correctly, or incompletely, the rule is not conditional, the provision cannot have for consequence the imposing of the duty to the natural or legal entity, which means that cannot have any horizontal or vertical effect, in M.SIMAN. M.SLAŠŤAN, D.IVANOVA-ŽILÁKOVÁ, *Primárne právo Európskej únie*, Bratislava, 2006, p.54-55.

<sup>853</sup>C.W.EICHOLZ, *Europarecht*, Heidelberg, 2011, p.865.

<sup>854</sup>ECJ judgment, 13 December 1989, *Salvatore Grimaldi v Fonds des maladies professionnelles*, case C-322/88 [1989] ECR, p.4407.

<sup>855</sup>R.STREINZ, *Europarecht*, Heidelberg, 2012, p.186.

founding treaties, all the following agreements signed to amend the formers, the annexed protocols and the treaties for the new members' accession.

According to Article 48 TEU, the Treaties can be modified in accordance to two possible procedure groups: the ordinary revision procedure and the two mechanisms of simplified procedure. Looking on the first one, it can be inferred the concretization of what the Court already stated in relation to the nature of the Treaties: they can be considered as 'international agreements', since the revision procedure requires an agreement between the MS governments and a subsequent ratification. Actually, as specified in the Van Gend & Loos case: *"The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only MS but also their nationals."*<sup>856</sup>

It has already been said of the importance of the Van Gend & Loos case, the Court affirmed the existence of 'direct effects' to EC Law, i.e. the possibility given to *individuals to immediately invoke a European provision before a national or European court* against States or other public subjects (*vertical effect*) or against other individuals (*horizontal effect*). The direct effect depends on the nature of the act, being submitted to certain conditions: for what concern primary law, in the aforementioned judgment. The Court recognized that effect is possible only where obligations are precise, clear, unconditional and not requiring additional measures.

For what concerns secondary legislation, the direct effect - absent for unbinding acts - depends, as announced, on the type of act. According to Article 288 TFEU: *"A regulation shall have general application. It shall be binding in its entirety and directly applicable in all MS."* As a consequence, regulations will always have

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<sup>856</sup>ECJ judgment, 5 February 1963, Van Gend en Loos v. Administratie der Belastingen, case 26/62 [1963] ECR, p.1.

also a direct effect: individuals are entitled to invoke their provisions since they enter into force.<sup>857</sup>

With the reference to directives, though they are not characterized by direct applicability (they need to be transposed by a national act), in some circumstances, they can have direct effect. This happens when the provisions contained in the act are unconditional and sufficiently clear and precise.<sup>858</sup> For what concerns decisions, they can have direct effect when the addressee is a MS. Both directives and decisions have only a vertical direct effect.

An aspect that strictly relates to the direct effect is the recognized principle of precedence of EU Law over national law, according to which EU Law will prevail on conflicting national law, whether previous or subsequent and irrespective of the rank. As a consequence, the judge - but also every public officer - is not allowed to apply the national provisions where conflicting with the EU law. In this way, individuals will be granted those rights enshrined at a supranational level. Though the principle is not set in the treaties, it has been enshrined by the Court in several judgments.<sup>859</sup>

#### **4.7 Conclusion**

The chapter IV covered wide scope of issues related to the legal position of the EU within the international legal relations. As the point of departure was considered the issue of the legal personality of the EU, further the division of the competences, and in the conclusive part analysis of the sources of the EU law with principles of their applicability.

The origins of the legal personality of the EU can be tracked back in the ECSC Treaty, starting with a functional approach, clearly linking the legal personality to the tasks with the aims the ECSC shall fulfil on the international

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<sup>857</sup>In this sense, see ECJ judgment, 9 March 1978, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, case 106/77 [1978] ECR, p.629.

<sup>858</sup>ECJ judgment, 4 December 1974, *Yvonne Van Duyn v. Home Office*, case 41/74 [1974] ECR, p.1337.

<sup>859</sup>The most important is the ECJ judgment, 15 July 1964, *Flaminio Costa v. ENEL*, case 6/64 [1964] ECR, p.585.

plain. In the line of enforcing the international appearance moved forward the EURATOM Treaty presuming the extension of the limits of the power and jurisdiction to subjects of international agreements, as third states, international organizations. Moreover, the EURATOM Treaty presumed the existence of mixed agreements and introduced the concept of notification of existing international agreements concluded by the MS. The EURATOM Treaty created a platform for the establishment of the relations between this grouping of states and other international organizations as UN, WTO, CoE and OECD.

In the development of the international dimension of the future EU was continued by the Article 210 EEC, although wording very briefly: "*The Community shall have legal personality*". By such a provision the Community gained virtual capacity to conclude the international agreements attaining the aims presumed by the treaty itself. The enactment of the personality was enforced by the provision of the Article 228 EEC on the conclusion of international agreements under the EEC Treaty.

The enactment of the legal personality was further developed by the ECJ, formulating the principles of the division of the competences and forming thus the feature of the legal personality of EEC. However, as a matter of principle, the international legal personality remained linked to the aims and objectives as presumed by the EEC Treaty. External dimension of the EEC was enforced by the Treaties amending the EEC as SEA, Maastricht (it is necessary to stress the fact that it came to the division of the action between the EU and EC) Amsterdam, Treaty of Nice and lastly by the Lisbon Treaty. Lisbon Treaty as the last amendment brought into practice three important elements, as clear enactment of single legal personality of the EU, clarification of the competences between the MS and the EU and removing the pillar structure.

Competence issue of the EU is one of the essential elements in deeper understanding of the delimitation of the competences which dispose the EU and those which left to be executed by the MS.

Originally, the founding treaties did not contain any systematic list of the competences; what persisted up to Lisbon Treaty. However, there were established the fundamental principles as the principle of attribution of the competences, enactment of the fields of activities covered by the Community.

The doctrine and practice of the EU institutions contributed the fact that the competences within the EU legal order may be may be grasped from various points of view among those are the most important divisions explicit – implied powers and vertical and horizontal ones.

The issue of the external implied powers appeared as the most actual also in terms of the formation of the external relations to EEC up to EU. First case, within which the ECJ was really confronted with the existence of the external implied powers where the case AETR, in which the Court decided that the Community enjoys the capacity to establish the contractual links in order to fulfil the objectives as defined in the Treaty. According to the Court, the competence may flow also from other than explicit provisions of the Treaty.

However, in the judgment conditioned these competences by the existence of adopted common rules within which the MS have no longer entitled to act take obligation with the third countries which could alter their scope. The Court clearly linked the internal Community measures to external ones, opening thus the way for the principle of parallelism. The principle remains valid also in the Lisbon Treaty and its provision 216 (1) of the TFEU.

The primary judgment AETR was further developed the judgment in the case Kramer 3,4 and 6/76 within which the Court repeated the conclusions as formulated in the case AETR, however, did not insist on the existence of previously adopted legislation. The existence of the exclusive competences justified by the efficient fulfilment of the tasks the Community shall exercise. Both judgments are doctrinally perceived as the motors of the expansion of the competences of the Community.



Better, said, ended first phase of parallelism and open the door for the second phase, the phase which started by the Opinion 1/76. In the Opinion the Court recognized the existence of the implied external powers, even in absence of previously adopted legislation in that subject-matter in case of the necessity to conclude an international agreement. Such argumentation further supports original idea of overcoming the AETR doctrine and building on new principles, especially with regard to the principle of necessity.

The concept of necessity was further elaborated by the Opinion 2/91 on accession to the ILO Convention on work safety. Within that the Court decided that the competences do not flow only from the measures adopted by the Community institutions, the very existence of the legislative measures was considered sufficient to consider the exclusivity of the competences. The concept of the exclusivity was conditioned by sufficiently of harmonization.

The Court alleged the link between the internal and external competences, the duty of cooperation between the MS and the Community and thus is perceived as the triumph of parallelism in the purest form. The competence dispute in following years marked especially the Opinion 1/94 on the competence to enter into WTO. Within that the Court relaxed and adjusted the existing case-law, as arose from the Opinion 1/76 and as a condition and insisted on the condition of certain act in order to attribute, considering thus the very existence of the competence as not sufficient.

Upon the Opinion 1/94 remained the conditions for the exclusivity of the competences, as existence of the internal legislation conferring the powers to the institutions to negotiate with non-MS, the complete harmonization on the Community level and in absence of the harmonization of the intrinsically perceived linkage to the objectives to be attained. Hence, the Opinion turned back to the original doctrine related to the AETR, Kramer and Opinion 1/76 and ruled that it is also necessary to take into consideration the development of the Community law.

The Lisbon Treaty reacted on the case-law of the ECJ EU, by clear providing the competences of the competences and the need for urgent enactment in the primary law. The primary law under the Lisbon Treaty tried to summarize the existing case law and to make a systematic order in the division of the competences between the EU and MS.

Within this division are the most strict ones are the exclusive competences, practically, hindering the MS to execute any powers falling under these competences, unless they are authorized by the Union.

Another type of the competences are the shared ones, within which the EU may adopt the binding acts. However, also the MS are entitled to adopt the measures, none the less to the extent the EU ceased to exercise the existing powers. Therefore the scholars speak about the pre-emptive effect of this type of the competences, however, respecting the principle of subsidiarity and not going beyond that what is needed to attain the objectives, i.e. respecting the principle of proportionality.

Third category of the competences represents the collection of support, coordinate and supplementary competences within which the MS without endangering of the uniform application of the EU law orient their law rather on soft-law guidelines and incentive measures.

The existing competences formed the existing sources of the EU law which are characterized by several elements being supranational, having direct effect, being directly and indirectly applicable. The legal order of the EU elaborated own system of the law, distinct to the legal order of public international law and the legal order of the MS.

At the top the primary law is occupied by primary law, including also unwritten sources of law as general principles of EU law, customary law of the EU. On the half-way between the primary law and the secondary are positioned the international agreements. Under the notion '*international agreements*' are to be

understood the agreements with third subjects. The ECJ considers the international agreement part of EU law and do not exclude the direct effect of the international agreement. Third group of the sources of the EU law build the secondary acts, acts adopted directly by the institutions of the EU.

## 5 *Common Commercial Policy of the EU*

### Summary

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### 5.1 Preface

*No fountain can be purified while a contaminated stream flows into it (therefore no) effort to curb and suppress trust violation (will succeed unless such effort strikes at the main source of their constant creation – protective tariff.<sup>860</sup>*

By saying that Cordell Hull, the member of the U.S. House of Representatives, perceived the cost inefficiency related to the protection of the internal market by limited means and ways.

The CCP was enacted for the first time in the ECSC Treaty, however, with subject-matter limitation to coal and steel sector. Thus, the CCP belongs to the oldest '*common policies*' which was over the years further developed by the Treaty of Rome which interconnected the CCP to the conclusion of the international agreements. Provisions dedicated to the CCP were further developed by the SEA, Maastricht, Amsterdam, Treaty of Nice and lastly Lisbon Treaty. The CCP was perceived as sort of competence falling under exclusive competence, mainly upon the expiration of the transitional period lasting till 1969 on the customs union.

From the historical perspective, there was important enactment of the principles of CCP as in the Article 131 and 133 as enacted by the Amsterdam

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<sup>860</sup>P.S.WATSON, J.E.FLYNN, C.C.CONWELL, *Completing the world trading system: proposals for a Millennium Round*, Hague, 1999, p.9.

Treaty and Lisbon Treaty linking the CCP closer to the international dimension of the EU.

Thus, the chapter will investigate in deep, the enactment of the CCP within the historical perspective, taking into account the gradual enactment of the CCP, however not only in terms or primary law, but reflecting the case-law of the CJ EU giving a statement to the various aspects of the CCP and interpreting its nature and position.

Going out from these facts, there will be provided an answer which subject-matter is to be covered by the CCP in terms of goods, services, intellectual property and investments and thus also the relation between the MS and the EU.

## **5.2 History of CCP**

### *5.2.1 CCP under ECSC Treaty*

Originally, the EC/EU were founded as ECSC. Aim of the coal and steel Community was the constitution of the institution based on creation of the common market, sharing common objectives and creation of common institutions.<sup>861</sup> At the first sight, the Article 1 clearly defined the principal aims and elements of the new organization. Thus, the scope of its applicability further develops and specifies the aims and tasks given to the Community.<sup>862</sup> The ECSC established the common market as a support tool for the integration of the specific sectorial coal and steel community. Treaty operated under the regime of crucial elements within which in to distinguish between two concepts, labelled as '*internal market*' and '*customs union*.'

Through the Treaty was naturally enforced the outer appearance of the Community, by granting the legal personality to it which was investigated in more profound way in the chapter IV. The legal personality of the Community was enacted with an aim to ensure its proper functioning. The legal personality was

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<sup>861</sup>Article 1 Treaty establishing the European Coal and Steel Community (1951).

<sup>862</sup>Article 1 Treaty establishing the European Coal and Steel Community (1951).

given to the extent as it was recognized for legal persons of the nationality of the country, represented by its institutions, acting within the frame of own powers and responsibilities. That means that the Community should have acted only within the limited scope of own powers and responsibilities, as set forth by the Treaty. Therefore the ECSC's legal personality might be characterized as the functional one, clearly interlinked to the aims to be fulfilled.

The Treaty sets forth fundamental characteristics of the operation of the common market as internal feature of ECSC.<sup>863</sup> In terms of the external face of the common market, the Treaty contains special provisions dedicated to the ECSC's CCP.<sup>864</sup>

While analysing CCP, the fundamental element shall be considered first appearance of the CCP. The shape of the customs union under the ECSC was really simple one though. ECSC Treaty states that in the frame of the customs union are the MS obliged to respect to change minimal and maximal customs duties on coal and steel products from being imported from third countries.<sup>865</sup> Among other responsibilities of the MS included the administration of the export and import licensing in respect to third countries. The determination of the amount of tariffs shall respect the national procedures of the MS with rather broadly defined competences given to the HA as authority with supervision competences.<sup>866</sup>

Rather conservative approach to the competences appeared evident also in the chapter dedicated to the CCP. General provision of the commercial policy goes

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<sup>863</sup>The ECJ confirmed in the joined cases 9-12/60 expressly that in relations to the goods coming from the third countries, stating that the principle of the free movement of the goods originating in the non-member countries and realized to the free circulation in the member state shall be ensured its free circulation, reference to the ECJ judgments, 14 July 1961, *Société commerciale Antoine Vloeberghs SA v. High Authority of the European Coal and Steel Community*, joined cases 9 and 12-60 [1960] ECR, p.197.

<sup>864</sup>Treaty makes clear the fact that the competences of the MS shall be preserved and not affected by the application of the Treaty. Moreover, this approach is even more stressed the aspect of the preservation of the powers of MS, in case that they would have been parties to another international agreements. The governments of the MS will lend each other the necessary assistance in the application of their international measures.

<sup>865</sup>Article 72 Treaty establishing the European Coal and Steel Community (1951).

<sup>866</sup>Article 72 Treaty establishing the European Coal and Steel Community (1951).

out from the general characteristics, meaning that existing competences of the MS shall not be affected by the application of the Treaty. The presumption is that the Treaty shall not exceed existing powers of the MS in case when they are free to exercise their international agreements to which they are parties.

The Treaty goes out from the cooperation principle, meaning that the MS shall only *'lend other necessary assistance in the application of the measures recognized by the HA.'* It shall be done in conformity with the present treaty and international agreements which were in effect. The coordination principles shall be defined by the HA, giving instructions to the MS as to the methods of the mutual assistance.<sup>867</sup>

The original posture of the CCP and certain lack of the ECSC's international appearance at that time was marked also by the fact that the MS in the field of the international appearance had informational obligations, i.e. to keep the HA informed about proposed commercial agreements or arrangements, related to the coal, steel or importation of the raw materials necessary to the production of the coal and steel in the MS.<sup>868</sup>

Nonetheless, despite the existence of several external implications, there was no evident enactment of policy-making for external economic relations at Community level in terms of CCP.<sup>869</sup> Thus, the ECSC explicitly recognized that the MS retain the competence in the commercial matters relating to the coal and steel.<sup>870</sup>

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<sup>867</sup>Ubertazzi in commenting the provision of the article 71(1) Treaty establishing the European Coal and Steel Community (1951) comes to the correct conclusion that the ECSC Treaty reserved for the MS basically all powers in matters of commercial policy, directly or indirectly attributed to the community institutions and under the respect to the community direction and supervision allowed exclusive state management of relations with third countries, reference to B.UBERTAZZI, *The End of the ECSC in European Integration online Papers*, Volume 8, Number 20, 2004, p.4.

<sup>868</sup>But the information duty had more significant connotation, stressing the fact the in case that proposed agreement or arrangement contained the clauses, which would have interfered with the application of the Treaty the High Authority was entitled to address necessary recommendation to that member state in the delay of 10 days Article 75 Treaty establishing the European Coal and Steel Community (1951).

<sup>869</sup>A.NIEMANN, *The Common Commercial Policy: From Nice to Lisbon* in F.LAURSEN (ed.), *The EU's Lisbon Treaty: Institutional Choices and Implementation*, Burlington, 2012, p.1.

<sup>870</sup>J.J.CALLAGHAN, *Analysis of the European Court of Justice's Decision on Competence in the World Trade Organization: Who Will Call the Shots in the Areas of Services and Intellectual Property in The*

The treaty introduced the means for enforcement of the common position adopted by the MS, stating that at the end of the transitional period, the MS are subject to the common action while operating within the framework of international organization in matters related to the common market. As the result of the adoption of the common position, the MS acting on their national level shall take actions to achieve as far as possible uniformed position.<sup>871</sup>

### 5.2.2 CCP under Treaty of Rome

In the further development of the Community reached certain level of consensus between the MS which stimulated the undertaking of further steps on the way of deepening of the European integration. As the result of the negotiations, the planned Treaty of Rome as general treaty was designed to merge national markets into a '*single market*'.

The negotiations at the treaty-making conference in Messina led to the conclusion of an agreement on customs union which gaining preference over the free trade area. The Messina conference still preserved the principle of friendly approach in relation to the MS and their own relations to third countries.

Conference outlined twofold fundamental points arising from the commercial issues:<sup>872</sup>

1. there shall be adopted the rules, in favour of '*one-voice speaking commercial policy*',
2. it was considered necessary to establish of a Treaty establishing a new-general economic Community.

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*European Union* in *Loyola of Los Angeles International and Comparative Law Review*, Volume 18, 1996, p.511.

<sup>871</sup>Article 18 Treaty establishing the European Coal and Steel Community (1951).

<sup>872</sup>Quoted from the Messina Conference to the Rome Treaties (EEC and EAEC), Luxembourg, 2012, downloaded from: ([http://www.cvce.eu/obj/from\\_the\\_messina\\_conference\\_to\\_the\\_rome\\_treaties\\_eec\\_and\\_eaec\\_full\\_text-en-950e8fdc-263d-4ef1-aae2-bd336cfacb54.html](http://www.cvce.eu/obj/from_the_messina_conference_to_the_rome_treaties_eec_and_eaec_full_text-en-950e8fdc-263d-4ef1-aae2-bd336cfacb54.html)) [downloaded 22.10.2012]



Treaty of Rome after its adoption and entry in power centralized the CCP powers, accentuated the fact that the EC shall speak with one voice in uplifting of the competences of the MS upwards to the supranational level. The Treaty of Rome was revolutionary (apart from the aspect of the supra-nationality) in terms of granting the new supranational entity an external personality with an authority to set out, negotiate and enforce all aspects of external trade relations achieved by the common trade policy, based on principles of CET, common trade agreements with the rest of the world and the uniform application of trade instruments across the MS.

However, the question which remained unclear at this time was the scope of the CCP to be covered by the Treaty of Rome. Especially, having in mind the contentious extend of the CCP in particular in terms of the services, intellectual property and investments agreements. In fact, the Treaty represented incremental reform of the external trade policy of the MS and of the intra-European tariff cuts.<sup>873</sup> The Treaty clearly indicates that by the treaty the contracting parties established the EEC. As the fact of designation, the Community clearly indicates that the Community should cover broad scale of the economic exchanges between MS which means, not exclusively limited to coal and steel, but rather be more complex and general ones.<sup>874</sup> Ambitious aims did not remain exclusively on the paper, but the CCP became the polity within which the MS reached the most intense degree of integration. Hence, the CCP was considered as the fundamental stone of the outer conception of the common market.<sup>875</sup>

Article 2 of the Treaty specifies that by establishing of the common market and progressively approximated economic policies shall be followed by the aim -

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<sup>873</sup>F.ERIXON, A.FREYTAG, G.PEHNELT, *The Rome Treaty at 50 in Policy Briefs*, Volume 4, 2007, p.2.

<sup>874</sup>The wording of the Preamble contain several references to the economic development and importance of the CCP as: RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe. RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition. And mainly: DESIRING to contribute by means of a common commercial policy, to the progressive abolition of restrictions on international trade, reference to Treaty establishing European Economic Community (1957).

<sup>875</sup>P.FIALA, M.PÍTROVÁ, *Evropská unie*, Brno, 2009, p.423.

harmonious development of economic activities, continuous and balanced expansion, rise in stability and standard of living and closer relations between the MS. Following this fundamental aim, the Article 3 provides clearly the '*diapason*' of the activities which are to be covered by the Treaty.<sup>876</sup> As to the fulfilment of these, rather generally defined aims, the Treaty provided several legal tools, sometimes linked to their timetables.<sup>877</sup>

The first reference having the feature of the CCP appears in the Article 12, establishing the customs union. According to this Article the MS could not have introduced new import and export customs or fees having equivalent effect. Since the legal unification was long-run process, it was not possible to remove the customs duties en block and at once.

Therefore, the sense of this Article was more foregoing and oriented on the cut-down of the customs and followed by cancellation of existing duties. Nevertheless, the process of the completion happened faster than as it was contemplated by the Treaty presuming till the 1 July 1968. Hence, since 1969, the European Commission became responsible for the CCP.<sup>878</sup> The success of the elimination of the customs was confirmed also by the ECJ in sense that the EEC Treaty should have been considered '*an upgraded version*' in comparison to the ECSC Treaty.<sup>879</sup>

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<sup>876</sup>Article 3 Treaty establishing European Economic Community (1957) wording as follows: "1. the elimination between MS of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect 2. the establishment of a common customs tariff and of a common commercial policy towards third countries; 3. the abolition, as between MS, of obstacles to freedom of movement for persons, services and capital; 4. the institution of a system ensuring that competition in the common market is not distorted; 5. the application of procedures by which the economic policies of MS can be coordinated and disequilibria in their balances of payments remedied; 6. the approximation of the laws of MS to the extent required for the proper functioning of the common market. "

<sup>877</sup>Article 8 and 111 Treaty establishing European Economic Community (1957).

<sup>878</sup>The enactment of the customs union contained several provisions aimed on progressive abolishment of the customs between the MS and rather complex set of the gradual reduction of the customs between the MS, reference to P.FIALA, M.PÍTROVÁ, *Evropská unie*, Brno, 2009, p.423.

<sup>879</sup>According to the ECJ, as decided in case 36/83: "All the foregoing considerations show that the ESCS does not constitute a free-trade area in which the origin of a product is a determining factor, but is more akin in its structure to the principle of a customs union.", reference to the ECJ judgment, 28 June 1984, *Mabanafit GmbH v. Hauptzollamt Emmerich*, case 36/83 [1984] ECR, p.2497, para 22.

The own provisions dedicated to the CCP under the EEC Treaty consist of the set of Articles 110-116. General introductory paragraph represents the Article 110, having rather declaratory nature and considering the customs union as a contribution to the development of the world trade. The aforementioned Article declares the effect of the cancellation of custom duties as increasing the competitive position of the MS.<sup>880</sup>

Since the process of the formation of the CCP could not have been done at once, the provision of the Article 111 enacted the transitional periods for the MS for adjustment of to the requirements of the CCP in order to ensure the uniformity of the CCP, including the state aid. Further on, the Article 113 (1) EEC Treaty sets forth ambitious aim,<sup>881</sup> connected with the time framework, upon expiration of the transitional period, there should have been established CCP, based on the uniform principles in regard to the changes of the tariff rates, conclusion of tariff and trade agreements, aimed on ensuring of the uniformity in the measures of liberalization, export policy and measures protecting the trade in cases of dumping and subsidies.<sup>882</sup>

Despite such general and complex nature of the Article, it was doctrinally often criticized as lacking of the definition of the extent of the CCP and accordingly, not defining in general terms the instruments at disposal of the

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<sup>880</sup>Article 110 Treaty establishing European Economic Community (1957) wording as follows: “By establishing a customs union between themselves MS aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of the restrictions on international trade and the lowering of customs barriers. The CCP shall take into account the favourable effect which the abolition of custom duties between MS may have on increase in the competitive strength of undertakings in those States.”

<sup>881</sup>Obviously, the Common customs policy may not exist as a separate concept without any linkage to the other policies. This linkage became even more evident after the ruling of the ECJ in the case 165/87 Commission v. Council. The ECJ decided that by the determination of the legal basis for the change of the legal base of the Community nomenclature may not be based on the Article 28, but 113 the provision of the CCP, reference to the case ECJ judgment, 27 September 1988, Commission of the European Communities v. Council of the European Communities, case 165/87 [1988] ECR, p.5545.

<sup>882</sup>The protective role of the customs union has been acknowledged by the Court in the joined cases 37-38/73 stated: “The purpose of the common customs tariff is the equalization of the customs charges levied at the frontier of the Community on the products imported from the third countries, in order to avoid any deflection of the trade in relation with those countries and any distortion of internal circulation or of competitive condition.” as referred to ECJ judgments, 13 December 1973, Sociaal Fonds voor de Diamantarbeiders v. NV Indiamex and Feitelijke Vereniging De Belder, joined cases 37 and 38/73 [1973] ECR, p.1609.

Community for implementation of this policy.<sup>883</sup> As it will be proven later on, the scope of the Article 113 covers exclusive competences and following aspects in terms of the common commercial policy:<sup>884</sup>

1. the power to conclude agreements with third countries or international organizations, or to enter into international engagements in the framework of international organizations, marked as '*conventional agreements*',
2. the power to adopt unilateral measures of commercial policy, usually referred to as '*autonomous measures*', e.g. regulations on the CCT and the external relations.

As doctrine further comments the scope of the Article 113, as giving clearly the competence to the EC institutions over external commercial policy, including almost all of the subjects of world trade. Moreover, in regard to the GATT Article enabled to the EC institutions the exercise of the principal representation role in the GATT.<sup>885</sup> Nonetheless, the Community over the years extended the applicability of the Article 113, not covering only the agreements on tariffs and trade, on uniformity in measures of liberalization, export policy and countervailing measures but also the agreements on regulation of the market and prices of certain commodities through particular commodity agreements, to make sure the availability of the '*wished goods*' and to restrict the import of the '*unwanted ones*'. The Article subsequently absorbed also the issues of antitrust.<sup>886</sup>

Institutionally, in achieving these aims, the power was given to the Commission entitled to submit the proposals to the Council for the implementation of CCP, whereas the Council was obliged to act on the basis of qualified majority.

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<sup>883</sup>J.H.J.BOURGEOIS, *External Relations Powers of the European Community* in *Fordham International Law Journal*, Volume 22, Issue 6, Article 11,1998, p.151.

<sup>884</sup>R.FRID, *The relations between the EC and international organisations: legal theory and practice*, Boston, 1995, p.63.

<sup>885</sup>J.H.JACKSON, *The European Community and World Trade: The Commercial Policy Dimension* in W.J.ADAMS, *Singular Europe : economy and polity of the European Community after 1992*, Ann Arbor, 1993, p.327.

<sup>886</sup>H.van HOUTTE, *International Law and Community Treaty-Making Power* in *Northwestern Journal of International Law & Business*, Volume 3, Issue 2, 1981, p.627.

Under the Treaty, the Commission was entitled to negotiate the international agreements upon previous authorization given by the Council. However, the Commission needed to consult a special committee appointed by the Council (named after the key Article 113 – Committee 113). Committee 113 issued for the Commission special negotiation directives. Therefore, the Commission's mandate was not completely free. Institutions were aware of the fact that the executions of the trade policy might have had a negative impact on the trade between the MS. If such situation happens, the Commission was to adopt the recommendation as to the methods for the requisite co-operation between the MS.

More to that the Commission is entitled to authorize the MS willing to adopt particular measures which could have had harmful effects over the trade, not only in the cases of urgency and applied during transitional period.<sup>887</sup>

Other enforcing and coherence measure was stipulated by the provision of the Article 116 by which the MS needed to proceed in regard to the common market by the common action within which the Commission submitted to the Council acting by the qualified majority the proposals concerning the scope and implementation of such type of action. Moreover, during the transitional period, MS consulted among themselves, the measures and concrete actions in order to adopt a uniform attitude.<sup>888</sup>

Apart from the provisions dedicated to the CCP, belong to the EEC Treaty the provision of the Article 228, enacting the Community the right to conclude international agreements with a third states, union of States or international organizations. According to this provision the international agreements were

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<sup>887</sup>Having in mind other decision of the ECJ in case C-125/94 *Aprile in liquidation v. Amministrazione delle Finanze dello Stato*, the MS were prevented from the possibility of an adoption of own custom duties or any supplementary charges, which would follow the setting up of the CCT, reference to ECJ judgment, 5 October 1995, *Aprile Srl, in liquidation v Amministrazione delle Finanze dello Stato*, case C-125/94 [1995] ECR, p. I-2919.

<sup>888</sup>The MS were not fully autonomous in the selection of the means, since the Treaty directly impose the obligation to first apply the measures causing the least disturbance to the functioning of the common market and take into account the crucial aim represented by the introduction of the CCT.

concluded by the Council, acting unanimously after consulting the Assembly (Parliament).

### 5.2.3 ECJ Opinion 1/75

Rather brief and overwhelming provision of the Article 113 brought in the practice several issues in terms of the scope of its applicability. Thus, not surprisingly the ECJ was soon confronted with the request for its opinion on this issue. In one of its early-stage decision - the Opinion 1/75 the ECJ had to present its opinion on the compatibility of the EEC Treaty with the proposal of the agreement '*Understanding on a Local Cost Standard.*'

Doing so, importantly, there came to existence the case on by which the Western countries tried to introduce more discipline in the branch of export credit policies. The policies of represented a risk of degenerating into a competition between the treaties of different Western countries.<sup>889</sup>

Principally, the ECJ had to decide the question whether the EEC had the competence to conclude the '*Understanding of the Local Cost Standard*' and if such a power of the EEC was exclusive. In terms of the admissibility of the examination of this agreement the Court has declared itself competent to examine this agreement.

As to the second part of the question, the Court examined the powers of the EEC to conclude the OECD Understanding on Local Cost Standard. As the Court recalls, the directives on credit insurance were adopted by the Council on the role of export credits in international trade as a factor of commercial policy, therefore the Court recognized that the export credits are covered by the scope of CCP. In giving such affirmative response, the ECJ confirmed the exclusivity of these

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<sup>889</sup>R.LEAL ARCAS, *Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice in Legal Issues of Economic Integration*, Volume 30, Issue 1, 2003, p.4.

competences,<sup>890</sup> which was rather unexpected since the expectation was that those competences will be declared having shared nature consistent with the gradually development of CCP which was not the case.<sup>891</sup>

The Court has examined the exclusivity of the powers in terms of CCP. As the Court said, the agreement was examined in terms of the objectives and how the CCP is conceived in the Treaty. The Court rejected any concurrent power of the MS to adopt own measures in external relations which would be harmful for the common interests of the Community and disparities in calculating the export credits provided by the MS. Thus, the Court insisted on the strict uniformity and granting of the export credits regardless to the nationality of its holders. It might be spoken about the state analogy in terms of CCP within which the Community develops common trade interests and becomes state-like actor.<sup>892</sup>

In this sense comments the opinion also Schütze, saying that the Opinion is: “[...] the first sign of a choice of a constitutionally exclusive power began to take shape in the form of ‘succession’ doctrine established by the judgment *International Fruit Company* and in fact appeared for the first time in the opinion 1/75.”<sup>893</sup> Thus, the interpretation of the CCP had rather broader conception of the CCP, since it cannot be interpreted more narrowly than it would be the case of the state’s commercial policy.<sup>894</sup>

Therefore, the Court rejects any intervention from the MS. The Court clearly states that in terms of the Article 113 and 114 TEC it is no more possible for the MS to conclude the international agreements. As the Court states: “*The provisions of Articles 113 and 114 concerning the conditions under which, according to the Treaty, Agreements on commercial policy must be concluded show clearly that the exercise of*

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<sup>890</sup>J.H.J.BOURGEOIS, *External Relations Powers of the European Community* in *Fordham International Law Journal*, Volume 22, Issue 6, Article 11, 1998, p.156.

<sup>891</sup>P.EECKHOUT, *EU external relations law*, Oxford, 2011, p.15.

<sup>892</sup>R.HOLDGAARD, L.HOLDGAARD, *External relations law of the European Community: legal reasoning and legal discourses*, Alphen aan den Rijn, 2008, p.31.

<sup>893</sup>R.SCHÜTZE, *From Dual to Cooperative Federalism The Changing Structure of European Law*, Oxford, 2011, p.161.

<sup>894</sup>H.van HOUTTE, *International Law and Community Treaty-Making Power* in *Northwestern Journal of International Law & Business*, Volume 3, Issue 2, 1981, p.628.

*concurrent powers by the MS and the Community in this matter is impossible.*" As the Court further adds, if the MS may adopt the positions which would differ to those ones which the Community intends to adopt, it would distort the institutional framework, call into question the trust within the Community and prevent from fulfilling the tasks in common interest. The Court principally rejected also the argument that the financial burden would be borne by the MS.

In commenting the outcome of the judgment: "[...]...the Court saw very sharply that the CCP had to be an exclusive power of the Community. It stressed that any solution that would give the MS a concurrent power in this area would lead to disparities in the conditions of competition between enterprises on the common market or on export markets, which was incompatible with the idea of a common commercial policy as such."<sup>895</sup> By this "The debate very soon shifted to the difficult terrain of the scope of common commercial policy. The term as such was used in the Treaty without any definition."<sup>896</sup> In Shuibhne's view the opinion of the Court has rather pragmatic nature, understanding the CCP as necessary adjunct to the common market, therefore is needed broader perception of the CCP.<sup>897</sup> It may be agreed with de Waele's point that the ECJ adopted the approach that the CCP is to be built only gradually via adoption of adoption of internal legislation and after through the adoption of international agreements doing so through the combination of internal and external measures.<sup>898</sup>

#### 5.2.4 ECJ Opinion 1/78

The constituent Treaties adopted till the Opinion contained only limited areas where the MS enjoyed the full exclusive competence. Obviously, the MS were reluctant to cease their competences in favour of the EC (Union). Nevertheless, they were already confronted with by the pre-emption principle as

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<sup>895</sup> P.J.KUIPER, *Of 'mixity' and 'double-hatting' : EU external relations law explained*, Amsterdam, 2008, p.10.

<sup>896</sup> P.J.KUIPER, *Of 'mixity' and 'double-hatting' : EU external relations law explained*, Amsterdam, 2008, p.10.

<sup>897</sup> N.N.SHUIBHNE, *Regulating the Internal Market*, Cheltenham, 2006, p.290.

<sup>898</sup> H.de WAELE, *Layered global player: legal dynamics of EU external relations*, Berlin, 2011, p.68.



formulated by the judgments AETR and Kramer. Therefore, they were already confronted with the reality of the implied powers and the doctrine of parallelism. In such a background situation, ECJ was called to present its opinion on the existence of the exclusive competence of the Community as contractual parties of the Agreement on Natural Rubber and the conclusion of this agreement.

Natural Rubber Agreement was the Treaty of universal nature, prepared under the UN as the result of the multilateral negotiations. The Treaty was aimed on the safety of national rubber and promoted creation of the stocks which shall be financially covered by parties of the Agreement.

The Court confirmed the dynamic approach towards the CCP confirming the doctrine which was subject to evolution since the Opinion 1/75 following external trade regulation.<sup>899</sup> The dynamism principle was confirmed by several arguments. As to the Court, it would not be possible to carry on any worthwhile CCP, if the Community were not in a position to avail also of more elaborate means for further development of international trade. The Courts continues in the dynamic interpretation also in terms that the Article 113 EEC. Treaty cannot have restrictive effect on the CCP, using traditional instruments intended to have effect only on the traditional aspects of international trade excluding thus more developed trade mechanisms as the Agreement at stake.

The Court continues its argumentation by the fact that the Article 113 must be based on the '*uniform principles*' governed not only as a system of customs and quantitative restrictions, which can be according to the Court represented by the changes in tariff rates, conclusion of tariff and trade agreements, uniformity in liberalization, export policy and measures to protect trade. However not exclusively, since any restrictive interpretation of the CCP would be risky and

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<sup>899</sup>G.de BAERE, P.KOUTRAKOS, *The intersections between the legislature and the judiciary in EU external relations* in P.SYRPIS, *The judiciary, the legislature and the EU internal market*, Cambridge, 2011, p.247.

could cause disturbances in the intra-Community trade by the disparities which would exist in the sectors of the economic relations with non-MS.

As the outcome, it may be concluded that both judgments demonstrated broad and evaluating powers of the EEC in terms of CCP, encompassing all trade instruments which made impossible for the MS to escape the strictures of the CCP by using new or different instruments in this area.<sup>900</sup>

Thus, in respect to the Opinion 1/78, it bordered the scope of the CCP rejecting the exclusivity to the traditional instruments of the CCP. In this Opinion is evident that it is build-on on the concept of the Opinion 1/75 that the CCP is the same to be understood within the meaning of the national concept.<sup>901</sup> Thus, the internal integration in went beyond the creation of customs union, since the CCP was used to formulate common rules with regard to all aspects of external trade in goods.<sup>902</sup>

As Holdgaard state, the Court *'felt'* a need to make a distinction between the exclusivity in terms of a distinction between the specific provisions on the CCP and the provisions having financial agreement as *'central point'* of the Agreement and creating the *'a more fundamental difficulty as regards to the demarcation between the Community and the MS.'*<sup>903</sup> In the further argumentation the ECJ is interesting argumentation as provided within the paragraphs 57-60. Court on the first place reflects the financial aspects of the agreement, i.e. that the Community would be direct contributor from the budget of the agreement.<sup>904</sup> As the Court stated,

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<sup>900</sup>P.J.KUIJPER, *Fifty Years of EC/EU External Relations: Continuity and the Dialogue Between Judges and Member States as Constitutional Legislators* in *Fordham International Law Journal*, Volume 31, Issue 6, 2007, p.1578-9.

<sup>901</sup>A.R.YOUNG, *'What Game? By Which Rules? Adaptation and Flexibility in the EC's Foreign Economic Policy,'* in M. KNODT, S.PRINCEN (eds.), *Understanding the EU's External Relations*, Routledge, 2003, p.61.

<sup>902</sup>A.DIMOPOULOS, *The Development of EU Trade and Investment Policies: Drawing Lessons from Past Experiences* in K.SAUVANT, F.ORTINO (eds.) *Yearbook of International Investment Law and Policy*, Oxford, 2011,p.246-247.

<sup>903</sup>L.HOLDGAARD, R.HOLDGAARD, *The External Powers of the European Community* in *The journal Retsvidenskabeligt Tidsskrift (RETTID)*, 2001, p.125.

<sup>904</sup> ECJ opinion, 4 October 1979, Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - International Agreement on Natural Rubber, opinion 1/78 [1979] ECR, p. 2871, para 57.

although there was no agreement on determination of the subject responsible for the financial issues, the situation if the MS would be obliged to bear some costs, would imply that those are entitled to take part in the decision-making of the Community what would not be compatible with CCP.<sup>905</sup> Paradoxically, such a brief analyses was sufficient in terms of considering the agreement a mixed one.<sup>906</sup>

The outcome of the judgment is that the Court affirmed the position of the CCP as an exclusive competence of the Union and outlined also difficulties which may occur in case of existence of parallel competences of the exclusive competences admitting the existence of the mixed agreements. Certain authors state that the financial participation of the MS on the conclusion of such an agreement of such a type implies certain participation of the MS during decision-making procedures leading to the conclusion of such a Treaty and as well their approval.

In terms of evaluation of this judgment, it adds clearly the external dimension of the CCP, reinforcing thus the principle of state analogy principle, as formulated in the Opinion 1/75. More to that the, Court gives preference to normative and factual evaluation of the CCP in terms of modern international economic relations.<sup>907</sup>

### 5.2.5 SEA and CCP

The SEA sets up in its preamble an ambitious plan of the completion of the common market. This aim was not only EEC related one, but it had also having significant international aspect, mainly to contribute to the harmonious development, reducing the differences between the regions, but in the same time having in mind another aim. Through the means of a CCP, the CCP had an aim –

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<sup>905</sup> ECJ Opinion, 4 October 1979, Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - International Agreement on Natural Rubber , opinion 1/78 [1979] ECR, p. 2871, para 60.

<sup>906</sup> E.CANNIZZARO, *Unity and Pluralism in the EU's Foreign Relations Power in C.BARNARD, The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate*, Oxford, 2007, p.204.

<sup>907</sup> R.HOLDGAARD, L.HOLDGAARD, *External relations law of the European Community: legal reasoning and legal discourses*, Alphen aan den Rijn, 2008, p.31.

the progressive abolition of the restriction on international trade. The SEA further fosters the developed and building of the competitive advantage towards the third countries, through the strengthening of the scientific and technological basis of the industry located on the territory on EEC. Therefore, the Community stimulates the undertakings, research institutes to exploit as much as possible the potential of the internal market, changed through the removal of the legal and fiscal barriers to the place of the cooperation.<sup>908</sup>

The SEA further enlarges the applicability of the goals of the support tools of the CCP. The achievement of these aims is linked also with common research and development effort, establishment of the internal market and implementation of the common policies, particular with regard to the competition and trade policies.<sup>909</sup>

To this aim the SEA, maybe surprisingly did not enforce the decision-making procedure towards the EC, neither adopted changes to the institutional structure.<sup>910</sup>

The enactment of the SEA further triggered the EEC trade agreements with other commercial subjects as EEA, EFTA, Euro-Mediterranean Partnership, Agreements with Central and Eastern European countries, cooperation agreement with Commonwealth of Independent States etc.<sup>911</sup>

#### 5.2.6 *Maastricht Treaty*

The shift from SEA to the Maastricht Treaty, this cannot not be clarified without brief look on the political background of the change of the political climate in Europe. The concept, as it was proposed resulted from the European Council meeting being held in Dublin. The Commission's proposal, formulated its

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<sup>908</sup>Article 130f, Single European Act, 28.2.1986, OJ L 169 of 29.6.1987.

<sup>909</sup>Article 130f, Single European Act, 28.2.1986, OJ L 169 of 29.6.1987.

<sup>910</sup>H.J.GLAESNER, *The Single European Act: Attempt At An Appraisal* in *Fordham International Law Journal*, Volume 10, Issue 3, Article 4, 1986, p.448.

<sup>911</sup>S.GSTÖHL, *The European Union's Trade Policy* in *Ritsumeikan International Affairs*, Volume 11, 2013, p.5.

opinion of October 1990 was based on the concept of unified set of Treaty articles on external policy. Generally, encompassing inter alia a new foreign and security policy and revised CCP, renamed 'external economic policy' and including the external dimension of services, intellectual property, capital, investment, establishment, and competition policy.<sup>912</sup> The doctrinal approach to this issue further accents the position of the Commission, by referring to the fact that the CCP would be part of the extended Community's competences, in fact as the result of the confirmation of the jurisprudence of the ECJ.<sup>913</sup> Unlike the SEA, Maastricht treaty brought about several relevant amendments.

Even stronger linkage to the economic aims indicates the complete change of the wording of the Article 2, being as follows: *"The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among MS."*<sup>914</sup>

Through the Articles 3 and 3a TEU, there were clearly listed the policies and activities to which the Community was entitled and empowered. From the commercial aspect point of view are to be stressed the provisions a, b, c, g, h, q.<sup>915</sup>

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<sup>912</sup>M.CREMONA, *EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders* in J.H.H.WEILER, *The EU, the WTO, and the NAFTA : towards a common law of international trade*, Oxford, 2000, p.8.

<sup>913</sup>M.CREMONA, *EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders* in J.H.H.WEILER, *The EU, the WTO, and the NAFTA : towards a common law of international trade*, Oxford, 2000, p.8.

<sup>914</sup>Article 2 Treaty establishing the European Community (Consolidated version 1992) OJ C 224, 31.8.1992.

<sup>915</sup>Article 3 Treaty establishing the European Community (Consolidated version 1992) OJ C 224, 31.8.1992 provides the following: " (a) the elimination, as between MS of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) a common commercial policy; (c) an internal market characterized by the abolition, as between MS, of (g) a system ensuring that competition in the internal market is not distorted; 3 (h) the approximation of the laws of MS to the extent required for the functioning of the common market; (q) a policy in the sphere of development co-operation. "

This list may be considered the first systematic and summarization of the competences and actions to be undertaken by the Community.

Among the new amendments introduced by the Maastricht treaty, may be clearly identified the provisions aimed on the elimination of disequilibrium of payments which could jeopardize the functioning of the common market and be harmful for the implementation of the CCP.

As a reference institution, providing the help to the concerned state to execute all necessary steps, it was the European Commission, providing to the state concerned the assistance upon the consultation of the Committee established by the Council. The Commission shall inform the Council on the regular basis about the development of the situation with significant change in sense that the unlike Rome Treaty, with the fact that foreign and security policy was enacted by the TEU.<sup>916</sup>

So, the wording of the Article 113 TEC under the amendments of the Maastricht Treaty reads in its complexity as follows<sup>917</sup>:

*1. The CCP shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in event of dumping and subsidies.*

*2. The Commission shall submit proposals to the Council for implementing the common commercial policy.*

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<sup>916</sup>M.CREMONA, *EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders* in J.H.H.WEILER, *The EU, the WTO, and the NAFTA : towards a common law of international trade*, Oxford, 2000, p.8.

<sup>917</sup>Article 113 Treaty establishing the European Community (Consolidated version 1992) OJ C 224, 31.8.1992.

3. *Where agreements with one or more States or international organizations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations.*

*The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.*

*The relevant provisions of Article 228 shall apply.*

4. *In exercising the powers conferred upon it by this Article, the Council shall act by a qualified majority.*

In summary may be stated that the Maastricht Treaty did not change substantially the wording of the Articles dedicated to the CCP.<sup>918</sup> Further provisions, encompassing the Article 113 TEC were provisions of the Articles 132 (112) and 134 (114) TEC. The propose of the Article 132 was the progressive harmonization of the systems of the aid granted to the third countries, though subject to certain exception being not applicable to specific cases of drawback of customs duties or charges having equivalent effect.<sup>919</sup> Certain protective measures contained also the provision of the Article 134.<sup>920</sup> According to that provision, the

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<sup>918</sup> S.GSTÖHL, *The European Union's Trade Policy in Ritsumeikan International Affairs*, Volume 11, 2013, p.5.

<sup>919</sup> Article 132 Treaty establishing the European Community (Consolidated version 1992) OJ C 224, 31.8.1992 reading as follows: "1. *Without prejudice to obligations undertaken by them within the framework of other International organizations, MS shall progressively harmonize the systems whereby they grant aid for exports to third countries, to the extent necessary to ensure that competition between undertakings of the Community is not distorted. On a proposal from the Commission, the Council shall, acting by a qualified majority, issue any directives needed for this purpose.* 2. *The preceding provisions shall not apply to such a drawback of customs duties or charges having equivalent effect nor to such a repayment of indirect taxation including turnover taxes, excise duties and other indirect taxes as is allowed when goods are exported from a MS to a third country, in so far as such a drawback or repayment does not exceed the amount imposed, directly or indirectly, on the products exported.*"

<sup>920</sup> Article 132 Treaty establishing the European Community (Consolidated version 1992) OJ C 224, 31.8.1992 reading as follows: "In order to ensure that the execution of measures of commercial policy taken in accordance with this Treaty by any MS is not obstructed by deflection of trade, or where differences between such measures lead to economic difficulties in one or more MS, the Commission shall recommend

MS are not obstructed by deflection of the trade or in case of economic difficulties among the MS. In such a case the Commission shall enact the adequate protective measures.

In fact, the reason was not the simplification of the provisions of the CCP, but rather the *'toiletage'* of the Treaties, meaning the suppression of the articles where the transition period has elapsed and had no significance under the Maastricht Treaty and the subsequent ones.<sup>921</sup> As a result of *'toiletage'*, the CCP was enacted as third part of the TEU dedicated to the Community policies. Originally, seven articles dedicated to the CCP were reduced only to 4. Also the Lisbon Treaty has continued in similar trend while abrogating the provisions of the Articles 132 and 134.<sup>922</sup>

The shaping of the CCP at that time was characterized as the external face of single market, or, even in rather architectural terms, if the common market were a building the CCP would be a façade.<sup>923</sup> Thus, the concept of the CCP should be extended to cover the external dimension of all the matters which fall within the single market, covering the fields of technical barriers, governmental procurement, services, and professional qualifications.<sup>924</sup>

However, the Maastricht Treaty did not contribute to the clarification of the notion CCP. In search of the notion, it may be asked for help rather the doctrine. There can be identified several important sources of difficulties while searching the notion of CCP. The first one goes out from the fact that the original and as well

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*the methods for the requisite cooperation between MS. Failing this, the Commission may authorize MS to take the necessary protective measures, the conditions and details of which it shall determine. In case of urgency, MS shall request authorization to take the necessary measures themselves from the Commission, which shall take a decision as soon as possible; the MS concerned shall then notify the measures to the other MS. The Commission may decide at any time that the MS concerned shall amend or abolish the measures in question. In the selection of such measures, priority shall be given to those which cause the least disturbance of the functioning of the common market."*

921F.ANTON, P.LEGER, Commentaire article par article des traites UE et CE, Bruxelles, 2000, p.1099.

922I.PINGEL, Commentaire article par article des traités UE et CE, de Rome à Lisbonne, Bruxelles, 2010, p.998.

923D.CHALMERS, E.SZYSZCZAK, European Union law / 1 Law and EU government, Aldershot, 1998, p.168.

924D.CHALMERS, E.SZYSZCZAK, European Union law / 1 Law and EU government, Aldershot, 1998, p.168.



the amended text as enacted by the Maastricht treaty did not made any reference to the indication of the subject-matter of the applicability of the Article 113 (further on 133, subsequently 207), nevertheless it shall be accepted the fact that the Article at stake was further on enriched by subsequent provisions dedicated to the further specification of this notion.<sup>925</sup>

As the fundamental interpretative Article in terms of the finality of the Maastricht Treaty was the Article 110, readopted from the wording of the Rome Treaty, reading in the wording of TEC as follows: *“By establishing a customs union between themselves MS aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.*

*The CCP shall take into account the favorable effect which the abolition of customs duties between MS may have on the increase in the competitive strength of undertakings in those States.”*<sup>926</sup>

In fact the legal regulation as set forth by the Treaty respects the conditions as they are enacted by the GATT Agreement. The Article 1 of the GATT provides that the Contracting Parties are obliged to extend any advantage with respect to custom duties granted to products from one country immediately and unconditionally to like products from all other WTO Contracting Parties – general MFN treatment. According to the Article 2 of the GATT Agreement, the WTO members are obliged to grant to the commerce of the other Contracting Parties the treatment no less favourable than the bound duty rate provided for in the schedule of concession (Article II GATT). Such a binding agreement represents the

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<sup>925</sup> P.CRAIG, G.de BÚRCA, *EU law : text, cases, and materials*, Oxford, 2011, p.1006.

<sup>926</sup> Article 110 Treaty establishing the European Community (Consolidated version 1992) OJ C 224, 31.8.1992.

maximum tariff. These provisions represent general rules, nevertheless, certain exceptions are allowed.<sup>927</sup>

The fundamental interpretation of the CCP remained upon the Maastricht Treaty the provision of the Article 110 (later on 131) TEC, reading as follows: *“By establishing customs union between themselves the MS aim to contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and lowering of customs barriers. The common commercial policy shall take into account the favorable effect which the abolition of custom duties between MS may have on the increase in the competitive strength of undertakings in those States.”*<sup>928</sup>

The idea behind this provision is to rebut the doubts of the third countries in regard of the creation EC being compatible with the GATT rules.<sup>929</sup> Other commentary states that the wording of the Article 131 TEC evidently proves that the CCP it is marked by the stamp of liberalism. Naturally, it cannot be dissociated within this context of the whole context of the GATT rules, as they appeared since 1947.<sup>930</sup> However, this reference cannot be perceived as the obligation to the complex deregulation. The idea behind it is rather to clarify the multiply

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<sup>927</sup>However, there are enacted several exceptions to the these rules, among them, under certain conditions bilateral or discriminatory treatment:

- preferential treatment, as foreseen in the Article I (2) – (4) GATT and in an understanding of the 1979 on “Differential and More Favorable Reciprocity, and Fuller Participation of Developing Countries,
- preferential treatment within customs unions, free trade areas, and international agreements leading to (Art. XXIV GATT Understanding on the interpretation of Art. XXIV GATT, OJ 1994, L 336/16,
- anti-dumping and countervailing duties (arts. II (2) (6), VI XVI TATT; Anti-Dumping and Subsidies Codes, OJ 1994, L336/103 and 156),
- safeguard (Art. XIX GATT) and security measures (Art. XXI GATT),
- countermeasures in case of nullification or impairment of a WTO obligation, such as a bound duty rate (article XXI GATT).

Moreover, from the stipulation of the most-favor-nation treatment are the Contracting Parties obliged

- to allow free transit through their national territory (Art. 5 GATT),
- to limit the fees and charges related to imports and exports to the approximate cost of services, rendered (Art. VIII GATT),
- to publish customs legislation particular when it is more burdensome than before the date of its entry into force (Art. X GATT),
- to administer tariff quotas in a non-discriminatory manner; an allocation of quotas among supplying countries is, however, feasible if due account is taken of their trade shares (Art. XIII GATT).

<sup>928</sup>Article 131 Treaty establishing the European Community (Consolidated version 1992) OJ C 224, 31.8.1992.

<sup>929</sup>I.PINGEL, *Commentaire article par article des traités UE et CE, de Rome à Lisbonne*, Bruxelles, 2010, p.998.

<sup>930</sup>F.ANTON, P.LEGER, *Commentaire article par article des traités UE et CE*, Bruxelles, 2000, p.1100.

regulation measures, barriers to the market competition or barriers on the way to the liberal approach to the world market.<sup>931</sup>

The provision of the Article 131 TEC constitutes the self-binding provision '*Sebstverpflichtung*'<sup>932</sup> of the Community and constitutes more than a simple determination of the aims of the CCP.<sup>933</sup> Nevertheless, they have significant importance for the Community. The outcome of the jurisprudence is appreciated the doctrine stating that the program formulating provision represents the binding program for the Community in execution of which act the MS and also the Community have significant playground according to the political margin of appreciation.<sup>934</sup>

The ECJ was called to justice to rule on nature as the provision dedicated to the 110. The ECJ decided about the binding character of the Article 110 having an impact on its liberal nature. However, the liberalism approach cannot be interpreted as absolute one, without giving the EU (EC) a power to adopt the measures liable to affect the trade with non-MS. To this conclusion came the ECJ e.g. in the case 112/80 Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen concerning the prohibition of the Chilean dessert apples and shortly afterwards in

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<sup>931</sup>R.STREINZ, *EUV/EGV: Vertrag über die Europäische Union und Vertrag zur Grundung der Europäischen Gemeinschaft*, Munich, 2003, p.1438.

<sup>932</sup>Such a self-binding clause of the Union shall be perceived as the provision binding of the Union towards MS, citizens of the Union, but not against the third states. Nevertheless, the third states may invoke their claims against the Communities or on the field of the WTO under WTO DSU.

<sup>933</sup>This conclusion may be apart from the doctrinal reflection perceived from the judgment of the ECJ in the case 45/86, *Commission v. Conseil*. In this judgment the ECJ stated: "*The Treaty takes possible changes into account. Accordingly Article 110 (later on 131) lists among the objectives of commercial policy the aim of contributing 'to the harmonious development of world trade', which presupposes that the commercial policy will be adjusted in order to take account of any changes of outlook in international relations. Likewise, articles 113 to 116 provide not only for measures to be adopted by the institutions and for the conclusion of agreements with non-member countries but also for common action "within the framework of international organizations of an economic character", an expression which is sufficiently broad to encompass the international organizations which might deal with commercial problems from the point of view if a development policy,*" reference to ECJ judgment, 26 March 1987, *Commission of the European Communities v. Council of the European Communities*, case 45/86 [1987] ECR, p.1493.

<sup>934</sup>ECJ judgment, 24 October 1973, *Balkan-Import-Export GmbH v. Hauptzollamt Berlin-Packhof*, case 5/73 [1973] ECR, p.1091, ECJ judgment, 19 November 1998, *United Kingdom v. Council*, case C-150/94 [1998] ECR, p. I-7235, ECJ judgment, 19 November 1998, *Kingdom of Spain v. Council of the European Union*, case C-284/94[1994] ECR, p.I-7309.

the case 245/81 Edeka Zentrale v Germany concerning the prohibition of the trade from Taiwan and South Korea.

In the first judgment of the Court's approach may be considered as reference to the invention of the formulation of the principle applicable under the provision of the Article 110. As the ECJ decided: *"Article 110 of the Treaty with the reference to the fact that the MS aim to contribute in the common interest, to the harmonious development of world trade, progressive abolition of restriction on international trade and the lowering of customs barriers, cannot be interpreted as prohibiting the Community from enacting, upon pain of committing an infringement of the treaty, any measure liable to affect trade with non-MS even where the adoption of such a measure is required, as in this case, by the risk of serious disturbance with which might endanger the objectives set out in article of the treaty and where the measures is legally justified by the provisions of Community law."*<sup>935</sup>

The same argumentation the ECJ repeated also in the second shortly after following case, while recalling clearly to the judgment 112/80 Dürbeck.<sup>936</sup> This early-stage jurisprudence of Court was further confirmed and further developed by the case C-150/94 where the Court interpreted the provision of the Article in the way that is clear that the wording of the provision has an objective to contribute to the progressive abolition of restrictions on international trade.<sup>937</sup> Nevertheless, as the Court further confirmed, this provision cannot compel the institutions to liberalize imports from non-MS which would be contrary to the interests of the Community. As the Court concludes, in such a case the Council was entitled to decide on quotas in terms of the products from the third countries.<sup>938</sup> The doctrine

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<sup>935</sup>ECJ judgment, 5 May 1981, Firma Anton Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen, case 112/80 [1981] ECR, p.1095, para 44.

<sup>936</sup>ECJ judgment, 15 July 1982, Edeka Zentrale AG v. Federal Republic of Germany, case 245/81 [1982] ECR, p.2745, para 24.

<sup>937</sup>ECJ judgment, 19 November 1998, United Kingdom v. Council, case C-150/94 [1998] ECR, p.I-7235, ECJ judgment, 19 November 1998, Kingdom of Spain v. Council of the European Union, case C-284/94 [1994] ECR, p.I-7309, para 67.

<sup>938</sup>ECJ judgment, 19 November 1998, United Kingdom v. Council, case C-150/94 [1998] ECR, p. I-7235, ECJ judgment, 19 November 1998, Kingdom of Spain v. Council of the European Union, case C-284/94 [1994] ECR p.I-7309, para 68.

in analysing these judgments considers them as intermediary applicable and thus confirmed their binding interpretative character.<sup>939</sup>

### 5.2.7 ECJ Opinion 1/94

Shortly upon entry in power of the Maastricht Treaty, the ECJ was called to rule on the question of the division of the competences between the Community and MS in terms of the Agreement establishing the WTO between the EU the non-MS. The role of the Court was to determine, if the Community can be bound by such type of agreement, including Multilateral Agreements on Trade in goods, General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights including counterfeit goods (TRIPs). As the Court recalled, the Council and MS have a clear aim - ensuring the consistency between the MS and the Community.

As result, the final question was formulated as the set of questions by the Commission, asking whether the EC has the competence to conclude all parts of GATS and TRIPs alone alongside the MS. The Commission in its request for the opinion expressed some doubts whether the agreements in its complexity would fall under the scope of the Article 113, especially to the cross-frontier supplies of the services and transport agreements being covered by the GATS Agreement and the release into circulation of the of the counterfeit products under the TRIPs Agreement.

The ECJ in terms of the Multilateral Agreement on Trade in goods ruled, that the EC has an exclusive competence, including coal and steel product as well as agricultural ones.<sup>940</sup>

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<sup>939</sup>J.SCHWARZE (ed.), *EU-Kommentar*, Munich, 2012, p.1898.

<sup>940</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 34.

### 5.2.7.1 GATS and CCP

However, the situation in terms of GATS was more complex. As a matter of principle, the Court referring back to the Opinions 1/75 and 1/78, with the expression of the position that the MS became rather service providers stated that as a matter of the principle, the: *“Trade in services cannot immediately, and as a matter of principle can be derived from the open-end nature of the CCP.”*<sup>941</sup> However, the issue of including the GATS Agreement, is more complex and must be examined the overall scheme of the GATS Agreement which goes beyond the scope of the Article 113 since the GATS agreement enacts the variety of the trade in services as 1. cross-frontier supplies not involving any movement of persons, 2. consumption abroad, which entails the movement of the consumer into the territory of the WTO member country in which the supplier is established, 3. commercial presence, i.e. the presence of a subsidiary or branch in the territory of the WTO member country in which the service is to be rendered, 4. the presence of natural persons from a WTO member country, enabling a supplier from one member country to supply services within the territory of any other MS.<sup>942</sup>

Since they are several modalities of the cross-border service supplies, there are particularly problematic those supplies of the services which require the consumption abroad, commercial presence and the presence of natural persons which are not covered by the CCP, since they have different nature in regard to the nature to CCP.<sup>943</sup> To similar conclusion came the Court also in terms of the transport agreements which are also not covered by the provision of the CCP.<sup>944</sup> In Court’s view, this shortcoming cannot be overcome by selection of an

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<sup>941</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 41.

<sup>942</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 42-43.

<sup>943</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 47.

<sup>944</sup>Reference to the AETR judgment, however rejecting its applicability to the CCP as the agreement having different nature to transport policy.

inappropriate legal basis for the international agreements as it would be the case by including the international agreements in field of transport policy.

#### 5.2.7.2 *TRIPs and CCP*

In terms of the TRIPs the Court rejected the argument that the TRIPs is not applicable in terms of the free circulation of the counterfeit goods<sup>945</sup>. As the Court stresses, there is a connection between the intellectual property and trade in goods. In further argumentation the Court stated that the intellectual property rights prevent third parties from release into free circulation. Intellectual property rights enable those holding them to prevent third parties from carrying out certain activities. As the activities, as having such effects are considered the right to prohibit the use of a trade mark, the manufacture of a product, the copying of a design or the reproduction of a book, a disc or a videocassette inevitably has effects on trade.

The Court opines that is not justifiable to subsume those aspects of the intellectual property to subsume them under the scope of Article 113 TEC. Intellectual property rights thus do not relate specifically to international trade.

In its analysis, the Court further confirms that the main purpose of the TRIPs is to strengthen and harmonize the protection of intellectual property on a worldwide scale. The Court further confirms the fact that the measures (suspension or withdrawal of any concession resulting from commercial policy negotiations; the raising of existing customs duties or the introduction of any other charge on imports; and the introduction of quantitative restrictions or any other measures modifying import or export conditions) adopted to deal with the lack of protection in non-MS are unrelated to the harmonization of intellectual property protection, since they fall under the scope of CCP.<sup>946</sup> In further argumentation, the

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<sup>945</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 56.

<sup>946</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 63.

Court refused also the argumentation of ancillary nature of the provisions on the intellectual property in regard to the TRIPs Agreement and exclusive competence.<sup>947</sup>

Thus, in summary the Court decided that apart from the prohibition of the release into free circulation that the TRIPs does not fall into the frame of the CCP.<sup>948</sup> Having decided the question of the question of the subject-matter of the relation of the TRIPs and the GATS agreement, the Court needed to rule on the existence of the Community's competences in terms of GATS and TRIPs.

As it was clear from the starting argumentation as to the subject-matter definition of the CCP in terms of the GATS and TRIPs, the Court adopted rather restrictive approach in regard to the subject-matter of the CCP. Now, the question however remained the definition of the nature of the implied external competences within which the Commission strongly advocated the exclusive nature of the external competences.<sup>949</sup>

### 5.2.7.3 *GATS and the Competence Issue*

In terms of the GATS Agreement the Court reflected the judgment AETR, however, stressed that fact only in so far the common rules have been established at internal level, the external competence of the Community become exclusive and thus not all transport matters are covered by common rules<sup>950</sup>, although the EC was entitled to adopt common measures falling under the scope of this subject-matter.

On the other hand, the right of establishment and freedom to provide services does not extend the competence of the Community in regard to

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<sup>947</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 68.

<sup>948</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 71.

<sup>949</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 72.

<sup>950</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 77.



*'relationship arising from the international law,'* since these are oriented on establishment and freedom to provide services exclusively for the citizens of the EC/EU from which cannot be concluded that the Community has the right to conclude international agreements having other nature as those covered by the Article 113.<sup>951</sup> The Court equally rejected the applicability of the Opinion 1/76 on the sphere of services since the freedom to provide services is not inextricably linked to the treatment to be afforded in the Community to nationals of non-MS or in non-MS.<sup>952</sup>

The missing harmonization was also one of the reasons for the rejection of the exclusivity of the competences of the Community in regards to GATS. The Court equally rejected the applicability of the Article 235 to the extent external competences of the Community.<sup>953</sup> This, however, it does not mean that the Community disposes of no powers in treatment to be accorded to the nationals non-MS, despite the fact that the only objectives is the right of establishment and on freedom to provide services of the nationals of the MS.<sup>954</sup>

As to the nature of such competences, the Court comes to a conclusion that whenever the Community included in its internal legislative acts the provision related to the treatment of nationals of non-MS or expressly conferred on its institutions powers to negotiate with non-MS, it acquires exclusive external competence in the spheres covered by those acts.<sup>955</sup>

As the Court further confirms, the same applies in any subject-matter, even in the absence of any express provision authorizing its institutions to negotiate with non-MS, in case that the Community achieved complete harmonization of the

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<sup>951</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 81.

<sup>952</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 85.

<sup>953</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 89.

<sup>954</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 91.

<sup>955</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 95.

rules, or if there were otherwise affected the common rules. Therefore, Court decided that the competence to conclude the GATS has shared nature.<sup>956</sup>

#### 5.2.7.4 TRIPs and the Competence Issue

The Court analogically examined the TRIPs Agreement as well. Similarly to the GATS, the Court rejected the applicability of the Opinion 1/76 and the Article 235 EC on the TRIPs agreement. In the examination considered necessary to examine the applicability of the AETR principle, however, confirmed only partial harmonization within the TRIPs.<sup>957</sup> Despite the fact that the Community is competent to harmonize national rules which *'directly affect the establishment of the common market'*, it did not adopt these measure in the field of *'enforcement of intellectual property rights'*.<sup>958</sup> Coming to such a conclusion the Court decided that the Community and the MS are jointly competent to conclude TRIPs.<sup>959</sup>

The Court further stressed the duty of cooperation between the MS and the Community. It is equally aware of the fact that the MS would like to maintain their position within WTO, therefore the Court calls upon the requirement of the consensus and coordination among the MS in regard to the CCP.<sup>960</sup>

The consistency, as required by the relevant case law of the Court is necessary to provide smooth fulfilment of the commitments as they arise from the WTO, not only in terms of the substantive law, but also dispute settlements in terms of cross-sector retaliations.<sup>961</sup>

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<sup>956</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 95.

<sup>957</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 103.

<sup>958</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 104.

<sup>959</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 105.

<sup>960</sup>CJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 106.

<sup>961</sup>ECJ opinion, 14 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994] ECR, p. I-5267, para 108-109.

Hilf perceives this Opinion as not surprising from the political perspective, especially in the climate of the post-Maastricht period.<sup>962</sup> In author's view the Opinion is one of the few cases within which the Court rejected the extension of the CCP and not fully applying the dynamic approach towards the perception of the CCP. Nonetheless, as the development further showed, the applicability of the Opinion 1/94 shortly afterwards will not be compatible with the primary law.

#### 5.2.8 CCP under Amsterdam and Treaty of Nice

In shortly adopted Amsterdam Treaty were attached to the provision of the Article 113 (in fact the Article 133 TEC) the provision dedicated to the services and intellectual property, the provisions of the paragraphs 1-4 remained unchanged.

The provision adopted particular regime of CCP in regard to the international agreements in services and intellectual property, while giving to the Council the obligation to act unanimously on the proposal of the Commission, involving the EP to be consulted.<sup>963</sup>

As the ECJ clearly admitted, unlike the Opinion 1/94 involving under the CCP only the cross-frontier supplies of services, upon adoption of the Nice Treaty (as referring to the provision of the Article 133 (5) and (6) TCE was decided on the extension of the competences, whereby the Community became competent to conclude under the scope of CCP all the agreements concerning the '*consumption abroad*', '*commercial presence*' and '*presence of natural persons*' respectively which formerly fell outside the sphere of the common commercial policy as the Court decided in the Opinion 1/94. Subsequently also Nice Treaty contributed to the further development of the enactment of the CCP although with rather complicated and not fully transparent regulation.

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<sup>962</sup>M.HILF, *The ECJ's Opinion 1/94 on the WTO - No Surprise, but Wise?* in *European Journal of International Law*, Volume 6, Issue 1, 1995, p.257.

<sup>963</sup>Article 133 (5) Treaty of Amsterdam (1997) OJ C 340, 10.11.1997 wording as follows: "*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 services and intellectual property insofar as they are not covered by these paragraphs.*"

Among the changes of this Article, it may be concluded that the MS became entitled to conclude agreements in the fields of the trade in cultural and audio-visual services and social and human services, nevertheless these sectors shall have a shared nature between the EU and the MS. Only the transport agreements had a particular regime.

Summarizing the CCP under the Nice Treaty, the conclusion is that the Nice Treaty has set forth the following wording of the paragraph 133 within its sections 5-7, wording as follows: <sup>964</sup>

*5. The Council shall act unanimously with respect to the negotiation and conclusion of a horizontal agreement insofar as it also concerns the preceding subparagraph or the second subparagraph of paragraph 6.*

*This paragraph shall not affect the right of the MS to maintain and conclude agreements with third countries or international organizations in so far as such agreements comply with Community law and other relevant international agreements.*

*6. An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonization of the laws or regulations of the MS in an area for which this Treaty rules out such harmonization.*

*In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audio visual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its MS.*

*Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the*

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<sup>964</sup>Article 133 (5-7) Treaty establishing the European Community (Consolidated version 2002) OJ C 325, 24.12.2002.

*common accord of the MS. Agreements thus negotiated shall be concluded jointly by the Community and the MS.*

*The negotiation and conclusion of international agreements in the field of transport shall continue to be governed by the provisions of Title V and Article 300.*

*7. Without prejudice to the first subparagraph of paragraph 6, 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 in so far as they are not covered by paragraph 5.*

Nonetheless, the Article 133 TCE remained also upon the Amsterdam and Treaty of Nice the key ' *pierre angulaire* ' of the CCP<sup>965</sup> and creates thus the unity with other provisions systematically with provisions, especially the Articles 131 and 132 TCE specifying the general objectives of the CCP.<sup>966</sup>

#### *5.2.9 Lisbon Treaty and the Innovations in the CCP*

In order to make an analysis of the innovations as brought by the Lisbon Treaty, it must be referred once again to the division of the competences between the Union and the MS. In order to evaluate the competences between the Union and its MS, there cannot be spoken about ' *en bloc* ' character of competences, considering the competences as a set.<sup>967</sup>

The Lisbon Treaty similarly to previous treaties contains the definition of the objectives of the CCP, however significantly reduced. The attentive reader surely recalls the use of the notion ' *toilettage* ' used reference to the Maastricht Treaty. This principle applies even more to the TFEU and its Article 206, wording as follows: " *By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world*

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<sup>965</sup>F.ANTON, P.LEGER, *Commentaire article par article des traités UE et CE*, Bruxelles, 2000, p.1108.

<sup>966</sup>Articles 131,132 Treaty establishing the European Community (Consolidated version 2002) OJ C 325, 24.12.2002.

<sup>967</sup>B.ANGEL, F.CHALTIEL-TERRAL, *Quelle Europe après le traité de Lisbonne?*, Paris, 2008, p.164.

*trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.”*

The ratio behind this Article remains declaratory in terms of the formulation of the principles of the CCP. As it was proved, such a formulation is nonetheless, not unimportant also for the CJ EU in terms of evaluation of the CCP. The wording of the Article 207 TFEU under Lisbon Treaty may be in comparison to the provisions of the Article 133 TCE considered more *‘straightforward.’* In addition of the complex drafting of this Article, the Lisbon Treaty extended the scope of competences of the EP in trade policy.<sup>968</sup> Certain authors while analysing the CCP speak about re-establishment and consolidation mainly in terms of the systematic changes given to the incorporation of the provisions of the CCP under the Lisbon Treaty.<sup>969</sup>

More complex and comparative approach to CCP upon Lisbon Treaty provides Craig, identifying the amendments under Lisbon Treaty, as follows:

1. the CCP has been connected to the aims as contained by the Article 206,
2. simplification of the provision of the Article 207 TFEU (previously 133 TCE),
3. the procedural involvement, actually, the EP is fully involved in the adoption of the legislative,
4. the powers of the EP increased with regard to the conclusion of the international treaties,
5. the Lisbon Treaty dismissed the Articles 132 and 134 TCE oriented on the granting of the export aid and adoption of the protective measures under the particular authorization given by the EC.

The outcome of Craig’s approach to CCP may be concluded that the Union has sole responsibility for commercial trade policy. Indeed, one of the first TEU

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<sup>968</sup>J.C.PIRIS, *The Lisbon treaty: a legal and political analysis*, Cambridge, 2010, p.280.

<sup>969</sup>J.SCHWARZE (ed.), *EU-Kommentar*, Munich, 2012, p.1901.

Articles provides that the Union shall have exclusive competence in the area of CCP. (provision of Article 3 (1) (e) TFEU). Moreover, the Union is based upon a Customs Union which involves the elimination of internal customs tariff.<sup>970</sup> In fact, the Lisbon Treaty continues in the systematically scattered regulation of the customs policy.<sup>971</sup>

Now, it shall be analysed the general provision on the CCP, reading according to the Article 207 TFEU as follows:<sup>972</sup>

*1. The CCP shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*

*2. The EP and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.*

*3. Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article. The Commission shall make recommendations Council, which shall authorize it to open the necessary negotiations. The Council and the Commission shall be responsible*

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<sup>970</sup>P.S.R.F.MATHIJSEN, *Guide to European Union law : as amended by the Treaty of Lisbon*, London, 2010, p.581.

<sup>971</sup>Articles 31-32 Treaty on the Functioning of the European Union (Consolidated version 2010), OJ C 83, 30.3.2010. Article 31 (ex Article 26 TEC) wording as follows: “*CCT duties shall be fixed by the Council on a proposal from the Commission.*” Article 32 (ex Article 27 TEC) wording as follows: “*In carrying out the tasks entrusted to it under this Chapter the Commission shall be guided by: (a) the need to promote trade between MS and third countries; (b) developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings; (c) the requirements of the Union as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between MS in respect of finished goods; (d) the need to avoid serious disturbances in the economies of MS and to ensure rational development of production and an expansion of consumption within the Union.*”

<sup>972</sup>Article 207 Treaty on the Functioning of the European Union (Consolidated version 2010), OJ C 83, 30.3.2010.

*for ensuring that the agreements negotiated are compatible with internal Union policies and rules. The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations.*

*4. For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules.*

*The Council shall also act unanimously for the negotiation and conclusion of agreements:*

*(a) in the field of trade in cultural and audio visual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity;*

*(b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of MS to deliver them.*

*5. The negotiation and conclusion of international agreements in the field of transport shall be subject to Title VI of Part Three and to Article 218.*

*6. The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the MS, and shall not lead to harmonisation of legislative or regulatory provisions of the MS insofar as the Treaties exclude such harmonisation.*

### **5.3 Subject-Matter under the Lisbon Treaty**

Thus, at first sight the Lisbon Treaty unified the subject-matter of all aspect of the CCP in terms of the subject-matter including: 1. trade agreements relating to the trade in goods and 2. services, 3. the commercial aspects of the intellectual



property as well as 4. foreign direct investment. Moreover, important novelty represented the linkage of the CCP to the external action of the Union.<sup>973</sup>

Thus, the coverage of the subject-matter after the Lisbon Treaty is the following one:

### 5.3.1 Goods

The goods are considered as the central point of the commerce of the CCP in sense of the Article 207 TFEU.<sup>974</sup> While analysing the extend of the notion of goods, it is needed to refer back to the provisions of the judgment *Commission v. Italy* case 7/68 in which the ECJ provided rather extensive definition of the notion 'goods' covering everything: "*[...] that can be valued in money and which are capable, as such, of forming the subject of commercial transaction.*"<sup>975</sup> As the result of this definition the ECJ attributed the characteristics of goods to paintings and other works of art, petroleum products, animals, coins which are no longer legal tender, waste (even with no market value) and also electricity.<sup>976</sup>

While taking into account of doctrinal approach to the CCP in terms of goods, into this domain belong also the products falling into the sector of agriculture (regulated rather independently in the provisions of the 38-44 of the TFEU though), further on the coal and steel products since the ECSC ceased to exist. Particular trade regime of the trade have the weapons,<sup>977</sup> however it is to be recalled that the weapons as the matter of principle are not excluded despite the

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<sup>973</sup>Article 21(1) Treaty on European Union (Consolidated version 2010), OJ EU C 83/47, 30.3.2010 wording as follows: "*The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*"

<sup>974</sup>J.SCHWARZE (ed.), *EU-Kommentar*, Munich, 2012, p.1902.

<sup>975</sup>ECJ judgment, 10 December 1968, *Commission of the European Communities v. Italian Republic*, case 7/68 [1968] ECR, p.423.

<sup>976</sup>P.MAGNETTE, *European Democracy Between Two Ages* in C.BARNARD, *The fundamentals of EU law revisited: assessing the impact of the constitutional debate*, Oxford, 2007, p.34.

<sup>977</sup>Article 346 Treaty on the Functioning of the European Union (Consolidated version 2010), OJ C 83, 30.3.2010.

particular regime from the rules of CCP.<sup>978</sup> Furthermore, there is also no doubt on the point that the CCP provisions relate also to the EURATOM Treaty.<sup>979</sup>

### 5.3.2 Services

In the past the question of the services and there was for the long time admitted that the case law of the CJ EU that understood them for a long time via free circulation of the services.

The legal regulation as to the Lisbon Treaty can be considered fully sufficient, since the Lisbon Treaty does not contain the definition of the notion of services and thus, it remains unclear whether this notion designates the services in the sense of EU (freedom to provide services in sense of the EU) or in the sense of the WTO Agreements covering thus four modes of the supply of the services.<sup>980</sup> As to Cremona, the services contain now all four modalities of the supply of the services supply of services.<sup>981</sup>

Some authors consider the regulation as fully covering the sector of services, however respecting the particular voting system in the specific sector of services as cultural and audio-visual services, as well as social, educational and cultural services.<sup>982</sup> Moreover, from the provision of the Article 207 (4) and in comparison to the Amsterdam Treaty, comes out that these types of services are included among the competences of the EU having exclusive nature and moving them from the category of shared ones.<sup>983</sup>

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<sup>978</sup>J.SCHWARZE (ed.), *EU-Kommentar*, Munich, 2012, p.1903.

<sup>979</sup>J.SCHWARZE (ed.), *EU-Kommentar*, Munich, 2012, p.1903.

<sup>980</sup>A.DIMOPOULOS, *The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?* in *Croatian Yearbook of European Law and Policy*, Volume 4, 2008, p.107.

<sup>981</sup>M.CREMONA, *A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty* in *EUI WORKING PAPERS LAW*, No. 2006/30, Florence, 2006, p.30-31.

<sup>982</sup>G.DIAN BALAN, *The Common Commercial Policy under the Lisbon Treaty* in *Jean Monnet seminar, Advanced Issues of European Law Re-thinking the European Constitution in an Enlarged European Union*, 2007, Dubrovnik, p.4.

<sup>983</sup>D.KLEIMANN, *Taking Stock: EU Common Commercial Policy in the Lisbon Era* in *CEPS Working Documents*, Number 346, 2011, p.10.

### 5.3.3 Trade Related Aspects of Intellectual Property Rights

The adoption of the Lisbon Treaty finished the discussions on the position of the trade-related aspects of the intellectual property law within the legal order of the Union. The key issue was the vague wording of this notion what contributed to the fact that the competences on this field had shared nature.<sup>984</sup>

Thus, it was abandoned the concept of the provision of the Article 133 (7) TCE by which was the Council entitled to the extent the applicability of the intellectual property to the extent as it was not covered by the CCP. This logic of the trade-related aspects of intellectual property had two consequences. As to first of them, the Council is no more entitled to decide on the extent of the trade-related aspects of intellectual property and secondly, it was given the preference to dynamic approach to this provision. (since the original wording of the Article 133 TEC would deprive the conclusion of the TRIPs Agreement).<sup>985</sup>

However, not all doubts and obscurity was removed, since the Lisbon Treaty did not provide any exhaustive definition as to that what this term means and which definition to this notion shall be given - the dynamic or static one.<sup>986</sup> The commercial aspects of intellectual property law shall be understood as a way to stronger enforcement of the intellectual property, via more efficient contractual enforcement of this protection, creating thus the same ambience for entering third countries markets which is the pre-condition for more extensive access on the market for goods, services and investments.<sup>987</sup>

In Cremona's view, these shall be understood as the linkage to the TRIPs Agreement despite the linguistic difference between commercial aspects and

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<sup>984</sup>M.TELÒ, *The European Union and global governance*, London, 2009, p.134.

<sup>985</sup>M.KRAJEWSKI, *The Reform of the Common Commercial Policy* in A.BIONDI, P.EECKHOUT, S.RIPLEY, *EU Law after Lisbon*, Oxford, 2012, p.301.

<sup>986</sup>A.DIMOPOULOS, *The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?* in *Croatian Yearbook of European Law and Policy*, Volume 4, 2008, p.108.

<sup>987</sup>L.ŠTĚRBOVÁ, *Práva k duševnímu vlastnictví jako nástroj EU pro obchodní liberalizaci a pro podporu exportu in Současná Evropa*, Number 2, 2012, p.24.

trade-related aspects of the intellectual property rights.<sup>988</sup> This conclusion may be supported also by the judgment C-414/11 within which the Court decided in fact referring to the '*travaux préparatoire*' that in reference to the Article 207(1) "[...] *the authors of the TFEU Treaty could not been unaware that the terms thus used in that provision correspond almost literally to the very title of the TRIPs Agreement.*"<sup>989</sup>

Within the judgment, the Court admitted exclusive nature of the CCP as policy related to the non-MS.<sup>990</sup> Furthermore, the Court admitted that the TRIPs Agreement relates to the international trade and forms integral part of the WTO system.<sup>991</sup>

The Court further stressed the fact that primary objective of the TRIPs Agreement is strengthening and harmonizing of the protection of intellectual property on the world level within which the EU exercises the competence over rule over TFEU Treaty within which the EU may adopt the acts related to the internal market. (however, these must comply with the TRIPs rules)<sup>992</sup>. As the Court concluded, the TRIPs Agreement falls within the scope of the CCP.

#### 5.3.4 Foreign Direct Investments under Lisbon Treaty

Accordingly to the notion '*commercial aspects of the intellectual property law*', also the notion '*foreign direct investment*' did not appear clearly enacted within the existing primary and secondary law of the Union.

Certain help how to identify the direct investments provides the provision of the Directive 88/361/EEC which understands under the notion '*foreign direct*

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<sup>988</sup>M.CREMONA, *A Policy of Bits and Pieces? The Common Commercial Policy after Nice* in A.DASHWOOD, J.SPENCER, A.WARD, *The Cambridge Yearbook of European Legal Studies 2001*, Volume 4, 2001, p.61 and 71.

<sup>989</sup>CJ EU judgment, 18 July 2013, Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon, case C-414/11, not yet published, para 55.

<sup>990</sup>CJ EU judgment, 18 July 2013, Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon, case C-414/11, not yet published, para 50.

<sup>991</sup>CJ EU judgment, 18 July 2013, Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon, case C-414/11, not yet published, para 53..

<sup>992</sup>CJ EU judgment, 18 July 2013, Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH v. DEMO Anonymos Viomichaniki kai Emporiki Etairia Farmakon, case C-414/11, not yet published, para 58-59..

*investments*' the investments of all kinds by natural persons or commercial, industrial or financial undertakings which serve to establish or maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity.<sup>993</sup>

However, the concept of foreign direct investments is understood as a new feature of the EU law, although some elements of the FDI may flow also from the provisions as freedom of establishment and free movement of capital consequence of which that the MS are not entitled to conclude the international agreements with the third states without prior consent of the Union.<sup>994</sup> However, as the doctrine stated, this notion must be interpreted also in coherence with national and international law.<sup>995</sup>

Thus, the wording of the notion foreign direct investments remains unclear since is not fully lucid, whether the provisions on the FDI linked to the trade cover exclusively those aspects as they are linked to the trade, or signalize the fact that the Union gained a right to adopt investment policy measures for the whole EU.<sup>996</sup>

This statement was already confirmed by the Project of the Commission Global Europe within which the Commission clearly pointed out to the free trade Agreements, by saying: *"Free Trade Agreements, if approached with care, can build on WTO and other international rules by going further and faster in promoting peace and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next level of multilateral liberalization and many key issues, including investment, public procurement, competition, other regulatory issues and OPR enforcement, which remain outside the WTO at this time can be addressed through*

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<sup>993</sup>Annex I, Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, Official Journal L 178 , 08/07/1988 P. 0005 – 0018.

<sup>994</sup>H.de WAELE, *Layered Global Player: Legal Dynamics of EU External Relations*, Berlin, 2011, p.64

<sup>995</sup>W.SHAN, S.ZHANG, *The Treaty of Lisbon: Half Way toward a Common Investment Policy* in *European Journal of International Law*, Volume 21, Number 4, 2010, p.1059-1060.

<sup>996</sup>L.HANCHER, F.M.SALERNO, *Energy Policy after Lisbon* in A.BIONDI, P.EECKHOUT, S.RIPLEY, *EU law after Lisbon*, Oxford, 2012, p.396.

FTAs.”<sup>997</sup> In order to attain this aim the EU enjoyed the strategic motto: “*The EU has a strategic interest in developing international rules and cooperation on competition policy to ensure European firms do not suffer from unfair subsidization in third countries.*”<sup>998</sup>

Despite the unclear definition, however, it seems that the EU tends to conclude the international investment agreement by itself overtaking thus the investments competences from the MS.

### 5.3.5 Definition of CCP

Therefore, going out from this facts (lack of the abstract definition in within the CCP), the definition of the CCP was subject to academic debate. As it was shown in the previous chapters, neither the primary law, nor the CJ EU provided any exhaustive definition of the CCP.<sup>999</sup> Actually, the Article 207 TFEU empowers the Union to formulate a ‘*commercial policy based on uniform principles*’ showing that the question of external trade must be governed from a wide point of view and not only regarding the administration of precise system such as customs and quantitative restrictions.

Furthermore, the enumeration of the Article 207 TFEU on the subject-matters covered by commercial policy (changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade) is conceived as a non-exhaustive enumeration which must not, as such, close the door for the

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<sup>997</sup>European Commission, *Global Europe competing in the world; A Contribution to EU’s Growth*, Brussels, 2006, p.10.

<sup>998</sup>European Commission, *Global Europe competing in the world; A Contribution to EU’s Growth*, Brussels, 2006, p.9.

<sup>999</sup>However, there were certain attempts to define the CCP were despite the difficulties done. E.g. Geiger while characterizing CCP contents that the CCP concerns the regulation of the external commercial relations of the community. Within this concept the CCP involves following elements: 1.the circulation of goods with third states (if not provided otherwise, as e.g. agricultural products – Article 37 of the Treaty TEC), 2. regulation of the circulation of the services, though limited to the transport services (taken into consideration the Opinion of the ECJ 1/94), 3. the protection against fake goods, 4. as complementary tool to the above mentioned elements shall be considered the circulation of the payments.

application in a community context of any other process intended to regulate external trade. A restrictive interpretation of the concept of CCP would risk causing the disturbances in intra-community trade by the disparities which would then exist in certain sectors of economic relations with non-MS.

Naturally, in the search definition of the CCP, also the CJ EU adopted rather open-end approach. The doctrine sets forth that such an approach being considered by the doctrine as open-end perspective for the notion of the CCP with dynamic approach (*'Perspektive der Dynamisierung in des unionrechtlichen Begriffs der Handelspolitik'*).<sup>1000</sup>

The endless dynamism of the CCP leads some authors to the conclusion that it is not possible to define the CCP. Any task of the definition of the notion of the CCP would result into a definition which would be too rigorous. The Court limited itself according to the opinion of Auvret-Finck to *'impressionism juridique'*, meaning that provided rather necessary elements of the CCP in the resolutions of the cases which were submitted to it and by deciding them in favour to the coherency and efficiency of the actions of the Communities and thus confirming the open-end character of the CCP.<sup>1001</sup>

On the other hand, the rigorous definition of the notion of CCP would lead to the inconsistency of the notion of the CCP and moreover would lead to the disruption of the Union appearance to the third countries. What makes the issue more obscure is the reference to the provision of the uniform principles.

The doctrinal point of view is that these references shall be interpreted in that way that the MS did not fully cease their rights in all field of the CCP.<sup>1002</sup>

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<sup>1000</sup>R.STREINZ, *EUV/EGV: Vertrag über die Europäische Union und Vertrag zur Grundung der Europäischen Gemeinschaft*, Munich, 2003, p.1448.

<sup>1001</sup>J.AUVRET-FINCK, *Jurisprudence. Cour de justice des Communautés européennes. Arrêt du 26 mars 1987. Commission des Communautés européennes c. Conseil des Communautés européennes (aff. 45/86) in Revue trimestrelle de droit européen*, Volume 23, Number 1, 1988, p.162.

<sup>1002</sup>T.OPPERMANN, *Europarecht: ein Studienbuch*, Munich, 2005, p.660-661.

Nonetheless, the regulation, as contained under the Lisbon Treaty opposes to this opinion

#### **5.4 Conclusion**

The fifth Chapter investigated a set of questions dedicated to the history, nature and the subject-matter of the CCP. Implicitly, this chapter was dedicated also to the search of the definition of the CCP. The CCP belongs to the oldest and most traditional common policies. The very origins of the CCP came out of the regulation as enacted in the ECSC Treaty.

Within that treaty the basic concept comes out of two concepts, mainly internal market and customs union. However, also within the ECSC Treaty it is traceable first CCP. The very basic presumption of the CCP under the ECSC is that the Treaty provision shall not exceed the existing competences of the MS and pay respect to the existing agreements of the MS. However, there can be spoken about rather co-ordinative role of the ECSC institutions represented by the HA.

The step forwards towards the unification represented treaty of Rome, setting up ambitious aim – the unification of the national markets into one single entity-single market. In terms of the CCP, there were put forward two principal points: 1. there shall be adopted the specific rules for the one voice speaking commercial policy 2. It was considered necessary to promote the CCP as a new general economic policy of the future EEC. It was clear that uplifting of the CCP and its transformation into a true policy was not possible without reaching supranational nature of these provisions. There was established the transitional period, there should have been attained the customs union and the CCP as a policy, based on uniform principles in regard to the tariff rates, conclusion of tariff and trade agreements which should have ensured the uniformity in terms of the measures of liberalization, export policy and protection against the dumping and subsidies. This ambitious aim was enforced also by mechanism of the treaty-making of the EEC.



As it was stated on various occasions, the CCP was not formed exclusively by the provisions of the Treaties, but also by the opinions and judgments of the ECJ/CJ EU. In the seventies, the ECJ rendered two important opinions – Opinion 1/75 and 1/78. In the first of them the Court clearly rejected in terms of the CCP any concurrent powers of the MS, while claiming for the strict uniformity of the rules within the CCP. The EEC, in the Court's view was taken likeness to the state-like actor. In the second one, the Court admitted that the CCP is not limited to the traditional tools of the commercial policy, since the integration of the CCP went beyond the customs union. Thus, the integration in the domain of the CCP cannot be limited to the traditional sources of CCP, but must cover more dynamic and broader concept of its understanding.

The Maastricht Treaty as the first of the big amendments of the Treaty of Rome did not bring much novelties in terms of the CCP. At the first sight appears obvious that the Treaty is simplified and with removed articles which did not fulfill anymore their purpose, as e.g. the provisions on transitional period with regard to the CCT.

The fundamental principles were contained still in the Article 110 TEC which is to be understood as self-binding provision for the EC in regard to the CCP, not having direct legal effect, but having the significance in the interpretation as the ECJ ruled on various occasions. Thus, the main aim remained the establishment of a custom union between the MS which shall in common interest contribute to the harmonious development of world trade and abolition of restrictions on the world trade. It may be stated that this provision has clearly similar wording and philosophy as the provisions of the GATT in regard to the basis presumptions.

Upon the novelties as brought into practice by the Maastricht Treaty, there were big expectations connected with the creation of the new entity – WTO. The ECJ had to rule on the fact whether the EC/EU could have acceded to the WTO en

block. There was at stake also the extent of the CCP, since the WTO Agreement contained several sector agreements, as GATS and TRIPs Agreement.

In terms of the subject-matter of the GATS, the Court decided that the trade in sector of services as a matter of principle cannot fall within the concept of the CCP. The reason for that conclusion was that the GATS Agreement presumes 4 modalities of providing of services and those services which presume the consumption abroad or require the presence of the natural persons abroad cannot be considered to be covered by the provisions of the CCP. Accordingly, the ECJ rejected the transport agreements as falling in the sector of the CCP

In terms of the TRIPs the Court decided that the TRIPs is not applicable in terms of CCP in regard to other of other aspects of intellectual property except free circulation of the counterfeit goods. Therefore, the Court rejected the applicability of the TRIPs as an integral part of the CCP.

Upon that, there were within the Opinion examined the competences to conclude the WTO Agreement, thus, there was decisive the question of the nature of these competences.

In terms of the GATS the ECJ rejected the applicability of the competences-extending judgments and stated that since the MS did not reach sufficient harmonization of the rules in this sphere, thus competences shall be shared ones.

The Court's opinion was rather similar one in terms of the other WTO-related agreement - TRIPs. The Court admitted that the rules which concern the TRIPs Agreement are those, which affect directly the establishment of the common market. In addition within this field was done only partial harmonization. This in the Court's view led to the shared nature of the competences in the field of TRIPs.

The amending treaties Amsterdam and Treaty of Nice brought the changes. As to the Amsterdam Treaty, there was adopted particular regime for the agreements in services and intellectual property which required unanimity of the

Council on the basis of the proposal of the Commission and requirement of the consultative opinion of the EP.

As to the Treaty of Nice, the MS became entitled to conclude the agreements in the fields of the trade in cultural and audio-visual services, and social and human services, however, particular regime was still present for the trade agreements.

The Lisbon Treaty brought into practice several amendments. It is not surprising that this agreement was linked to the aims not only in regard to the traditional CCP, however with stronger linkage also to the external appearance of the Union. From the procedural point of view, it was enforced the position of the EP, not only in adoption of the legislation but also in regard to the international agreements.

Besides these changes, it must be alleged that the Treaty did not bring much light into the domain of foreign direct investment agreements, unlike the trade in services, goods and commercial aspects of the intellectual property law. The novelty, subsuming the foreign direct investment agreements under the regime of the CCP needs to be clarified in the future and thus, contribute to the definition of the CCP. However, the difficulties in its definition will very probably persist, since the dynamic feature of the CCP will very probably render any definition risking lacking the preciseness.

## 6 GATT/WTO as legal system

### Summary

**Error! Reference source not found.** Preface 6.2 GATT as System of Law 6.2.1 Generalities 6.2.2 GATT's Institutional Structure 6.2.3 DSM under GATT 1947 6.3 From GATT to WTO 6.4 WTO as System of Law 6.4.1 Generalities 6.4.2 Nature of the Obligations from WTO Law 6.4.3 Institutional Framework of WTO 6.4.4 Decision-Making within WTO 6.4.5 DSM under WTO 6.5 Conclusion

### 6.1 Preface

As already presented in the Chapter II, the vast variety of economic theories has been developed since from 18<sup>th</sup> century. These theories oscillated between the openness of trade and the trade restrictions. However, there is remarkable stronger tendency towards liberalism which culminated in the establishment of the WTO.<sup>1003</sup> For Petersmann is the development even result of philosophical and economic thinking and the replacement of the Hobessian war of everybody against everybody through peaceful cooperation, despite people and governments act as self-interested utility maximizers.<sup>1004</sup>

The first serious concepts of the world trade regulation appeared within the negotiation during Second World War between the US and Great Britain, and were related to the two projects - Atlantic Charter and Land Lease.<sup>1005</sup> The key principles of the negotiations were set forth as the prohibition of discrimination and free trade. First materialized outcomes of the British and US concept appeared in the document '*Multilateral convention on commercial policy*' and in the British one labelled '*Commercial Union*'. Both came to existence in the mid – 1943 and were subjects to the discussion lasting till 1945<sup>1006</sup>, when they were concretized on the basis of common proposal of commercial agreement.

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<sup>1003</sup>J.WOUTERS, B.De MEESTER, *The World Trade Organization: a legal and institutional analysis*, Antwerpen, 2007, p.1.

<sup>1004</sup>E.U.PETERSMANN, *The GATT/WTO dispute settlement system: international law, international organizations, and dispute settlement*, London, 1997, p.2.

<sup>1005</sup>M.H.AGHAEI-DANSHVAR, S.L.KANTARDIJAN, E.OMIDBAKSH, M.KHOSHSCHEREH, *World trade organization pseudo-paradigm as a necessity for change: A qualitative study in African Journal of Business Management*, Volume 4, Issue 1, p.73.

<sup>1006</sup>The British position was defined by political and economic one, connected with Churchill's worries about the deteriorating of the overseas positions and in the same time having Electoral connotations, reference in T.W.ZEILER, *Free trade, free world: the advent of GATT*, Chapel Hill, 1999, p.39.

Within this process, the year 1944 may be marked as important milestone. Since that time the economic conference took place at Bretton Wood, which resulted in drafting of the Charters of International Monetary Fund and International Bank for Reconstruction and Development and last but not least there was presented an idea of creation of an international organization intended to develop and coordinate world trade.<sup>1007</sup>

Creation of the international trade organization was considered in fact as the third pillar of the world trade operating under UN<sup>1008</sup> and as a supplement of the international economic system on the multilateral level.<sup>1009</sup>

The Post-Second World War era was remarkably affected by the change of the political climate. It was not only the end of the war which formed the international relations. Changed political atmosphere of that period was demonstrated clearly by British Prime Minister Winston Churchill stating that: *“From Stettin in the Baltic to Trieste in the Adriatic an iron curtain has descended across the Continent. Behind that line lie all the capitals of the ancient states of Central and Eastern Europe: Warsaw, Berlin, Prague, Vienna, Budapest, Belgrade, Bucharest and Sofia, all these famous cities and the populations around them lie in what I must call the Soviet sphere, and all are subject in one form or another, not only to Soviet influence but to a very high and, in some cases, increasing measure of control from Moscow.”*<sup>1010</sup> Churchill brilliantly predicted the future shape of international scene. Forming two antagonistic blocks became evident the shape of bipolar appearing since the late forties over the European continent.<sup>1011</sup>

To be more demonstrative, it can be added the quotation of Clair Wilcox, one of the key personalities of the post-Second World War period, who

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<sup>1007</sup>United Nations Monetary and Financial Conference at Bretton Woods. Summary of Agreements. July 22, 1944.

<sup>1008</sup>H.J.PRIESS, G.M.BERRISCH, *WTO-Handbuch*, Munich, 2003, p.3.

<sup>1009</sup>D.I.SIEBOLD, *Die Welthandelsorganisation und die Europäische Gemeinschaft : ein Beitrag zur globalen wirtschaftlichen Integration*, Berlin, 2003, p.33.

<sup>1010</sup>Reproduced e.g. in T.REARDON, *Winston Churchill and Mackenzie King: so similar, so different*, Toronto, 2012, p.13.

<sup>1011</sup>P.JOHNSON, *Dějiny 20.století*, Prague, 1991, p.427.

characterized the moving times of the post-Second World War period stating that: “[...] ...the grounds of the liberalism in Europe has been swung out through the First World War and that the economy of the states was destroyed and thanks to the creation of the new states survived the nationalism and protectionism.”<sup>1012</sup>

In fact, certain predispositions of the world trade organization have been concluded already at the Bretton Wood conference. However, during the conference only marginal aspects were dedicated to the trade issues. Under the initiative of president of US Truman, the US called upon its allies to negotiate the regulation of the world trade under new organization ITO. As the platform for the negotiations served the UN Economic and Social Council resolution (from February 1946) on the basic of which there was convoked the Conference for the establishment of ITO.<sup>1013</sup> Thus, the very first proposal was made to create the ITO during a special conference dedicated its creation as a specialized UN agency.<sup>1014</sup> The committee composed by 18 members met during preparatory conferences negotiating the details for the successful establishing of the ITO.<sup>1015</sup> Among the issues which dominated the discussion of the first of them, Genève Council was the competition of the further elaboration of the Charter of the planned international organization, the continuation of the negotiation on a general agreement of the cut-down of the customs and lastly, there were proposed general provisions on the customs duties. However, the completion of the ITO Charter

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<sup>1012</sup>D.I.SIEBOLD, *Die Welthandelsorganisation und die Europäische Gemeinschaft: ein Beitrag zur globalen wirtschaftlichen Integration*, Berlin, 2003, p.33.

<sup>1013</sup>The resolution was an outcome of the UN Economic and social Council, being convened for the conference on trade and employment and the first meeting of the UN Economic and Social Council led to the resolution on drafting an Charter of ITO, reference to B.E.OLSEN, Introduction in B.E.OLSEN, M.STEINICKE, K.E. SØRENSEN, *WTO law: from a European perspective*, Alphen aan den Rijn, 2012, p.5.

<sup>1014</sup>S.SALEEM, *Business environment*, New Delhi, 2010, p.458.

<sup>1015</sup>The proposals of the conference have been presented as London report (referring to the conference being held from October-November 1946 in London – UN Document EP CT/33), New York report (January-February 1947) – EPCT/34 March 5, Genève report (referred to the conference being held from April till August 1947 in Genève- UN Document EP CT/186), in R.E.HUDEC, *The GATT legal system and world trade diplomacy*, New York, 1975, p.9-10.

was postponed until the Havana conference,<sup>1016</sup> starting 18 November 1947 with final signature of the Charter 24 March 1948.

This vanguard was considered as a minimal initial step for the creation of the ITO and its 'constitution' containing the dispute settlements procedure, and unlike the GATT also the chapter on the employment and economic policy, economic development and the reconstruction, the elimination of the commerce barriers and the competition policy provisions.<sup>1017</sup> Nevertheless, the lack of urgency of the creation of an organization of such a type and lack of the political will and lastly also the political situation in the US of that time (Marshall's plan priority, establishment of NATO, later on Korean war) significantly lowered the motivation for the establishment of the ITO. Some authors refer in regard to the motivation also the past political climate, lingering after protectionist trade policies of the 1920-30<sup>1018</sup>, among which can be certainly mentioned the damaging 1930 US Tariff Act, and other protectionist measures as e.g. quota restrictions.<sup>1019</sup> Thus, the plan of creating an organization which would be one of triad of the world trade organizations collapsed and by this fact, the GATT intended as a provisional solution while constituting the ITO Agreement remained in place.<sup>1020</sup> The main issue of the not acceptance of the GATT Agreement was the reluctance of the Congress of the US to grant to the Agreement the autonomy and the preoccupation of the US in regard of sovereignty. In Peet's view, the greatest problem for the Congress remained the granting of the authority to the UN organization, to make agreements, or to impose the sanctions, that might have threatened the US national interests. As he adds further, the problem with this organization was also that this organization would be able to veto Congressional decision and the fact that the Charter for the ITO could be amended by the two-

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<sup>1016</sup>B.E.OLSEN, Introduction in B.E.OLSEN, M.STEINICKE, K.E. SØRENSEN, *WTO law : from a European perspective*, Alphen aan den Rijn, 2012, p.6.

<sup>1017</sup>H.J.PRIESS, G.M.BERRISCH, *WTO-Handbuch*, Munich, 2003, p.4.

<sup>1018</sup>S.SALEEM, *Business environment*, New Delhi, 2010, p.458.

<sup>1019</sup>J.H.JACKSON, *Restructuring the GATT system*, New York, 1990, p.9.

<sup>1020</sup>P.M.RAWORTH, L.C.REIF, *The law of the WTO: final text of the GATT Uruguay round agreements*, New York, 1995, p.1.

third majority, regardless to the members not being involved in agreement, or not complying with that ruling.<sup>1021</sup>

The philosophy of the Charter was meant as the complex codification ('*umfassende Kodifizierung*') of the world trade in accordance with the Bretton-Wood system, creating the world legal order in the world trade.<sup>1022</sup> Well-known reluctance of the Congress as presented above contributed to the fact that the world trade Charter was effectively dead.<sup>1023</sup>

As the consequence, the GATT Agreement became the only multilateral instrument governing international trade from 1948, until the WTO was established in 1995.<sup>1024</sup> By deciding negatively by the US, they have fulfilled the presumption of the rational-choice analyses in the international relations, stating that: "*The states use international institutions to further their own goals and they design the institutions accordingly.*"<sup>1025</sup>

Thus, the creation of the GATT Agreement can be labelled as suffering of the '*birth defects*', labelling inherent weakness that handicapped its operation.<sup>1026</sup> The fact is that the elaboration of the GATT was negotiated without waiting for the completion and entering into force of the ITO Charter.

Within this process, 23 of the 50 States began negotiations with an aim to bind or reduce the tariffs.<sup>1027</sup> Since the importance of such negotiations appeared

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<sup>1021</sup>R.PEET, *Unholy trinity: the IMF, World Bank and WTO*, Kuala Lumpur, 2003, p.149.

<sup>1022</sup>W.ALBERS, *Handwörterbuch der Wirtschaftswissenschaft: (HdWW): zugleich Neuauflage des Handwörterbuchs der Sozialwissenschaften*, Stuttgart, 1982, p.660.

<sup>1023</sup>World Trade Organization, *Understanding the WTO*, Genève, 2008, p.16.

<sup>1024</sup>World Trade Organization, *Understanding the WTO*, Genève, 2008, p.16.

<sup>1025</sup>B.KOREMENOS,C.LIPSON,D.SNIDAL, *The rational design of international institutions*, Cambridge, 2004, p.762.

<sup>1026</sup>These defects may be characterized by Jackson as follows: 1.the lack of a charter granting the GATT legal personality and establishing its procedures and organizational structure; 2.the fact that the GATT had only '*provisional*' application; 3. the fact that the Protocol of Provisional Application contained provisions enabling GATT contracting parties to maintain legislation that was in force on accession to the GATT and was inconsistent with the GATT (called grandfather rights), 4.ambiguity and confusion about the GATT's authority, decision-making and legal status, reference to J.H.JACKSON, *Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects in A.O.KRUEGER, The WTO as an International Organization*, Chicago, 1998, p.161-163.

<sup>1027</sup>J.WOUTERS, B.De MEESTER, *The World Trade Organization: a legal and institutional analysis*, Antwerpen, 2007, p.9.



significant also for the further negotiations, the London Preparatory Committee encouraged the further negotiations in this field and their involvement in the ITO Charter.<sup>1028</sup> However, the main part and the negotiations were held in Genève. The conference in Genève had principally two functions. On the one hand, the Committee continued to draft the ITO Charter; on the other hand, 23 nations undertook negotiations aimed on the reduction of tariffs which they transformed into GATT.<sup>1029</sup> In fact, the Genève conference successfully completed the GATT text and reached tariff reductions agreement and enabled the entry into power of the partial agreement GATT via the Protocol on Provisional Application since 1 January 1948.

The obscurity and shortcomings of the beginnings of the GATT agreement, basically related to the non-implementation of the intended ITO Agreement was resolved by the application of the mentioned '*Protocol on Provisional Application.*' The philosophy of the protocol was to overcome the legislative barriers on the national level, since several of the original GATT contracting parties could not adopt the GATT without approval from their legislatures, or needed to amend their national legislation in order to make it compatible with the GATT.<sup>1030</sup>

In regard to its applicability speaks the fact that the GATT was not an international organization, but an intergovernmental treaty, negotiated before the ITO negotiations were fully concluded. Since the ITO never came into being, the GATT was the only concrete result of the ITO negotiations. Despite the GATT Agreement overtook by many specific provisions of the ITO, it was permanently

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<sup>1028</sup> According to the London Preparatory committee (the results of the negotiations) shall be... incorporated in an agreement among the members of the Preparatory Committee which would contain, either by reference or by reproduction, those general provisions of Chapter V [the trade policy section of the ITO Charter] considered essential to safeguard the value of tariff concessions and such other provisions as may be appropriate. As referred to Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Annexure 10, Section H, London 1946, p. 50-51.

<sup>1029</sup> J.H.JACKSON, *The jurisprudence of GATT and the WTO: insights on treaty law and economic relations*, Cambridge, 2000, p.22.

<sup>1030</sup> D.ROBERTSON, *International Economics and Confusing Politics*, Cheltenham, 2006, p.45.

conceived as an interim agreement <sup>1031</sup> Moreover, unlike the future WTO Agreement, the GATT Agreement was technically *'only'* an agreement, not an organization.<sup>1032</sup> The term technically might be explained in the words of Kahler, stating that: *"In the absence of the ITO, GATT took shape as a combination of multilateral tariff agreements plus substantive obligations concerning the conduct of national trade policy. From the start, it was not defined as an organization, which seemed at first to place limits on its institutionalization. GATT rules or injunctions were typically qualified, often in GATT itself or in the practices that involved in the postwar trade regime."*<sup>1033</sup>

## 6.2 GATT as System of Law

### 6.2.1 Generalities

In order to make the trade more effective and easier, 23 states<sup>1034</sup> signed the multilateral trade agreement GATT,<sup>1035</sup> entering into the force since 1 January 1948 through the Protocol on Provisional Application.

As the protocol clearly states: "Contracting parties agree on the provisionary application starting from 1 January 1948 of:<sup>1036</sup>

1. Parts I and III of the General Agreement on Tariffs and Trade,
2. Part II of that Agreement to the fullest extent was not consistent with existing legislation.

Part I contained only two brief Articles dealing with two aspects – firstly, principle of the non-discrimination among competitors on the market and secondly, the schedule of the tariffs rates which were just negotiated. On the other hand, provisions, contained in the Part III enacted the subject-matter having

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<sup>1031</sup>B.M.HOEKMAN, M.M.KOSTECKI, *The political economy of the world trading system: WTO and beyond*, Oxford, 2001, p.12.

<sup>1032</sup>M.W.PENG, *Global business*, Mason, 2009, p.39.

<sup>1033</sup>M.KAHLER, *International institutions and the political economy of integration*, Washington, 1995, p.23.

<sup>1034</sup>The General Agreement on Tariffs and Trade, GATT, 1947.

<sup>1035</sup>H.J.PRIESS, G.M.BERRISCH, *WTO-Handbuch*, Munich, 2003, p.3.

<sup>1036</sup>Havana Charter for an International Trade Organization, including Annexes, 1948.

administrative background. As the matter of fact, the final text of the GATT 1947 contained the Treaty text with more than 20 custom lists, with 123 negotiations results and over 45 000 product position which included the half of the commerce.<sup>1037</sup>

In summary, the GATT Agreement as a general rule lowers the tariffs by limiting tariff charges to those agreed in the Schedule of Concessions (Article II) and giving those benefits to all Contracting Parties as enacted in the Article I.

The list of the GATT 1947 provisions contains the following provisions:

*Substantive rules*

1. a requirement of national treatment of imports with respect to taxes and regulations (Article III),
2. a prohibition on quotas, import or export licenses and other measures, with some exceptions (Article XI), and special provision relating to quotas on cinematograph films (Article IV),
3. guarantees of freedom of transit (Article V),
4. rules relating to subsidies and antidumping and countervailing duties (Articles VI and XVI),
5. rules on valuation for customs purposes (Article VII),
6. rules on fees and formalities connected with import and export (Article VIII),
7. rules on marks of origin (Article IX),
8. rules on transparency and publication of national trade regulations,
9. rules on currency exchange regulation (Article XV),
10. rules on state-trading enterprises (Article XVII),

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<sup>1037</sup>S.OETER, M.HILF, *WTO-Recht : Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.82.

11. rules on government assistance to economic development (Article XVIII),  
Apart from the general provisions the GATT Agreement contains also certain exceptions to basic rules:

11.1. Exceptions for quotas for balance-of-payments purposes (Articles XII, XIII, XIV, XV and XVII, Section B),

11.2. Exceptions for developing countries (Article XVIII and Part IV),

11.3. an exception for emergency action where serious injury is caused or threatened to a domestic industry (Article XIX – called escape clause),

11.4. an exception for health, safety, the protection of natural resources and other matters (Article XX),

11.5. an exception for national security (Article XXI),

11.6. an exception for customs union and free trade areas (Article XXIV),

11.7. an exception for waivers by the contracting parties (Article XXV),

11.8. an exception allowing a GATT contracting party to 'opt out' of a GATT relationship, on a one-time basis, when a new contracting party joins the GATT (Article XXXV).

#### *Dispute Settlement Provisions*

The GATT Agreement further contains the provisions for the dispute settlement:

1. a provision dedicated to the consultation (Article XXII),

2. a provision dedicated to the complains and giving the permission to investigation and giving the recommendations for the dispute resolving (Article XXIII),

#### *Other GATT the Procedural Rules*

1. procedures for modifying the Schedules of Concessions (Article XXVIII) and conducting tariff negotiations (Article XXVIII *bis*),
2. procedures for withholding or withdrawing concessions if a state withdraws or fails to become contracting party (Article XXVII),
3. procedures defining which countries may be Contracting Parties and for accession to the GATT (Articles XXXII and XXXIII),
4. procedures for amending the GATT (Article XXX),
5. procedures for withdrawing from the GATT on six months' notice (Article XXXI),
6. procedures for accepting, entry into force and registration of the GATT (Article XXVI).

In addition to above mentioned provisions, the GATT contains the Annex with notes and supplementary interpretations.<sup>1038</sup> The most massive subject-matter remained enacted within the Part II, including the provisions dedicated to the national treatment, antidumping and countervailing duties, valuation of imports for custom purposes, marks of origin, import and export quotas and limitations, restrictions on imports for balance of payments purposes, exchange arrangements, subsidies, state trading enterprises, governmental assistance to economic development, emergency action on import of particular products, exceptions to GATT obligations - including exceptions necessary to protect human, plant and animal life, health, and safety, and exceptions for national security purposes. In the view of Palmeter and Mavroidis, Part II provides the necessary market access complement to the Part I.<sup>1039</sup>

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<sup>1038</sup>M.MATSUSHITA, T.J.SCHOENBAUM, P.C.MAVROIDIS, *The World Trade Organization, Law, Practice, and Policy*, Oxford, 2006, p.3-5.

<sup>1039</sup>D.PALMETER, P.C.MAVROIDIS, *Dispute Settlement in the World Trade Organization Practice and Procedure*, Cambridge, 2004, p.4.

In fact, Part II guaranteed the Contracting Parties the preservation of the godfather rights, though inconsistent with GATT law, authorizing thus the Contracting Parties not to amend existing legislation on sensitive subjects, such as import quotas, subsidies, anti-dumping legislation and customs administration.

Such a term refers to legislation as in power in 1947 which may include federal or sub-federal legislations and legislation which according to the states expressed intention of a mandatory character, i.e. it imposed on the executive authority obligations which cannot be modified by executive action.<sup>1040</sup> In short, it might me agreed with Lanoszka stating that the GATT requirements to implement certain articles, depending on the country's existing legislation were reduced.<sup>1041</sup>

The adjective '*provisionary*' clearly invokes the fact that the such type of applicability shall be considered time-limited and soon be superseded by the Havana World Trade Charter as more comprehensive, including comprehensive tariff schedules. The agreements should have contained the bunch of international treaties, regulating the cross boarder investment measures, adoption of the control measures for surveillance over the market. All those ambitious aims should have been covered by one single institution – ITO.<sup>1042</sup>

Nonetheless, the full legal effect of the word '*provisional*' was not clarified. However, presumably this notion was used to help some governments to evade domestic ratification procedures.<sup>1043</sup> As the conclusion, the GATT became more significant important agreement that could be though the activities of the Contracting Parties.<sup>1044</sup>

The perception of the GATT as an international agreement appears in the textbook Economic Integration and the Law of GATT in which the GATT

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<sup>1040</sup> A.KRISHEN KOUL, *A guide to the WTO and GATT: economics, law, and politics*, Hague, 2005, p.8.

<sup>1041</sup> A.LANOSZKA, *The World Trade Organization accession process : negotiating participation in a globalizing economy* in *Journal of world trade*, Volume 35, Number 4, 2001, p.580-581.

<sup>1042</sup> G.VOLZ, *Die Organisationen der Weltwirtschaft*, Oldenburg, 2000, p.122.

<sup>1043</sup> R.E.HUDEC, *The GATT legal system and world trade diplomacy*, New York, 1975, p.46.

<sup>1044</sup> D.P.STEGER, *Afterword: The 'Trade and ...' Conundrum- A Commentary* in *American Journal of International Law*, Volume 96, Issue 1, 2002, p.135-136.

Agreement is characterized as a multilateral trade agreement whose members are called Contracting Parties.<sup>1045</sup> Such an approach corresponds to the perception of the 'Contracting Parties' as the only real organ to the Agreement.<sup>1046</sup>

Despite the mentioned shortcomings, the protocol remained provisionally applicable during following years and gained over the years to the stand point that the agreement via the customary international law developed to the international organization. In this direction may be quoted also Jackson saying that: "[...]the GATT as an organization ... despite the original intention of the draftsmen that GATT was not to be an international organization, history forces to assume that role," in the similar way perceives the development of the GATT also Steinberger stating that GATT Agreement has moved from the provisional tariff and trade agreement and gets closer to the WTO Agreement.<sup>1047</sup>

In order to be provide complete information, in 1965 there was attached to the GATT the Part IV, with title Trade and Development formulating the principles and objectives for the relations to the less-developed countries and delineates the commitments and joint action to achieve the objectives of the trade and development at large in general and with particular attention being paid to the developing countries.

### 6.2.2 GATT's Institutional Structure

As a matter of principle, the provisions of the GATT Agreement were rather scant in regard to the institutional provisions. The Agreement went out from the presumption, that GATT represented rather an agreement under international law than international organization.<sup>1048</sup> Some authors even state that the GATT 1947 was intended rather as bridging agreement which should have filled in the

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<sup>1045</sup>P.LORTIE, *Economic integration and the law of GATT*, New York, 1975, p.1.

<sup>1046</sup>B.E.OLSEN, *Introduction* in B.E.OLSEN, M.STEINICKE, K.E. SØRENSEN, *WTO law: from a European perspective*, Alphen aan den Rijn, 2012, p.6.

<sup>1047</sup>W.BENEDEK, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht*, Berlin, 1990, p.251.

<sup>1048</sup>P.van den BOSSCHE, *The law and policy of the World Trade Organization : text, cases, and materials*, Cambridge, 2008, p.80.

vacuum, until the entry in power of the ITO Treaty.<sup>1049</sup> In practical terms, the GATT 1947 agreement came into life as an '*accidente historico*' meaning that the GATT 1947 became the follower of the Havana Charter, however in haphazard way and in limited and rudimental feature.<sup>1050</sup>

The historical accident marked also the '*institutional framework*' of the GATT 1947. As matter of principle, all references to '*Members of Organization*' were replaced by the reference to the '*Contracting Parties*', which left as the only organ.<sup>1051</sup> The idea behind was the effective collective decision-making apparatus, submitting all decision-making to a collective group of Contracting Parties, gathering once a while how the things are going.<sup>1052</sup>

The contracting parties presented themselves reluctant to delegate any activities to a '*committee*'. The reluctance faded gradually and there were in the practice accepted '*Intersessional Committees*',<sup>1053</sup> meeting between sessions of the Contracting Parties.<sup>1054</sup>

In addition, since the GATT had no real organization structure, the ICITO (convened for the preparation of the ITO) overtook secretary functions and began to administer also the GATT 1947 Agreement. Doing so, the ICITO over the years converted into the GATT Secretariat.<sup>1055</sup> In fact, ICITO leased some of its personnel to the GATT to act as the Secretariat personnel.<sup>1056</sup> As Jackson states, the GATT Contracting Parties decided to avail ICITO for Secretariat functions,<sup>1057</sup> which since

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<sup>1049</sup>S.OETER, M.HILF, *WTO-Recht: Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.84.

<sup>1050</sup>X.FERNÁNDEZ PONS, *La Organización Mundial del Comercio y el derecho internacional: un estudio sobre el sistema de solución de diferencias de la OMC y las normas secundarias del derecho internacional general*, Madrid, 2006, p.63.

<sup>1051</sup>B.E.OLSEN, *Introduction* in B.E.OLSEN, M.STEINICKE, K.E. SØRENSEN, *WTO law: from a European perspective*, Alphen aan den Rijn, 2012, p.6.

<sup>1052</sup>R.E.HUDEC, *The GATT legal system and world trade diplomacy The GATT legal system and world trade diplomacy*, New York, 1975, p.46.

<sup>1053</sup>Oeter and Hilf state that even an explicit empowerment to do so, p.87, in S.OETER, M.HILF *WTO-Recht : Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.87 even without an explicit empowerment to do so.

<sup>1054</sup>J.H.JACKSON, *The World Trade Organization: constitution and jurisprudence*, London, 1998, p.19.

<sup>1055</sup>H.J.PRIESS, G.M.BERRISCH, *WTO-Handbuch*, Munich, 2003, p.4.

<sup>1056</sup>P.van den BOSSCHE, *The law and policy of the World Trade Organization: text, cases, and materials*, Cambridge, 2008, p.81.

<sup>1057</sup>J.H.JACKSON, *World trade and the law of GATT; (a legal analysis of the General agreement on tariffs and trade)*, Indianapolis, 1969, p.145.



1955 started to fulfil the function of the empowered as depositor of the GATT Treaties.<sup>1058</sup> Shortly afterwards the ICITO's only function was to perform secretary functions for GATT.

Formally, the GATT was headed by Director-General nominated by Contracting Parties, which choice was formally sanctioned by the ICITO simultaneously naming this person to be its executive secretary.<sup>1059</sup> All employment contracts were formally concluded to ICITO and the employees were falling under UN umbrella.<sup>1060</sup> Thus the personnel disposed of the benefits, privileges and immunities as other UN employees.<sup>1061</sup>

Even upon abandoning the ITO concept, retained the ICITO the position as legal basis for the existence of the GATT Secretariat status of which remained also in power since 1995 establishing the WTO with own Secretariat.<sup>1062</sup> Moreover, there were formed a number of organizations supporting the Secretariat and the Council like committees, working groups, expert groups.<sup>1063</sup> Apart from the Council and Secretariat, Beise mentions also the existence of 'Advisory group of 18' established as the as a steering committee, established to ensure sound functionality of the GATT Agreement being composed by the senior officials 20 states to prepare the diplomatic background for the decisions of the above mentioned bodies.<sup>1064</sup>

In fact, the original GATT 1947 Agreement never came into full applicability and remained temporary applicable treaty however, over the time became endowed with relatively functional organizational structure. Nonetheless,

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<sup>1058</sup>Decision of Contracting Parties, 23 March 1965, BISD 13S/19.

<sup>1059</sup>J.H.BARTON *et. al.*, *The evolution of the trade regime : politics, law, and economics of the GATT and the WTO*, Princeton, 2006, p.42.

<sup>1060</sup>P.F.J.MACRORY, A.E.APPLETON, M.G.PLUMMER, *The World Trade Organization: legal, economic and political analysis*, New York, 2005, p.54.

<sup>1061</sup>Convention on the Privileges and Immunities of the Specialized Agencies, 21 November 1947.

<sup>1062</sup>R.E.HUDEC, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure* in J.BHAGWATI, M.HIRSCH, *The Uruguay Round and Beyond: Essays in Honor of Arthur Dunkel*, London, 1998, p.105.

<sup>1063</sup>S.OETER, M.HILF, *WTO-Recht : Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.84.

<sup>1064</sup>B.BEISE, *Die Welthandelsorganisation (WTO) : Funktion, Status, Organisation*, Baden-Baden, 2000, p.52.

the lack of the stable institutional framework led to considerable confusion for international trade relations.<sup>1065</sup>

### 6.2.3 DSM under GATT 1947

The first reference in which was presumed the dispute settlement mechanism was contained in the Havana Charter on the creation of ITO<sup>1066</sup> creating GATT Agreement DSM.<sup>1067</sup> In practice, the articles 92-96 of the ITO agreement enabled the contractual parties in case of alleged violation of the agreement the possibility of the consultation, the dispute resolution via the arbitrage and if the case was not still resolved, the contracting parties could addressed to Executive Council to which was given the competence to adopt correspondent recommendations or opinion.

The state concerned had the possibility to submit a defence requesting the Council to further escalate the dispute up to the highest body of ITO. This was empowered to confirm, change or cancel the adopted measure. The system as such prohibited adoption of unilateral measures adopted by the contracting parties. The ITO contained as well a possibility to ask for advisory opinions the ICJ in regard to legal issues.

In difference to the ITO mechanism, the GATT Agreement did not contain any elaborated dispute settlement mechanism, since the GATT was conceived to be a partial agreement under the institutional umbrella of ITO.<sup>1068</sup>

In consequence, one may not wonder that the provisions for dispute settlement within the GATT Agreement were very sparse,<sup>1069</sup> containing only two articles dealing with dispute settlement. Paradoxically, as Petersmann states, none

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<sup>1065</sup>J.H.JACKSON, *Sovereignty, the WTO and changing fundamentals of international law*, Cambridge, 2006, p.82.

<sup>1066</sup>Havana Charter for an International Trade Organization, including Annexes, 1948.

<sup>1067</sup>K.KAISER, P.T.STOLL, R.WOLFRUM, *WTO: Institutions and dispute settlement*, Leiden, 2006, p.269-270.

<sup>1068</sup>G.A.BERMANN, P.C.MAVROIDIS, *WTO law and developing countries*, Cambridge, 2007, p.886.

<sup>1069</sup>D.BUGGIE THORJØRN, *The WTO Institutions* in B.E.OLSEN, M.STEINICKE, K.E. SØRENSEN, *WTO law: from a European perspective*, Alphen aan den Rijn, 2012, p.38.

of the provisions dedicated to the dispute settlement was labelled as dispute settlement, referring to the fact that the first provision dedicated to the dispute settlement was marked '*Bilateral consultations*' and the second one, '*Nullification or Impairment*'.<sup>1070</sup>

The DSM was over the time during the following years converted into rather functional model of the dispute settlement via various modifications as BISD 14/S, Decision of 5 April 1966 on Procedures under Art. XXIII; BISD 26S/210, Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979; BISD 29S/13, Ministerial Declaration of 29 November 1982, Decision on Dispute Settlement; BISD 31S/9, Decision on Dispute Settlement of 30 November 1984; BISD 36S/61, Decision of 12 April 1989 on Improvements to GATT Dispute Settlement Rules and Procedures; L/7416, Decision of 22 February 1994 on Extension of the April 1989 Decision on Improvements of the GATT Dispute Settlement Rules and Procedures and under the Tokyo round. There were adopted particular provisions dedicated to the treatment of developing countries, by BISD 14S/18, Decision of 5 April 1966 on Procedures under Article XXIII.

Hence, as the result of the negotiation, the GATT Agreement consists of various types of procedures, fundamentally contained in the Articles XXII, XXIII and in Article XVIII (12) - provision on disputes over balance-of-payment restriction and Article XXIV (7) on the disputes over the GATT consistency of interim agreements for a custom union or free trade area.

Jackson even identifies together nineteen procedures concerning certain form of the resolution of the disputes within the GATT Agreement Articles II:5, VI:7, VII:1, VIII:2, IX:6, XII:4, XIII:4, XVI:4, XVIII:12, XVIII:16, XVIII:21, XVIII:22, XIX:2, XXIII, XXIV:1, XXVII, XXVIII:1, XXVIII:4, XXXVII:2.<sup>1071</sup> Nonetheless, it was generally perceived that the GATT system lacked an authentic DSM. The lack of

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<sup>1070</sup>E.U.PETERSMANN, *The GATT/WTO dispute settlement system: international law, international organizations, and dispute settlement*, London, 1997, p.70.

<sup>1071</sup>J.H.JACKSON, *World trade and the law of GATT; (a legal analysis of the General agreement on tariffs and trade)*, Indianapolis, 1969, p.164.

existence of one single DSM was considered as one of the weaknesses of the GATT system, leading to the forum shopping, i.e. searching the available and most suitable platform for the dispute settlement.<sup>1072</sup>

The author will touch upon only the principal provisions of the Articles XXII and XXIII with the key question on the very nature. According to Jackson, there are roughly saying two principal methods for dispute settlement, power-oriented technique with its opposite face, rule-oriented technique. A nature of the power-oriented technique suggests discussions, negotiations or dispute settlement within which the party asserts or uses the relative power at its disposal to influence the conduct of the other party. On the other hand, rule-oriented approach suggests the negotiations among the governments or individuals on elaboration an observance of such rules which the participants voluntarily accept because the rules reconcile their conflicting short-term interests with their common long-term interests in a mutually beneficial manner.<sup>1073</sup>

The provision dedicated to the consultations represents the simplest form of the dispute settlements. The provision of the Article XXII represents the general provision calling for '*sympathetic consideration*' and '*consultations*' with respect to the GATT agreement.<sup>1074</sup> Over the time, the consultations have not changed that dramatically as the appeal and panel procedure under the WTO.

Originally, the provision dedicated to the consultation gave to each Contracting Party the possibility to accord sympathetic consideration and adequate opportunity for consultation regarding the matter falling under the scope of applicability of the GATT Agreement.<sup>1075</sup> In addition, the Contracting Parties could have consulted at request any matter within which satisfactory

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<sup>1072</sup>S.OETER, M.HILF, *WTO-Recht : Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.508.

<sup>1073</sup>E.U.PETERSMANN, *The GATT/WTO dispute settlement system : international law, international organizations, and dispute settlement*, London, 1997, p.66-67.

<sup>1074</sup>M.MATSUSHITA, T.J.SCHOENBAUM, P.C.MAVROIDIS, *The World Trade Organization, Law, Practice, and Policy*, Oxford, 2006, p.105.

<sup>1075</sup>Article XXII (1) The General Agreement on Tariffs and Trade, GATT, 1947.

solution was not reached.<sup>1076</sup> The consulting procedure, thus in fact maintained the form of the negotiating forum designed to preserve a balance of concessions and obligations.<sup>1077</sup> The amendment of the DSM from 1958 of the consultation procedure did not change the nature as being only an informal tool of exchange of ideas with an aim of diplomatic settlement of the dispute at stake.<sup>1078</sup>

The provision of Article XXIII dedicated to 'Nullification' and 'Impairment' first defines what shall be understood under these notions. As to this fact, there are three situations under which can come to the application of these provisions.

Such violations may be based on: 1. the failure of another Contracting Party to carry out the obligations under the GATT agreement, 2. the application by another contracting party of any measure, whether or not it conflicts with the provision of the GATT Agreement or 3. any other situation. Thus, the dispute settlement procedure covered the complete subject-matter of the GATT Agreement within which may be initiated the dispute settlement procedure.

First section provides that, if any Contracting Party opines that any benefit accruing to it under the GATT Agreement was nullified or impaired, the Contracting Party may make recommendations or proposals to the other Contracting Party or parties. The approached party shall give sympathetic consideration to such a recommendation or proposal.<sup>1079</sup> The provision of Article XXIII seems authentic with Article XXII (2). According to GATT

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<sup>1076</sup> Article XXII (2) The General Agreement on Tariffs and Trade, GATT, 1947.

<sup>1077</sup> O.LONG, *Law and its limitations in the GATT multilateral trade system*, London, 1987, p.73.

<sup>1078</sup> Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties, BISD, 24, adopted 10 Nov. 1958, bringing into practice as the amendment of the consultation procedure 1. notification of the GATT Executive Secretary by contracting party seeking consultations for the information of all contracting parties, 2. notification of the Executive Secretary by any other contracting party with substantial trade interest informing the consulting parties of the desire to join consultations, 3. joinder of the third party in consultations if the party to which the request was made agrees that there is a substantial trade interest, 4. referral of a claim to the contracting parties by a third state whose request to join consultations was rejected; 5. informing the contracting parties of the outcome of consultations and 6. the provision of assistance in consultations by the Executive Secretary if requested by consulting parties, reference to P.F.J. MACROCY, A.E. APPELTON, M.G. PLUMMER, *The World Trade Organization. Vol. 1: Legal, economic and political analysis*, New York, 2005, p.1200-1201.

<sup>1079</sup> Article XXII (1) The General Agreement on Tariffs and Trade, GATT, 1947.

decision BISD 9S/20 was made clear that both can be alternatively used as a legal basis for the further procedure.

Furthermore, if satisfactory adjustment is not reached between contracting parties, such a matter may be submitted to all Contracting Parties which shall investigate the matter and make appropriate recommendations. In case, that the Contracting Parties would find a violation, the violating party was required to implement the appropriate measures which are in compliance with GATT law.

For that purpose can be adopted a Panel<sup>1080</sup> meaning that the defendant must agree with its creation, being proposed on the proposal of the complainant. If all this steps were attained no implementation occurred, the Contracting Parties could have authorized the complaining party to suspend the GATT Agreement vis-à-vis the recalcitrant state.<sup>1081</sup>

As regard to the system of the remedies under the Article XXIII (2), the Article establishes the following types of remedies provided by the contracting parties:

1. recommendations shall be imposed against the Contracting Parties which they consider to be appropriate,
2. it shall be given a ruling on the matter, if appropriate.

According to GATT Agreement the Contracting Parties may authorize a damaged Contracting Party or Parties to suspend their obligations against other Contracting Party or Parties, if they deemed them appropriate.

As Macrory et al. state, two parts of the system are the key elements of its operability, consultation at the very beginning and possibility of suspension of

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<sup>1080</sup> Since 1955 the contracting states of the GATT Agreement started to refer their cases to '*panels*', which were constituted as ad hoc groups of experts and not as governmental representatives. Legally speaking did not have legal effects but were referred to the GATT Council available to make '*appropriate recommendations*', reference to E.U.PETERSMANN, *The Dispute Settlement system of the World Trade Organization and the Evolution of GATT Dispute Settlement since 1948* in *Common Market Law Review*, Volume 31, Issue 5, 1994, p.1157.

<sup>1081</sup> Article XXIII (2) The General Agreement on Tariffs and Trade, GATT, 1947.

concession or other obligations at the very end of the process. These two components mark the opposite ends of two extremes: consultations are the most conciliatory form of settling a dispute and suspension of GATT concessions or other obligations is the ultimate ratio of retaliation and enforcement, if a Contracting Party fails to comply with its legal obligations under the agreement.<sup>1082</sup>

Further deepening of the GATT rules came into play under Tokyo round of negotiation within which there were adopted the Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979.<sup>1083</sup> According to the doctrine, in the year 1979 was codified for the first time a framework of procedural rules for the GATT dispute settlement as a whole<sup>1084</sup> which was shortly afterwards completed by the Decision on Dispute Settlement Procedures.<sup>1085</sup>

The Understanding in the part dedicated to the dispute settlements significantly lauded the role of the Panels. The practice for the Panels has been to hold two or three meetings with the parties concerned. The Panel invited the Parties to present their view either in writing or orally in the presence of each other. Panels heard also the views of any Contracting Party having substantial interest in the matter which is not directly Party to the dispute, but which was expressed in the Council a desire to present its views.

Panels often consulted and asked for information any relevant source they deem appropriate and they sometimes consulted experts to obtain their technical opinion on certain aspects on the matter. Panels were entitled to seek advice or assistance from the Secretariat in its capacity as guardian of the GATT, especially

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<sup>1082</sup> P.F.J.MACROCY, A.E.APPELTON, M.G.PLUMMER, *The World Trade Organization. Vol. 1 : Legal, economic and political analysis*, New York, 2005, p.1200.

<sup>1083</sup> The Understanding on Notification, Consultation, Dispute Settlement and Surveillance, 28 November 1979.

<sup>1084</sup> P.F.J.MACROCY, A.E.APPELTON, M.G.PLUMMER, *The World Trade Organization. Vol. 1 : Legal, economic and political analysis*, New York, 2005, p.1201.

<sup>1085</sup> The Decision on Dispute Settlement, 30 November 1984.

on historical or procedural aspects. The Secretariat provided its services for the needs of Panels.<sup>1086</sup>

Thus, in summary the panels as the investigation bodies had following tasks: 1. starting with the inquiring of the facts of the case, 2. assessing all the relevant elements for a decision on the measures 3. submitting the proposals for such decision.<sup>1087</sup>

However, again appear one of the elements of the weaknesses of the GATT system that the Panel reports were adopted via the positive consensus requiring unanimity in its adoption.<sup>1088</sup> The GATT Agreement consistently respected the principle of unanimity, unless otherwise stipulated which was valid approach also for the dispute settlement.

This fact caused in practices many difficulties, since the losing party in a dispute settlement proceeding could have refused to agree, and thus block the adoption of adverse report or even deny the approval with the creation of the Panel.<sup>1089</sup> As Hudec states, in case of the establishment of the Panels, there was an issue with the accepting the findings which reached ca. 80 percent, taking into account also the common practice in the 80s, when losing parties tended to block the adoption of the decision of the panel.<sup>1090</sup>

The issue of enforcing of the panel procedure was one of the elements which contained the Montreal rules inspired by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. Among the novelties brought by the Montreal Rules are evident two important elements – enactment of the time limits on consultations and providing an automatic obligatory

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<sup>1086</sup>Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2) , annex to Negotiating Group on Dispute Settlement, 6 April 1987.

<sup>1087</sup>A.KRISHEN KOUL, *A guide to the WTO and GATT: economics, law, and politics*, Hague, 2005, p.43.

<sup>1088</sup>S.OETER, M.HILF, *WTO-Recht : Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.508.

<sup>1089</sup>N.D.PALMETER, P.C.MAVROIDIS, *Dispute settlement in the World Trade Organization: practice and procedure*, Cambridge, 2004, p.9.

<sup>1090</sup>R.E.HUDEC, *Enforcing international trade law: the evolution of the modern GATT legal system*, Salem, 1993, p.278, supra note 11.



establishment of a Panel. In terms of establishing of the Panel the Montreal Rules provided the following enactment: “ [...] if a complaining party so requests, a decision to establish a panel or a working party shall be taken at the latest at the Council meeting following that at which the request first appeared as an item on the Council’s regular agenda, unless at the meeting the Council decided otherwise.”

Thus, as Mavroidis et. al. state, the system changed from the requirement of positive consensus to a negative consensus, meaning decision not to establish a panel.<sup>1091</sup> Despite these significant amendments, however, the of the legally binding nature of the DSM had to wait till the Uruguay round of negotiation.<sup>1092</sup>

### 6.3 From GATT to WTO

To be objective, as it was proved above, there were some provisions having institutional nature, moreover the GATT Agreement contained also in its Article XXV of the GATT contained some institutional fundaments.<sup>1093</sup> More than the institutional shortcomings became important the real practice of the GATT which in words of van der Bossche created own modus operandi by the way of practice “[...] through experimentation and trial and error – some fairly elaborated procedures for conducting its business. Some of these procedures were clearly ‘contrary’ to Article XXV.”

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<sup>1091</sup>P.C.MAVROIDIS, G.A.BERMANN, M.WU, *The law of the World Trade Organization (WTO): documents, cases & analysis*, Saint Paul, 2010, p.890.

<sup>1092</sup>N.D.PALMETER, P.C.MAVROIDIS, *Dispute settlement in the World Trade Organization: practice and procedure*, Cambridge, 2004, p.11.

<sup>1093</sup>Article XXV The General Agreement on Tariffs and Trade, GATT 1947 wording as follows:”1. representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of this Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of this Agreement. Wherever reference is made in this Agreement to the contracting parties acting jointly they are designated as the Contracting Parties 2.the Secretary-General of the United Nations is requested to convene the first meeting of the Contracting Parties, which shall take place not later than March 1, 1948, 3.Each contracting party shall be entitled to have one vote at all meetings of the Contracting Parties.4. Except as otherwise provided for in this Agreement, decisions of the Contracting Parties shall be taken by a majority of the votes cast. 5. In exceptional circumstances not elsewhere provided for in this Agreement, the Contracting Parties may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The Contracting Parties may also by such a vote (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and(ii) prescribe such criteria as may be necessary for the application of this paragraph.”

As an example further mentions that the GATT voting was very uncommon and preference was given to consensus.<sup>1094</sup>

The enforcing the institutional framework of the GATT Agreement was later on subject to 1955 Review Session drafting a new organizational protocol. Principally, the protocol should have established Organization for Trade Cooperation destined for organizational role of the GATT, however, not that much elaborated as the ITO, but nevertheless lacked the approval from the US Congress as before the project of ITO.<sup>1095</sup>

The WTO system has gradually developed during the round of negotiations starting in 1947 and lasting till 1994. Any of the rounds of negotiations contained a tariff protocol (negotiation of customs lists of customs cut-offs on goods) and diverse legal texts completing the GATT Agreement, including the decisions, interpretative declarations or sometimes multilateral agreements.<sup>1096</sup> In practice, before adopting Article XXVIII, originally introduced to the GATT 1947, the contractual parties executed the negotiations outside of general tariff conferences.

The achieving and wide spreading of the GATT Agreement brought the rounds of negotiation, oriented on the different- subject matter. The outcome was that the GATT rounds should not be perceived as episodes, having separate significance, but they together constitute the continuous process, impact evident over the time.<sup>1097</sup>

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<sup>1094</sup>P.van den BOSSCHE, *The law and policy of the World Trade Organization: text, cases, and materials*, Cambridge, 2008, p.80.

<sup>1095</sup>J.H.JACKSON, *The World Trade Organization: constitution and jurisprudence*, London, 1998, p.19.

<sup>1096</sup>T.FLORY, *L'organisation mondiale du commerce : droit institutionnel et substantiel*, Bruxelles, 1999, p.4.

<sup>1097</sup>I.W.ZARTMAN, *International multilateral negotiation: approaches to the management of complexity*, San Francisco, 1994, p.52.

The GATT was perceived as permanent forum, as bargaining vehicle within which the countries negotiated on selected items or products, where the gains from the customs reduction were reciprocally negotiated.<sup>1098</sup>

Principally, the negotiations started by the official letters of the countries, sending the product-related requests for the concessions which they wanted to get granted. On the other hand, the countries were expected in exchange to balance the value of the concession with a commensurate accession to their home market. At the end of the discussion, all concessions were listed as changes on each participant's home tariff schedule and all GATT members on the basis of the MFN rule.<sup>1099</sup>

According to Robertson, negotiating process was criticized because of the lack of the balance and the fact that gave preference to the principal suppliers, initializing the negotiation processes on the fields like agriculture, material processing where they wished to maintain the protection.<sup>1100</sup> As he further adds, multilateral negotiations of the concessions, precise forecasting of the costs and benefits was not fully possible.<sup>1101</sup> Nonetheless, not all authors share the same opinion; e.g.. Guzmán identifies three shortcomings of the negotiation model. In his view, firstly, due to the liberalization of tariff negotiations smaller countries were frozen out of the negotiations, secondly, focusing negotiations on particular products encouraged domestic producer in the resistance of the tariff concessions on products in which they were interested, as the third and finally the economic fact – product-by-product basis in comparison to the across-the-board tariff cuts are considered to be the highly-transaction oriented process.<sup>1102</sup> Perdkis and Read state that the GATT rules have, since their inception, embraced the multilateral

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<sup>1098</sup>J.H.BARTON, J.L.GOLDSTEIN, T.E.JOSLING, R.H.STEINBERG, *The Evolution of the Trade Regime : Politics, Law, and Economics of the GATT and the WTO*, Princeton, 2010, p.38.

<sup>1099</sup>J.H.BARTON, J.L.GOLDSTEIN, T.E.JOSLING, R.H.STEINBERG, *The Evolution of the Trade Regime : Politics, Law, and Economics of the GATT and the WTO*, Princeton, 2010, p.38-39.

<sup>1100</sup>D.ROBERTSON, *International economics and confusing politics*, Cheltenham, 2006, p.43.

<sup>1101</sup>D.ROBERTSON, *International economics and confusing politics*, Cheltenham, 2006, p.43.

<sup>1102</sup>A.T.GUZMAN, A.O.SYKES, *Research handbook in international economic law*, Cheltenham, 2007, p.13.

approach to trade negotiations and liberalization. In doing so, they reject outright the mercantilist philosophy of unilateral action based upon self-seeking exercise of economic and political power by a small number of wealthy countries. The GATT rules for the conduct of trade were amended periodically to take account of subsequent developments in countries' protectionist strategies.<sup>1103</sup>

Paradoxically, the principal impetus for the renegotiating the enacted GATT legislation was the provision of the Article 17 of the Havana Convention, which has never come into force. That provision stated that: *"Each Member shall, upon the request of any other Member, or Members and subject to procedural arrangement established by Organization, enter into and carry out with such other Member or Members, negotiations directed to the substantial reduction of the general levels of tariffs and other charges on exports and imports, and to the elimination of the preferences referred to in paragraph 2 of Article 16, on a reciprocal and mutually advantageous basis."*<sup>1104</sup>

Thus, this provision served as the legal basis for the GATT negotiations till Review session which was held in the years 1954-55, introducing the provision of the current Article XXIII bis.<sup>1105</sup> This confirms the nature of GATT in terms of functionality, defining GATT as *'permanent forum'* between the contractual parties, with the aim to make available the commercial cooperation between the nations and to foster the liberalization of the exchanges.<sup>1106</sup>

First rounds of the negotiation were marked by the fact that in the foreground stood the tariff reduction. In Kerr's view, GATT negotiations in the early stages were similar to search goods in that the parties to the negotiation were

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<sup>1103</sup>N.PERDIKIS, R.READ, *The WTO and the regulation of international trade : recent trade disputes between the European Union and the United States*, Cheltenham, 2005, p.9.

<sup>1104</sup>Havana Charter for an International Trade Organization, Havana, 24 March 1948.

<sup>1105</sup>A.HODA, *Tariff negotiations and renegotiations under the GATT and the WTO: procedures and practices*, Cambridge, 2001, p.8.

<sup>1106</sup>B.BLANCHETON, *Histoire de la mondialisation*, Bruxelles, 2008, p.64.

able to assess the likely economic effects prior to accepting the agreement and where the requests and offers should have been revised.<sup>1107</sup>

Historically, first five rounds of negotiations (Genève, Annency, Torquay, Genève and Dillon) were aimed on the tariffs reduction. In fact, the outcomes of the first five negotiation rounds are not evaluated fully positively by the doctrine. As Graz states, the principal contribution of the GATT after entering into power was the reduction of the previously reduced customs, hindering the augmentation of the customs, whereas during the fifties the importation contingents and exchange controls and their elimination was fundamentally under the surveillance of other international institutions.<sup>1108</sup>

The following rounds of negotiation (Kennedy, Tokyo and mainly Uruguay) had a broader agenda, although the tariff reduction negotiations retained their importance on the agenda of these Rounds.<sup>1109</sup> Till the Dillon round the procedure, each round began with the adoption of the decision convening a tariff conference on the fix day. Upon fixing the date of negotiation round the contractual parties were required to exchange request lists and furnish the latest edition of their custom tariffs and their foreign trade statistics for a recent period.<sup>1110</sup>

Kennedy Round<sup>1111</sup> amended general GATT clauses, and in Jackson's view provided the last true GATT amendment.<sup>1112</sup> Principally, there was adopted the Protocol to add Part IV to the GATT which was focused on the developing countries. The Kennedy round in comparison to previous negotiation rounds brought more success than it was expected. According to Avenhaus, the Kennedy

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<sup>1107</sup>W.A.KERR, *Conflict, chaos and confusion: the crisis in the international trading system*, Cheltenham, 2010, p.119.

<sup>1108</sup>J.C.GRAZ, *Aux sources de l'OMC, la Charte de la Havane : 1941-1950*, Genève, 1999, p.289.

<sup>1109</sup>P.van den BOSSCHE, *The law and policy of the World Trade Organization : text, cases, and materials*, Cambridge, 2008, p.80.

<sup>1110</sup>A.HODA, *Tariff negotiations and renegotiations under the GATT and the WTO : procedures and practices*, Cambridge, 2001, p.44.

<sup>1111</sup>Named after American president John F. Kennedy.

<sup>1112</sup>J.H.JACKSON, *Sovereignty, the WTO and changing fundamentals of international law*, Cambridge, 2006, p.98.

Round was extremely successful with ‘*across-the-board*’ tariff cuts around 40 percent on the products in countries of the OECD,<sup>1113</sup> as to Dam, Kennedy Round led to concessions covering 70 per cent of world trade volume, and two-thirds of the concessions reduced tariffs by more than 50 per cent.<sup>1114</sup> Among other things, the Kennedy round of the negotiation needed to react on the more exhaustive gap between the developed countries. The idea behind it was to create more trade opportunities for developing countries.<sup>1115</sup> As the result of these efforts was adopted new part of the GATT 1947 Agreement, with a title ‘*Trade and Development*.’<sup>1116</sup>

Tokyo round of negotiations started in the 1973 and lasted till 1979. In economic figures this round agreement entailed a reduction of the tariffs by the major industrialized countries by almost one third. The Tokyo round came to history of the GATT as round within which were adopted legal text – Tokyo Code and Enabling clause. The clause, adopted in 1979 provided the legal basis for the developed countries to provide differential and more advantageous treatment to the developing countries. Thus, the Tokyo round of negotiations provided a legal basis for GSP and RTAs. Nonetheless, since these preferences operated outside of the bounds of MFN, they were not subjects to standard GATT rules on discrimination. As the consequence, a developed nation could grant tariff preferences to some developing nations and not to others ones and it could rescind any or all of these preferences at any time and for any reason.<sup>1117</sup>

Till Tokyo round negotiation rounds might be characterized as the project of GATT ‘*à la carte*’<sup>1118</sup> meaning that it was given a right to the parties of the GATT

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<sup>1113</sup>R.AVENHAUS, G.SJÖSTEDT, *Negotiated risks: international talks on hazardous issues*, Berlin, 2009, p.237.

<sup>1114</sup>K.W.DAM, *The GATT : law and international economic organization*, Chicago, 1970, p.56.

<sup>1115</sup>B.M.CARL, *Trade and the developing world in the 21st century*, Ardsley, 2011, p.83.

<sup>1116</sup>Entering into power since 1966.

<sup>1117</sup>D.A.MOSS, N.BARTLETT, *Note on WTO disputes : five major cases*, Boston, 2002, p.3.

<sup>1118</sup>Meaning the reference to the right to choose the Agreements to be implemented by the state. During the Tokyo round, there were negotiated several agreements on non-tariff barriers among which the states were free to select those on which they wanted to participate – Agreement on Implementation of Article XI of the General Agreement on Tariffs and Trade, Agreement on Interpretation and Application of Articles VI, XVI

to decide whether or not accede to the various existing codes.<sup>1119</sup> These codes represented set of rather plurilateral agreements which in nature did not bind all contracting parties.<sup>1120</sup> Nonetheless, à la carte principle was subsequently abandoned and converted into single-undertaking approach requiring from the contractual parties to adhere basically to all concluded agreements.<sup>1121</sup>

Upon finishing the negotiation rounds in Tokyo it seemed clear that the new round of negotiations must go on.<sup>1122</sup> Upon certain difficulties with establishing the following round of negotiations (the GATT Ministerial meeting in 1982), the next world negotiation round was open up in Punta del Este on the basis of the Ministerial declaration setting up ambitious aims:

1. enhancing the surveillance in the GATT to enable regular monitoring of trade policies and practices of contracting parties and their impact on the functioning of the multilateral system,
2. improving overall effectiveness and decision-making of the GATT as an institution, including through involvement of Ministers,

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and XXII of the General Agreements on Tariffs and Trade, Agreement on Import Licensing Procedures, Agreement on Technical Barriers to Trade, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade and Protocol to the Agreement, Agreement on Government Procurement, Agreement on Trade in Civil Aircraft, International Dairy Agreement, International Agreement Regarding Bovine Meat.

<sup>1119</sup>P.C.MAVROIDIS, *Trade in goods: the GATT and other agreements regulating trade in goods*, Oxford, 2007, p.34.

<sup>1120</sup>P.van den BOSSCHE, *The law and policy of the World Trade Organization: text, cases, and materials*, Cambridge, 2008, p.81.

<sup>1121</sup>P.C.MAVROIDIS, *Trade in goods: the GATT and other agreements regulating trade in goods*, Oxford, 2007, p.35.

<sup>1122</sup>J.H.Jackson labels this process as 'bicycle theory of the trade policy.' Under his understanding, unless there is a permanent move forwards, the bicycle will fall. The same presumption shall be in his view valid also in international trade needs new impetus from the governments. If there were no initiatives on the trade policies, the temptations of national governments to backslide would be high, in J.H.JACKSON, *The World Trade Organization : constitution and jurisprudence*, London, 1998, p.24;Beise, Oppermann, Sander speak even about the Grauzonen (grey-zones) as an expression of the new way of protectionism being the landmark of the economic development in the early eighties, reference to M.BEISE, T.OPPERMANN, G.SANDER, *Grauzonen im Welthandel : Protektionismus unter dem alten GATT als Herausforderung an die neue WTO*, Baden-Baden, 1998, p.8.

3. increasing the contribution of the GATT to achieve greater coherence in global economic policy-making, through strengthening its relationship with other international organizations responsible for monetary and financial matters.<sup>1123</sup>

In summary, the agenda covered by the Declaration of the Punta del Este belonged to the most ambitious ones, covering the issues of re-insertment of the agriculture and textile into the mechanism of liberal exchange, elaboration of the multilateral agreements in the new domains as investments, services, intellectual property, reinforcement of the institutional background.<sup>1124</sup> Nonetheless, the idea of creating an overwhelming world trade institution appeared only in February 1990 by the Italian Trade Minister Renato Rugiero, followed by proposals of Canada and EC<sup>1125</sup> which led to the Draft Final Act presented in December 1991.

Upon further negotiations, the delegations declared December 15, 1993 that the Uruguay Round of multilateral negotiations reached a successful conclusion.<sup>1126</sup> The end of the negotiations were further finalized during the Marrakesh negotiations (via the Marrakesh declaration) leading to the signature of The Agreement Establishing the World Trade Organization, abbreviated normally as the '*WTO Agreement*'<sup>1127</sup> entering into force since 1 January 1995. Having completed the negotiation, it was reached probably the greatest ever institutionalization of the world trade.<sup>1128</sup>

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<sup>1123</sup> Ministerial Declaration on the Uruguay Round. GATT MIN.DEC., Part I, Section E, 'Functioning of the GATT System, 20 September 1986.

<sup>1124</sup> T.FLORY, *L'Organisation mondiale du commerce : droit institutionnel et substantiel*, Bruxelles, 1999, p.5.

<sup>1125</sup> P.van den BOSSCHE, *The law and policy of the World Trade Organization: text, cases, and materials*, Cambridge, 2008, p.82-83.

<sup>1126</sup> P.M.RAWORTH, L.C.REIF, *The law of the WTO: final text of the GATT Uruguay round agreements, summary*, New York, 1995, p.12.

<sup>1127</sup> The results of the Marrakesh Agreement are entailed in the final acts having more than 500 pages, with 28 special agreements, hereto come also the tariff concessions and lists of concessions which constitute a bunch having more than 26 000 pages of the text, reference to S.OETER, M.HILF, *WTO-Recht : Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.82.

<sup>1128</sup> G.P.SAMPSON, *The role of the World Trade Organization in global governance*, Tokyo, 2001, p.5.



## 6.4 WTO as System of Law

### 6.4.1 Generalities

The substance of the Rounds of negotiations did not deal exclusively with the reduction of tariff concession. In the same time, they added new agreements to the original GATT.<sup>1129</sup> Unlike the GATT, the WTO selected a different approach to towards the system of understanding of the WTO legal system as '*single undertaking approach*' prevailing in the Uruguay round. Doing so, it was changed the traditional structure of the legal order into separate agreements which can be accepted or rejected by the States only in their entirety as '*a package*.'<sup>1130</sup> However, the new organization, created by the WTO Agreement had brand new features and '*distinctly different legal quality*,'<sup>1131</sup> in regard to the GATT.<sup>1132</sup>

At the first sight is visible that the aim of the GATT 1994 is perceived differently in comparison to the GATT 1948. In fact, this fundamental introductory remark seems obvious from the WTO Agreement, especially the Article II (4) and Annex 1A of the WTO Agreement. These Articles end-up with clear indication that the legal provisorium shall be terminated, thus stating that the Protocol of Provisional Application shall not be applied anymore which was further confirmed by other instruments, including the protocols, decisions on waivers, other decisions, including the Marrakesh protocol adopted in 1994.

Having in mind these aforesaid remarks, the GATT 1947 agreement was reconfirmed by the WTO Agreement incorporated in the GATT Agreement as it

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<sup>1129</sup>P.C.MAVROIDIS, G.A.BERMANN, M.WU, *The law of the World Trade Organization (WTO): documents, cases & analysis*, Saint Paul, 2010, p.4.

<sup>1130</sup>P.T.STOLL, F.SCHORKOPF, *WTO: world economic order, world trade law*, Leiden, 2006, p.13.

<sup>1131</sup>T.OPPERANN, M.BEISE, *Die neue Welthandelsorganisation : ein stabiles Regelwerk, für weltweiten Freihandel?* in *Zeitschrift für internationale Politik : Halbmonatsschrift der Deutschen Gesellschaft für Auswärtige Politik Europa*, Volume 49, Number 7, 1994, p.195.

<sup>1132</sup>Confirmation of this assumption comes out from the provision of the Article II of the WTO Agreement Negotiators agreed to establish a veritable intergovernmental organization that would among other things provide the institutional framework to regulate the rules of trade between countries through the administration of the agreements concluded the round, reference to Article II Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

was in power in 1994.<sup>1133</sup> Nonetheless, the legal continuity is more than clear since WTO and Multilateral Trade Agreements shall be: “[...] *guided by the decisions, procedures, and customary practice followed by GATT 1947.*”<sup>1134</sup> Fundamental reason for the implementation of the WTO was that the WTO brought into practice several advantages in comparison to the old GATT Agreement with an aim of its better and more efficient implementation.

Jackson perceives the difference and the shift between the GATT and WTO and comments it in the following way: “ *It is very clear that law and legal norms play the most important part of the institutions which are essential to make markets work. The notion ‘rules of law’ (ambiguous as the phrase is) or rule-based or rules-oriented system of human institutions is essential to a beneficial operation of markets, is a constantly recurring scheme in many writings.*”<sup>1135</sup> In summary, the WTO system is built up on the WTO Agreement itself<sup>1136</sup> and creates own system of substantive provisions and rules, contained in four annexes.<sup>1137</sup> Thus, the structure of the WTO Agreement is composed as follows:

#### Annex 1A Multilateral Agreements on Trade in Goods

- GATT 1994 (incorporating GATT 1947)
- Agriculture
- Sanitary and Phytosanitary Measures
- Textiles and Clothing (terminated January 1 2005)

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<sup>1133</sup>M.MATSUSHITA, T.J.SCHOENBAUM, C.MAVROIDIS, *The World Trade Organization Law, Practice, and Policy*, Oxford, 2005, p.9.

<sup>1134</sup>Article XVI (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1135</sup>J.H.JACKSON, *Global economics and international economic law* in *Journal of International Law*, Volume 1, Issue 1, 1998, p.5.

<sup>1136</sup>It might be agreed that it is sparse document dealing almost exclusively with the institutional issues, reference to S.N.LESTER, B.MERCURIO, A.DAVIES, *World trade law: text, materials and commentary*, Oxford, 2012, p.72.

<sup>1137</sup>The rule defining the relationship between the WTO Agreement and the annexes is expressed in the provision of the Article XVI (4) of the WTO Agreement stipulating: Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in annexed Agreements, reference to Article XVI (4) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

- Technical Barriers to Trade
- Trade-Related Investment Measures
- Anti-dumping
- Customs valuation
- Preshipment Inspection
- Rules of origin
- Import Licensing
- Subsidies and Countervailing Measures
- Safeguards

Annex 1B General Agreement on Trade and Services (GATS)

Annex 1C Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Annex 2 Dispute Settlement Understanding

Annex 3 Trade Policy Review Mechanism

Annex 4 Plurilateral Trade Agreements

- Annex 4 (a) Agreement on Trade in Civil Aircraft
- Annex 4 (b) Agreement on Government Procurement
- Annex 4 (c) International Dairy Agreement (terminated in 1997)
- Annex 4 (d) International Bovine Meat Agreement (terminated in 1997)

The shift from GATT to WTO can be perceived in several ways. According to Jackson, adding to his initial opinion, there can be traced several points, considered advantageous in comparing the WTO Agreement over the GATT. These may be summarized as follows:

1. the WTO can be considered a Charter,
2. WTO continues the GATT institutional ideas and practices from WTO,
3. the WTO brings more effective structure destined on more effective implementation of the GATT rules,
4. establishing of legal authority for the organization,
5. enlargement of the organizational structure of the WTO for the better implementation of the WTO Agreement,
6. better opportunities to the evolution and development for the international trade cooperation.

Several authors go even further and grant to the WTO constitutional value, though not equalizing the constitutionalism in terms of national state law, rather perceiving the WTO as a particular constitutional pattern going out from above mentioned axioms, forming the nature of the legal and factual nature of the WTO.

Thus, in this view, as an example to such an approach may be presented the opinion of Cass. Cass identifies several elements of the WTO constitutionalism, different to those one, having national state feature though.<sup>1138</sup> In her view, as an overreaching definition of the constitutionalism shall have in the WTO case the following elements:

1. WTO shall be a tool of institutional management,
2. WTO as system portraying a system of rights is somewhat akin to human rights, which shall be combined with the suggestion that their enforcement should allow the individuals to claim against governments in domestic courts, for violation of national trade rules,

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<sup>1138</sup>D.Z.CASS, *The constitutionalization of the World Trade Organization: legitimacy, democracy, and community in the international trading system*, Oxford, 2005, p.3.

3. WTO shall be the result of the judicialized rule-making going out mostly from the rule-making approach of the WTO dispute resolution body.

In summary, the perceptions of the WTO agreement tend to project the WTO as public law entity shaping global markets, restricting the public authorities to affect the trade.<sup>1139</sup> The perception of the WTO agreement as an agreement of constitutional agreement in terms of international trade and its perception as an agreement under the scope of public international law has in words of the Bogdandy: “[...]... *important implication for its interpretation.*”<sup>1140</sup>

So, how shall be characterized the WTO Agreement and WTO law as such? Certain perception can be traced in the AB report in case Japan – Alcoholic Beverages within which was characterized in the following way: “*The WTO Agreement is a treaty – the international equivalent of a contract. It is evident that in an exercise of their sovereignty, and, in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the WTO Agreement.*”<sup>1141</sup>

For the purposes of this dissertation, the author will touch upon only limited scope of the questions relating to the WTO Agreement as its functions, namely - legal system of the WTO and the position of the WTO legal system within the international law, WTO’s institutional structure and lastly mechanism for the enforcement of the duties, as they come out from the WTO Agreement. It goes without saying that each of these arguments would deserve deeper analyses;

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<sup>1139</sup>I.FEICHTNER, *The law and politics of WTO waivers: stability and flexibility in public international law*, Cambridge, 2012, p.31.

<sup>1140</sup>A.von BOGDANDY, *Legitimacy of International Economic Governance : Interpretative Approaches to WTO Law and the Prospects of its Proceduralization* in S.GRILLER (ed.), *International Economic Governance and Non-economic Concerns: New Challenges for the International Legal Order*, Wien, 2003, p.103 and 120.

<sup>1141</sup>Japan – Alcoholic Beverages II Panel Report, Japan — Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, WT/DS11/R, 1996, adopted as modified by Appellate Body 1 November 1996. DSR 1996:I, 125.

however, the author will respect the particular needs and principal purpose of the dissertation.

#### 6.4.2 *Nature of the Obligations from WTO Law*

The WTO agreement, unlike to the GATT without any doubts, enacts WTO as an international organization having full legal personality, endowed with the privileges and immunities necessary to dully fulfilment of its functions and mandate to develop relations with other international organizations. As the fundamental objective-setting of the new agreement can be considered the preamble, setting out the in broadest terms the whole body of agreements reached at the end of Uruguay round.<sup>1142</sup> The preamble, as it is traditionally perceived, determines the principal aims and philosophy on the international agreement. In general terms, the preamble contains the summarized intention of the law-maker, present the common will and speaks the desires out.<sup>1143</sup>

The principal ideas of the GATT Preamble were overtaken also by the WTO Preamble, clearly referring to the endeavour of the MS which was attained during the existence of GATT, and set up ambitious plan for raising of the standard of living, full employment, expanding production of the trade and allowing optimal use of world's resources.<sup>1144</sup>

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<sup>1142</sup>World Trade Organization, *Guide to the Uruguay Round agreements*, Hague, 1999, p.3.

<sup>1143</sup>Siebold referes to the use ot the tem 'being desirous', reference to D.I.SIEBOLD, *Die Welthandelsorganisation und die Europäische Gemeinschaft : ein Beitrag zur globalen wirtschaftlichen Integration*, Berlin, 2003, p.83.

<sup>1144</sup>Preamble Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994 wording as follows: "*The Parties to this Agreement: Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development; Recognizing further that there is need for positive efforts designed to ensure that there is need for positive efforts designed to ensure that developing countries and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development, Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations; Resolved therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariff and Trade, the results of past trade liberalization efforts, and all of the results*

The interpretation of the Preamble was subject to various procedures before the DSM, whereby it was confirmed the importance of coherent, universal and international character of WTO to facilitate, administer and operate and to further the objectives of Agreements concluded under the WTO and GATT 1994.<sup>1145</sup>

In concretization of the preamble the WTO agreement, its Article III, clearly defines five fundamental functions of the WTO. These functions shall be perceived as a responsibility that the results out of the world trade which shall be directed free and without any disruptions in the transparent and predictable way.

The WTO Agreement as the principal aims formulates the following aims: “[...]... to facilitate the implementation, administration and operation, and further the objectives of this agreement and the Multilateral Trade Agreements, and to provide also the framework for the implementation, administration and operation of Plurilateral Trade Agreements. Furthermore, the WTO shall be considered as a forum. Furthermore, the third and fourth objective is the administration of the Agreements contained in the Annexes 2 and 3 and finally the coordination function explicitly providing the fundamental enactment of the cooperation between the WTO and the IMF and WB having an intention of achieving greater coherence in the economic policy-making.”<sup>1146</sup>

#### 6.4.3 Institutional Framework of WTO

The institutional structure of the WTO is basically founded upon the structure of the original GATT 1947, however, in certain domains there is evident a departure from the original provisions.<sup>1147</sup> Theoretically speaking, the

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*of the Uruguay round of Multilateral Trade Negotiations; Determined to preserve the basic principles and to further the objectives underlying this multilateral trade system.”*

<sup>1145</sup>E.g. the decisions of the DSB India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Panel Report, Brazil – Measures Affecting Desiccated Coconut, WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report WT/DS22/AB/R, DSR 1997:I, p. 189, Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755.

<sup>1146</sup>To this aim were concluded the particular agreements with International Monetary Fund and International Bank for Reconstruction and Development, the International Development Association (section of WB group), WT/L/195, 18 November 1996.

<sup>1147</sup>S.N.LESTER, B.MERCURIO, A.DAVIES, *World trade law: text, materials and commentary*, Oxford, 2012, p.74.

institutions of the WTO may be broken down into the main bodies provided directly by the WTO Agreement<sup>1148</sup> and additional bodies and institutions,<sup>1149</sup> provided in different agreements creating the WTO law system or set up on the basis of establishing by General Council or the Ministerial Conference. Another approach to the perception of the bodies of the WTO might be hierarchical principle, going out from the nature and the tasks of the respective institution.

In the frame of the institutional structure, the prime position occupies the Ministerial Conference, on the second place General Council, DSB and TPRB and on the lower level specialized councils, committees and working parties, including also quasi-judicial and another non-political bodies as well the Secretariat.<sup>1150</sup>

Hence, from the institutional point of view is the highest institution the Ministerial Conference, composed by trade ministers having the authority to take decisions in all matters related to the Multilateral Trade Agreements.<sup>1151</sup> In accordance with own Rules of Procedure, it is composed by minister-level representatives from all Members and having the decision-making powers on all matters under any of multilateral WTO agreements.<sup>1152</sup> Moreover, besides the general powers disposes of specific powers as adopting of authoritative interpretations of the WTO Agreements<sup>1153</sup>, granting waivers<sup>1154</sup>, adopting the decision on accession of the new members<sup>1155</sup>, appointing the Director General and adoption of staff regulations.<sup>1156</sup> In addition to the above mentioned functions, the Ministerial Conference has a constitutive function in respect to the creation of the Committee on Trade and Development, Committee on Balance-of-Payments

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<sup>1148</sup>Among this bodies belong the Ministerial Conference having the aim of the representative body Article IV (1), General Council having the principal role as executive body (provision IV:2) and Secretariat entrusted with administrative tasks Article VI.

<sup>1149</sup>P.T.STOLL, F.SCHORKOPF, *WTO: world economic order, world trade law*, Leiden, 2006, p.16 and 21.

<sup>1150</sup>P.van den BOSSCHE, *The law and policy of the World Trade Organization : text, cases, and materials*, Cambridge, 2008, p.80.

<sup>1151</sup>Article IV (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1152</sup>Rules of Procedure for the Ministerial Conference, WT/L/161, 25 July 1996.

<sup>1153</sup>Article IX (2) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1154</sup>Article IX (3) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1155</sup>Article X Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1156</sup>Article XII Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.



Restrictions and a Committee on Budget, Finance and Administration or any other committee creation of which deems appropriate.<sup>1157</sup>

Another institution of the WTO is the General Council. General Council is composed by the representatives of all the members, meeting as much as appropriate. The General Council executes the operability of the WTO, between the single meetings of the WTO. From the personal point of view, it is a body composed by the senior representatives ranged as ambassadors. The General Council is the contact point for other institutions of the WTO reporting to them. Among other competences of the General Council can be mentioned the establishment of appropriate agreements for effective cooperation with other international organizations, having related responsibilities to the WTO ones<sup>1158</sup> and the power to adopt appropriate agreements also with non-governmental organizations.<sup>1159</sup> Furthermore, the General Council discharges the responsibilities of two important subsidiary bodies – DSB and TPRB.<sup>1160</sup> General Council is the body responsible for the reporting of specialized Councils and Committees as - Council for Trade in Goods, a Council for Trade in Services and Council for Trade-Related Aspects of the Intellectual Property.

In order to deal with the administrative issues the WTO Agreement envisages the Secretariat, presided by the Director-General, appointed by the Ministerial Conference.<sup>1161</sup> The Secretariat provides technical and professional support for the WTO bodies, technical assistance to developing-countries members, monitoring and analysing of the developments in world trade, advising

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<sup>1157</sup> Article IV (7) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1158</sup> Article V Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1159</sup> Article V (2) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1160</sup> Although these functions are executed by the Council which institutionally independent, and having own rules of procedures nevertheless still considered as two formation of the Council, as referred to the Article IV (3) and (4) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994 and is doctrinally perceived in S.OETER, M.HILF, *WTO-Recht : Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.145.

<sup>1161</sup> Article VI Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

the governments of the candidate countries on the membership of the WTO and providing the information to the public and media.<sup>1162</sup>

Apart from the 'official institutional' framework may be in the trade issues created ad hoc Working Parties and Committees, composed by the representatives of the WTO Members, participating on a voluntary, though official basis.<sup>1163</sup>

TPRB represents the platform for the General Council meetings under the TRPM and represents a platform open to all WTO members.

#### 6.4.4 Decision-Making within WTO

The general decision making procedures are entailed in the provision of the Article IX WTO Agreement. The forms of the decision-making are basically two - decision by consensus and voting.<sup>1164</sup>

As matter of principle, the WTO continues on the practice of the GATT 1947.<sup>1165</sup> The customary practice of the GATT 1947, was modified in that way that the: " [...] body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision."<sup>1166</sup> Doha Ministerial Declaration however insisted on the requirement that such an objection against the decision to be taken needs to be explicit.<sup>1167</sup> This means in practice that some states can out of deference to other ones remain silent on the decision to be taken.<sup>1168</sup>

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<sup>1162</sup>P.van den BOSSCHE, *The law and policy of the World Trade Organization : text, cases, and materials*, Cambridge, 2008, p.135.

<sup>1163</sup>M.MATSUSHITA, T.J.SCHOENBAUM, C.MAVROIDIS, *The World Trade Organization Law, Practice, and Policy*, Oxford, 2005, p.11.

<sup>1164</sup>M.MATSUSHITA, T.J.SCHOENBAUM, C.MAVROIDIS, *The World Trade Organization Law, Practice, and Policy*, Oxford, 2005, p.12.

<sup>1165</sup>The provision of the article XXV (4) GATT 1947 fundamentally went out from the principle of the majority, however, as Benedek concedes in the customary way was established the principle of the unanimity as the leading principle, in reference Article XXV (4) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994 and W.BENEDEK, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht*, Berlin, 1990, p.232.

<sup>1166</sup>Article IX (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1167</sup>Ministerial Declaration adopted on 14 November 2001, Doha, 9-14 November 2001.

<sup>1168</sup>J.H.JACKSON, *The World Trade Organization: constitution and jurisprudence*, London, 1998, p.48.

#### 6.4.5 DSM under WTO

##### 6.4.5.1 Generalities

The dispute settlement mechanism provoked significant attention. As it was stated, the original plan of establishing ITO as it was already mentioned collapsed. The main issue is the question of the approach to DSM as a system based on diplomatic or legal one. The consequence of this discussion is whether the DSM shall be perceived as juridical process by which an impartial panel makes the ruling on the fact whether there was or was not violated the GATT rule,<sup>1169</sup> or there shall be undertaken some diplomatic negotiations. Thus, the logic of the system change can be characterized as a '*conflict*' between the – conciliation and negotiations and rule orientation.<sup>1170</sup>

The tendencies in the development of the dispute system resulted in the early steps gave preference to the European conciliatory model rather than to the American litigation model. However, this seemed to be evidently desirable for the US administration.<sup>1171</sup> Evidently, as it will be proven, the DSM moved from the conciliation to the adjudication.<sup>1172</sup>

Intention to avoid to perception of the GATT as strictly legal instrument comes out from the supportive argument that the GATT Agreement avoids to mention the notion '*dispute*'. The ratio behind was not that the drafters would not have foreseen the problems would arise due to the future action or non-actions of

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<sup>1169</sup>J.H.JACKSON, *The World Trade Organization: constitution and jurisprudence*, London, London, 1998, p.60.

<sup>1170</sup>J.H.JACKSON, *The World Trade Organization: constitution and jurisprudence*, London, London, 1998, p.62.

<sup>1171</sup>Clair Wilcox, Vice-president of the USA Delegation to the Havana Conference clearly pronounced his opinion on the desirable functionality of the dispute settlement system as voting for juristic approach in this field: "*The procedure/ regarded as a method of restoring a balance of benefits and obligations that, for any reason, may have been disturbed. It is nowhere described as a penalty to be imposed on members who may violate their obligations or as a sanction to insure that these obligations will be observed. But even though it is not so regarded, it will operate in fact as a sanction and a penalty.*" As he adds further, the intention is "A basis is thus provided for the development of a body of international law to govern trade relationship.", reference to C.WILCOX, *A Charter For World Trade*, New York, 1949, p.159 and p.305-308.

<sup>1172</sup>G.ABI-SAAB, *The WTO dispute settlement and general international law* in R.YERXA, B.WILSON, *Key issues in WTO dispute settlement : the first ten years*, Cambridge, 2005, p.7-10.

one or more GATT Contracting Parties concerting the matters covered in the GATT.

In other words the dispute settlement system might be characterized as twofold, containing thus both informal as formal procedure. Informal part of the dispute settlement sets forth relatively simple provisions, dedicated to the consultations on bilateral,<sup>1173</sup> but equally multilateral basis.<sup>1174</sup>

Therefore, as Hudec stated in commenting the lack of procedural rules, the practice at the beginning of the dispute settlement procedure, the disputes were mostly decided by diplomatic procedures. At first, they were dealt within semi-annual meetings of Contracting Parties, and later were delegated to the working parties, later to the working party set up to examine either all disputes or only disputes brought to GATT.

The move towards of the system of GATT and its transformation into the WTO changed remarkably changed the rules of the game. According to Ruttley, from the legal view the WTO Agreements is a revolution of the international trade law. One of the central features of the WTO system is the creation of what amounts to an international trade arbitration tribunal with binding jurisdiction on the 150 states which have joined the WTO since its establishment. As he adds, this new system amounts to a legal revolution because the results of the WTO's dispute settlement procedures are legally binding on the WTO MS. This contrasts to largely flexible and diplomatic nature of dispute settlement ruling under the old and pre- 1994 GATT system.

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<sup>1173</sup>Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994 provides as follows: “1. Each Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.”

<sup>1174</sup>Article XXII (2) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994 provides as follows: “2. The Contracting Parties may, at the request of a Contracting Party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.”

In the view of Sutherland, the WTO attempts for rules-based system for economic coexistence of its members in the ambient of peace and equal trade opportunities. A large community of WTO Members provided practical expression to an overall understanding that institution of a multilateral character such as WTO has an essential role in maintaining this cohesion.<sup>1175</sup>

The passage on the way from GATT to WTO is marked by three significant shifts and changes. As the first aspect, there were created the AB entrusted with the hearing of the appeals on questions of law from the Panels. Secondly, it came to the extension of the requirement of the negative consensus for the establishing of the Panel/AB, and thirdly the WTO adjudicating bodies became the exclusive forum to adjudicate disputes under the WTO covered agreements which means that any dispute arising out of the covered agreement shall be resolved via the DSM and procedures on the dispute settlements.<sup>1176</sup>

In order to give an overview over the existing ways of dispute settlement mechanism, all existing procedures may be broken down in the following categories, informal ones as good offices, conciliation and mediation and the formal ones including panels, AB procedure and arbitration.<sup>1177</sup> Not to be forgotten are also the consultations.

Alternative view on them provides Petersmann, dividing them into political and legal ones. Among political methods of dispute settlement involves Consultations (Article 4 DSU), Good Services (Article 5, 24 DSU), Conciliations (Articles 5, 24 DSU), Mediation (Articles 5,24 DSU), Recommendations by Panels (Article 19 DSU), AB (Article 19 DSU), DSB (Article 16, 17 DSU), Surveillance of Implementation of Recommendations and Rulings (Article 21 DSU), Compensation and Suspension of Concession (Article 22 DSU).

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<sup>1175</sup>P.SUTHERLAND, *The future of the World Trade Organisation*, Florence, 2004, p.5.

<sup>1176</sup>P.C.MAVROIDIS, G.A.BERMANN, M.WU, *The law of the World Trade Organization (WTO): documents, cases & analysis*, Saint Paul, 2010, p.892.

<sup>1177</sup>B.THORNBjørn DANIEL, *Interpretation, Sources of Law and Precedent* in B.E.OLSEN, M.STEINICKE, K.E. SØRENSEN *WTO law: from a European perspective*, Alphen aan den Rijn, 2012, p.40.

As the legal ones mentions Panel Procedure (Article 6-16, 18, 19 DSU), Appellate Review Procedure (Articles 17-19 DSU), Rulings by DSB on Panel and Appellate Reports (Articles 16, 17 DSU), Arbitration among States (Article 25 DSU), Private International Arbitration (Article 4 Agreement on Preshipment inspection), Domestic Court Proceedings (Article X GATT, Article 13 Antidumping Agreement, Article 23 Agreement on Subsidies, Article 32, 41-5 TRIPs Agreement Article XX Agreement on Governmental Procurement).

#### 6.4.5.2 *Good Offices, Conciliation and Mediation*<sup>1178</sup>

The very nature of the set of informal procedures depends upon the declaration of the involved states. Generally, they have confidential nature and may be requested at any stage of the procedure. On the basis of the approval of the parties, they may lead to standard dispute settlement as panel proceeding.

#### 6.4.5.3 *Panel Procedure*

The panels represent the bodies of the WTO, having the quasi-judicial nature. They represent the first stage in the dispute settlement.<sup>1179</sup> As a body is composed usually by three, maximally by five experts which chosen specifically for the resolving of a concrete dispute. That means that this body is composed and established ad hoc and it does not represent a body which would have permanent nature. Thus, the composition of the panel may vary from one panel to another one.<sup>1180</sup>

In terms of the qualification of the members of the WTO panel, all conditions are enacted in the Article 8 DSU. The Article 8 (1) sets forth the requirements for the qualification of the experts. The role of the Panel is to execute

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<sup>1178</sup>Article 5 Understanding on rules and procedures governing the settlement of disputes, Annex 2 of Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1179</sup>WTO Bodies involved in the dispute settlement process: Panels [on-line]. WTO (available under [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s3p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm)) [downloaded 24 March 2013].

<sup>1180</sup>WTO Bodies involved in the dispute settlement process: Panels [on-line]. WTO (available under [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s3p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm)) [downloaded 24 March 2013].

an objective evaluation of the dispute which was submitted to it. As the Article XI DSU provides, the function of the Panels is based on: “[...] *objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.*”<sup>1181</sup>

More concretely, the panel procedure operates in that way that the board composed by experts must objectively investigate the subject-matter and also legal aspect of the given dispute. Upon that, members of the Panel shall elaborate a report within which the Panel provides own opinion on the fact, if the claims applied by the complainant are founded, or not and the report is upon that submitted to the DSM.<sup>1182</sup>

If the Panel comes to conclusion that the claim is founded, the Panel in the same time attaches a recommendation which would resolve the dispute or would lead to the rectification. The Panel, in accordance with the provisions of the DSU is in permanent contact with the parties to the dispute and consults with them any open questions and provides them space for the resolution of a dispute which would be mutually satisfactory.<sup>1183</sup>

The final ‘*product*’ of the findings is the final report, including the discussion and arguments of the parties during the primary stage. The very nature of the final report in terms of the provision 12.7 DSU presented the AB in the case Mexico-Corn Syrup within which AB ruled on the nature of the Panel as ‘*basic rationale behind any findings and recommendations that it makes.*’<sup>1184</sup>

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<sup>1181</sup> Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994

<sup>1182</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes.

WTO (available under [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm)) [downloaded 24 March 2013].

<sup>1183</sup> WTO Bodies involved in the dispute settlement process, (available under [http://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s1p1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm)) [downloaded 24 March 2013].

<sup>1184</sup> Mexico – Corn Syrup (Article 21.5 – US) Panel Report, Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU by the United

Upon the finalization of the report by the Panel, the report is in the following step submitted to DSB. Within this step, the members may raise objections against it, whereby the same right is given also to the parties to dispute. The report is adopted at latest 60 days upon its submission; unless it was rejected the consensus or one of the parties to dispute lodged an appeal against the such a report.

#### 6.4.5.4 AB Procedure

The appellate procedure is enacted in the provisions 17 – 21 of the DSU. Moreover, some partial questions as explication of the notions and periods are contained in the Working procedures for appellate review.<sup>1185</sup> The AB proceeding has strictly legal function and was perceived as a rule-oriented substitute for the political consensus practice regarding panel reports in the GATT Council.<sup>1186</sup>

The philosophy behind this procedure is, that the procedure is meant as an objective legal control,<sup>1187</sup> within which the AB limits its investigation exclusively to the legal questions, covered in the Panel's report and legal interpretation developed by the Panel.<sup>1188</sup>

Over the years, the AB became the inevitably supplement of the process, within which the reports of the Panels are exempted from blocking. On the other hand, it is expected that the AB will continue in the consistent interpretation not only of the agreements, but also the whole system of negotiations building the system WTO.<sup>1189</sup> Thus, the role of the AB is functionally similar to the appeal court

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States, WT/DS132/RW, 2001, adopted as upheld by Appellate Body 21 November 2001. DSR 2001:XIII, 6717.

<sup>1185</sup>Working procedures for appellate review, WT/AB/WP/6, 16 August 2010.

<sup>1186</sup>E.U.PETERSMANN, *The GATT/WTO dispute settlement system: international law, international organizations, and dispute settlement*, Boston, 1997, p.186.

<sup>1187</sup>H.J.PRIESS, G.M.BERRISCH, *WTO-Handbuch, Munich*, 2003, p.726.

<sup>1188</sup>A.K.KOUL, *Guide to the WTO and GATT : economics, law and politics, Hague*, 2005, p.59.

<sup>1189</sup>A.F.LOWENFELD, *International economic law*, Oxford, 2003, p.166-167.



in a domestic system, since it reviews only legal interpretations given by the panels.<sup>1190</sup>

In the Report US – Certain EC Products the AB gave some reflection to own rule in the DSM. As the AB said: “[...] pursuant to Article 3.2 of the DSM, the task of panels and the AB in the dispute settlement system of the WTO is ‘to preserve the rights and obligations of Members under the covered agreements, and to clarify existing provisions of those agreements in accordance with customary rules of interpretation of public international law. The determination of the rules and procedures of the DSU ought to be is neither our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO.’”<sup>1191</sup>

The Article 17 (1) DSU provides a possibility for the DSB to establish a body, empowered to hear appeals from panel cases. The AB is composed by 7 persons among whom three shall serve on any one case.

Upon the investigation of the appeal by the Members of the AB, the report is signed by the Members of the AB and subsequently within 30 days is submitted to the DSB. The report must be ‘unconditionally accepted by the parties of the dispute’, unless the DSB decides not to adopt the report.<sup>1192</sup> However, it is given a right to the parties of the dispute to express their own position on the dispute.<sup>1193</sup>

#### 6.4.5.5 Enforcement of the AB Reports

Upon the adoption of the report, the Member concerned must inform the DSB on its intentions to comply with the recommendations and rulings.<sup>1194</sup> Thus, during the reasonable period of time, the DSB surveilles over the adopted

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<sup>1190</sup>G.A.BERMANN. P.C.MAVROIDIS, *WTO law and developing countries, WTO law and developing countries*, Cambridge, 2007, p. 1027.

<sup>1191</sup>US – Certain EC Products Appellate Body Report, United States — Import Measures on Certain Products from the European Communities, WT/DS165/AB/R, 2000, adopted 10 January 2001. DSR 2001:I, 373.

<sup>1192</sup>Article 17 (4) Understanding on rules and procedures governing the settlement of disputes, Annex 2 of Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1193</sup>Article 17 (14) Understanding on rules and procedures governing the settlement of disputes, Annex 2 of Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1194</sup>Article 21 (3) Understanding on rules and procedures governing the settlement of disputes, Annex 2 of Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

recommendations and rulings.<sup>1195</sup> Moreover, it is enforced also the right of the Members to raise the issues related to the implementation at the DSB.<sup>1196</sup> Once the ruling did not comply fully within the period as determined by the report, there are stipulated two temporary sanctions as compensation and retaliation.<sup>1197</sup>

The compensation is perceived as a mutual agreement between the parties to the agreement. However, if no satisfactory compensation is agreed within 20 days upon expiration of the reasonable period, the parties may submit their case to DSB for retaliation. The retaliation is understood as suspension of concessions. The provision of the Article 22.3 is equivalent to the nullification or impairment. More concretely, there are presumed three types of the retaliations authorized by the AB: 1. parallel retaliation by suspension of concessions with respect to the same economic sector in which the nullification or impairment has been found, 2. cross-sector retaliation which is the suspension is applied to different sector 3. cross-agreement retaliation within which is the suspension provided for in different agreements.

However, the retaliations cannot be adopted fully autonomously by the Members, however, need to be authorized by the DSB which must also monitor the retaliation taken<sup>1198</sup> since any unilateral retaliation is prohibited.

According the Štěřbová, the DSM is one of the most successful stories of the creation of this international organization. The Uruguay round of the negotiations created bigger stability of the system, in order to give to the Contracting Parties more possibilities to enforce the stipulated rules.<sup>1199</sup> In addition to this point, it may be added one supplementary one. The outcome of the *'revolutionary novelty'* is

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<sup>1195</sup>Article 21 (6) Understanding on rules and procedures governing the settlement of disputes, Annex 2 of Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1196</sup>Article 21 (6) Understanding on rules and procedures governing the settlement of disputes, Annex 2 of Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1197</sup>M.MATSUSHITA, T.J.SCHOENBAUM, C.MAVROIDIS, *The World Trade Organization Law, Practice, and Policy*, Oxford, 2005, p.120.

<sup>1198</sup>Article 22 (8) Understanding on rules and procedures governing the settlement of disputes, Annex 2 of Article XXII (1) Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

<sup>1199</sup>L.ŠTĚŘBOVÁ, *Aktuální otázky vývoje Světové obchodní organizace*, Prague, 2011, p.11.

that the recommendations of a Panel or the ruling of the AB are considered adopted, unless there is a consensus of members not to adopt them. This means that the losing states have no longer the right to veto the results of dispute settlement proceeding.

It is very true that the WTO also in terms of the dispute settlement was aware of the birth defects of the GATT. Importantly, one of the primordial efforts of the new GATT Agreement was to grant the WTO full severity, not having only provisional character.

In summary, the difference between both GATT and WTO expressed in the following way:<sup>1200</sup>

In terms of the independence the WTO mechanism represented the step forward in terms of the WTO procedures. Under the WTO mechanism the AB members are independent experts. Their establishment of the Panels under the AB is more stringent as the WTO, since the AB reports cannot be neither blocked neither the establishment of the AB cannot be blocked. The same conclusion is valid also for the sanctions which the AB imposes.

## **6.5 Conclusion**

The principal objective of the Chapter VI was to clarify the nature of the legal order of WTO which will be needed for deeper understanding and reflection of WTO law in the legal order of the EU.

The history of the creation of the WTO dates back to the Second World War and post Second World War period when there were adopted first visions of the world trade regulation. Among the most important ones belonged the project of ITO. However, political reluctance of the US Congress in regard to ITO buried the ambitious project of an institution regulating overwhelming the world trade. As a

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<sup>1200</sup>A.HELMEDACH, B.ZANGL, *Dispute Settlement under GATT and WTO: An Empirical Enquiry into a Regime Change* in C.JOERGES, E.U.PETERSMANN, *Constitutionalism, multilevel trade governance and international economic law*, Oxford, 2011, p.92.

consequence, the only small part of the ITO Agreement came into power, namely the trade and tariff agreement - GATT. Also the GATT did not come into power by standard way, but via the Protocol of Provisional Application. The protocol was intended as a preliminary agreement, however, became in fact the only valid source of law in terms of pre-WTO law period.

By the Protocol on Preliminary application came into power practically the whole GATT (to the full extend the Parts I and III of the Agreement) and with certain limitations Part II. The limitation of the second part meant that this entered into power to the extent, as it was not conflicting the existing legislation in power in the contracting parties. The Part II was marked as '*godfather rights*' enabling to states to preserve their existing legislation, even contradictory to the GATT agreement.

The GATT agreement contained the provision dedicated to the tariff aspects of the trade, containing besides the substantive law provisions also several exceptions, procedures for the tariff reductions and also the provisions dedicated to the dispute settlement, accession to the GATT, withdrawals and general provisions on entry into force.

Despite the shortcomings, the GATT agreement over the years turned into multilateral trade agreement and gradually built up its own institutional structure. Nonetheless, the central role played the Contracting Parties as the only real '*institution*', as stipulated by the GATT agreement. In the practice the ICITO overtook the role of the GATT's Secretariat; and subsequently the expert and advisory groups were established. Thus, the GATT agreement found its own *modus operandi*.

The GATT Agreement entailed own DSM, however, very restricted one in regard to the DSM as presumed by the ITO. Within the GATT, the DSM was limited to two Articles on dispute settlement, one dedicated to the bilateral consultations (Article XXII) and the second one to the nullification and

impairment (Article XXIII). However, some authors even recognize some sub-DSM systems.

The consultations represented the traditional conciliatory way of the dispute resolution. The real dispute settlement mechanism represented rather the procedures under nullification and impairment provision which concerned any situation which violated the provisions of the GATT Agreement.

In this process were involved all Contracting Parties which could have presented their opinions. If the violation was found, the violating Contracting Party was obliged to implement appropriate measures to comply with GATT rules. If the Contracting Party rejected to comply with the ruling, the Contracting Parties were entitled to suspend their obligations under the GATT Agreement. Under the Tokyo round of negotiations, the Panels composed by experts gained more significance, however, the shortcoming of this system was that contracting states could have blocked the establishment of the Panel.

On the way to WTO the GATT, there were changed the substantive rules within the negotiation rounds on the tariff cuts. However, there were still more powerful voices speaking for the enhancing and more efficient surveillance over the GATT rules and stronger contribution of the GATT in the world trade in all sectors relating to the trade. The negotiations for a stronger new entity started in the Punta del Este and ended during the Marrakesh negotiations and led up to the new system, entering into force since 1 January 1995.

The WTO system, explicitly referring to the practice of the former GATT system, reposed on several plurilateral agreements – Multilateral Agreements on Trade in Goods, General Agreement on Trade and Services, Trade-Related Aspects of Intellectual Property Rights, Dispute Settlement Understanding and Plurilateral Trade Agreements. The WTO Agreement, unlike the GATT Agreement brought into practice an international organization having the features of a real

international organization – with clear enactment of the of the WTO's legal personality and not lastly, improved system for the dispute settlement.

From the institutional point of view, the WTO continued on the practice of the GATT Agreement. Within new institutional framework still plays the most important role the Ministerial conference, as the body composed by the trade ministers from the MS of the WTO. Alongside the Ministerial conference, there were established secondary institutions as General Council, DSB and TPRB.

In terms of decision-making, there were introduced two principles, decision by consensus and by voting. Principally, the basic rule was the general agreement among the states, however, any objection shall be presented explicitly.

The DSB was marked by significant changes. The original model of dispute settlement was changed to the legal one, creating besides informal means for dispute settlement two-stage DSM. The Panel consists of experts deciding on the basis of the assessment of the subject-matter. As the end of the investigation, the Panel shall present a report to DSB.

If the resolution of the dispute was not satisfactory resolved, the parties are entitled to file an appeal which shall investigated the AB, limitating the investigation to the legal questions. At the end of the investigation, the AB adopts a report. The report is legally binding, since the violating parties must present their intentions how to comply with the AB. However, if the parties do not comply, there are possible several sanctions as retaliations upon previous authorization of the DSB. Thus, the DSB may be considered fully fledged dispute resolution mechanism for completing the WTO as a legal system.

## 7 *Intersection between the World Trade Organization and the EU*

### Summary

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### 7.1 Preface

What the EU does in the WTO is not a matter exclusively for only Europeans but also the rest of the world. This relationship is arguably one of the cornerstones in contemporary global governance. Europe is an undisputed giant in the global economy. It is the biggest trader in the world, responsible for roughly a fifth of global trade in goods and services. The stakes are high for the EU in global trade but outsiders have little confidence in what the EU does in the WTO, whereas the EU sees itself as its most loyal supporter.<sup>1201</sup>

It cannot be presented the position of the EU in the WTO in even more evident way. Now, the question is whether such an *'open-mind to WTO,'* an approach falling into scope of political science was reflected also in legal science and practice.

Methodologically speaking appears suitable to use Mendez's approach considering the issue to be investigated in terms of pre- and post WTO époque, transformation of which in the words of Petersmann offers the so far most

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<sup>1201</sup>J.LADEFOGED MORTENSEN, *The World Trade Organization and the European Union* in K.E. JØRGENSEN, *European Union and international organizations*, London, 2008, p.80.

successful example for the '*constitutionalization*' of a worldwide organization based on constitutional principles. These principles shall include the freedom and non-discrimination, '*rule-of-law*', compulsory adjudication, '*checks and balances*' between legislative, executive and judicial powers and the legal primacy of the '*WTO constitution*' vis-à-vis the annexes and to '*secondary WTO law*' (such as GATT Schedules of Concessions, GATS Protocols, DSB decisions).<sup>1202</sup>

More to that, there will be examined the particular nuances in the applicability of the GATT/WTO law with the final comparison to other trade block MERCOSUR. Under such comparative view, it will be investigated how the stance of the WTO law can be traced in the different association system, as represented in this dissertation by the MERCOSUR.

The CJ EU on various occasions repeated the fact that the legal system of the EU was created as a new legal order of international law which became integral part of the legal order of the MS. Moreover, the Court further enforced the position of the EU law position by the requirement of the uniform applicability. As an example can be mentioned the case Wilhelm in which the CJ EU clearly stated that: "[...] *the binding force of the Treaty and measures taken in application of it must not differ from one State to another as a result of internal measures, lest the functioning of the Community system should be impeded and the achievement of the aims of the Treaty placed in peril.*"<sup>1203</sup> Within the EU, the international agreements represent important part of the EU law which was de iure confirmed by the judgment Haegeman in which the Court decided that the international agreements '*form an integral part of the Community law.*'<sup>1204</sup>

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<sup>1202</sup>E.U.PETERSMANN, *European and International Constitutional Law: Time for Promoting 'Cosmopolitan Democracy'* in the WTO in G.de BÚRCA, J.SCOTT, *EU & the WTO: Legal & Constitutional Aspects*, Oxford, 2001, p.97.

<sup>1203</sup>ECJ judgment, 13 February 1969, Walt Wilhelm and others v. Bundeskartellamt, case 14/68 [1969] ECR, p.1.

<sup>1204</sup>ECJ judgment, 30 April 1974, R. & V. Haegeman v. Belgian State, case 181/73 [1974] ECR, p.449, para 5.



In order to ensure the uniform interpretation, the ECJ added that: “[...]it follows from the Community nature of such provisions that their effect in the Community and their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the MS and, in the latter case, according to the effects in the internal legal order of each MS which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community.”<sup>1205</sup>

The fact is that the GATT/WTO agreements are without any doubts the agreements under the regime of Vienna Convention on the law of Treaties. However, may be questioned whether these agreements belong to the agreements having the features of ‘*standard international agreement*’ within the EU legal order regime, or have own, GATT/WTO specific one. A comparative view on this will be provided also via the investigation of the cases where the MERCOSUR Tribunal which will be confronted with regard to the relation to the GATT /WTO law.

## 7.2 EU and the GATT Law

### 7.2.1 Introduction

Prior to the case International Fruit Company (will be analysed shortly afterwards), the cases dealing with the GATT law were rather limited. As to the first case, the ECJ referred to GATT law was the case 10/61 Commission v. Italy, known also under the designation ‘*Radio-Tubes case*’<sup>1206</sup> on the fixing of duties after entry into power of the EEC agreement.

The ECJ made a clear distinction between the EEC MS and as the Contracting Parties to the GATT Agreement while admitting the different regime between the MS of the contracting parties, saying that: “*As a result of Article 234*

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<sup>1205</sup>ECJ judgment, 26 October 1982, Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A., case 104/81 [1982] ECR, p.3641, para 14.

<sup>1206</sup>ECJ judgment, 27 February 1962, Commission of the European Economic Community v. Italian Republic, case 10/61 [1962] ECR, p.1.

*different tariffs are applied to MS and third countries, even though they are parties to the same Genève agreement of 1956. This is the normal effect of the treaty establishing the EEC, the manner in which MS proceed to reduce custom duties amongst themselves cannot be criticized by third countries since this abolition of customs duties is accomplished according to the provisions of the Treaty and does not interfere with the rights held by third countries under agreements still in force.*"<sup>1207</sup> Implicitly, from this part of judgment may be considered as determination of the hierarchical rang of the EEC treaty, having superior position in regard of the agreements concluded by the MS.<sup>1208</sup>

From other cases, there to be mentioned numerous cases in which the Court simply referred to the fact that the challenged Community regulations only implemented the tariff quotas without referring to the GATT agreement.<sup>1209</sup>

### 7.2.2 ECJ Judgment *International Fruit Company*

First relevant judgment concerning the applicability of the GATT Agreement dates back to the early seventies. The judgment, to be analysed may the characterized as standing in the foreground of the whole collection of the judgments on the applicability of the GATT law within the legal order of the EC/EU.

To be more precise on this point, the GATT 1947 was not an international agreement which came into force by the virtue of the Article 228 EEC (determining the ordinary procedure for the conclusion of the EEC agreements), but by reality the GATT shall be respected by the Community under the provision of the 234 of

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<sup>1207</sup>ECJ judgment, 27 February 1962, Commission of the European Economic Community v. Italian Republic, case 10/61 [1962] ECR, p.1, para 10-11.

<sup>1208</sup>A.OTT, *GATT und WTO im Gemeinschaftsrecht : die Integration des Völkervertragsrechts in die Europäische Gemeinschaftsrechtsordnung am Beispiel des GATT-Vertrags und der WTO-Übereinkünfte*, Cologne, 1997, p.132.

<sup>1209</sup>M.MARESCEAU, *The GATT in the Case Law of the European Court of Justice* in M.HILF, F.G.JACOBS, E.U.PETERSMANN, *The European Community and GATT* (1986), Boston, 1986, p.108.

the EEC Treaty, however, the EEC Court gave preference to the to the Community as successor of the MS in the GATT.<sup>1210</sup>

Before going into details of the case, it is worth to develop this argumentation further. At the time of the judgment, the EEC was not the Contracting Party to the GATT agreement. Nonetheless, the Community has from the start regarded itself as bound by GATT, and has exercised in its own name the rights belonging to its MS, without formally joined the GATT.<sup>1211</sup>

However, as the Commission presented in its position to the judgment later on, the Community was in fact represented at all GATT meetings on commercial policy subjects, since the voting rights were exercised by MS which agreed on a common positions, presented during the voting within GATT. As the ECJ confirmed, *'so far as fulfillment of the commitments provided for by GATT is concerned, the Community replaced the MS.'*<sup>1212</sup>

The whole story began in the year 1970 when the Commission adopted particular regulations protecting of the EU market imports from particular harmful fruit imports since the limit of the imported apples which would not be reasonably absorbed by the EU market.

In the merit of this case, four Dutch companies, led by International Fruit Company challenged the decision of the Dutch national authority Produktschaab voor Groenten en Fruit, refusing to grant to these companies import certificates, enabling them to import the eating apples from the third countries to Netherlands. The plaintiffs argued that the EEC regulation on the importation of the apples from the third states shall be considered invalid, since this is discriminatory and in

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<sup>1210</sup>K.J.KUILWIJK, *The European Court of Justice and the GATT dilemma: public interest versus individual rights?*, Beuningen, 1996, p.91-92.

<sup>1211</sup>H.G.SCHEMERS, *Application of International Law by the Court of Justice of the European Communities* in H.F.van PANHUYS, F.KALSHOVEN, P.J.LAMMERS, *Essays on the development of the international legal order : in memory of Haro F. van Panhuys*, Alphen Aan den Rijn, 1980, p.173.

<sup>1212</sup>ECJ judgments, 12 December 1972, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, joined cases 21-24/72 [1972] ECR, p.1219, para 20.

contradiction with the provisions of the Article of the XI of the GATT Agreement.<sup>1213</sup>

As to the facts, in the procedure, there were risen two questions, the first one was whether the Community's measures adopted on the basis of the ex-Article 177 TEC (now 282 TFEU) may be declared invalid, in case that these are contrary to the rule of international law.<sup>1214</sup>

In fact, in case of the GATT it could not be spoken fully about in the international agreement '*stricto sensu*', since the EEC replaced the MS within the GATT and thus was not concluded under the provision ex-Article 228 (1) EEC Treaty.<sup>1215</sup>

Second question, fully depending on the answer to the first one, related to the declaration of the validity of the above mentioned regulations 459/70, 565/70 a 686/70 providing the protective measures on the limitation of the imports of the apples from the third states was whether these regulations are not invalid as to their contradiction with the provision of the XI of the GATT agreement regulating generalities of the quantitative restrictions.<sup>1216</sup>

The question arose as a preliminary question based on the action filled by Dutch company - International Fruit Company. Implicitly, the ECJ had to give a ruling on possibility of the individual to invoke the provisions of the GATT rules

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<sup>1213</sup>ECJ judgments, 12 December 1972, International Fruit Company NV and others v Produktschap voor Groenten en Fruit, joined cases 21-24/72 [1972] ECR, p.1219, para 3.

<sup>1214</sup>ECJ judgments, 12 December 1972, International Fruit Company NV and others v Produktschap voor Groenten en Fruit, joined cases 21-24/72 [1972] ECR, p.1219, para 2 and 6..

<sup>1215</sup>C.D.EHLERMANN, *Application of GATT Rules in the European Community* in M.HILF, F.G.JACOBS, E.U.PETERSMANN (eds.), *The European Community and GATT*, Boston, 1986, p.132.

<sup>1216</sup>The General Agreement on Tariffs and Trade (GATT 1947).

within the proceeding before ECJ.<sup>1217</sup> As Espósito correctly confirms, it is the question of the direct effect.<sup>1218</sup>

In answering the posed questions posed, the ECJ clearly stated that before examining the validity of the Community measures it is needed to answer the question whether the provision of international law can affect the validity of that measure of the Community law, and whether the Community must be bound by that provision.<sup>1219</sup>

If such a condition is fulfilled, the Court goes further and sets up fundamental conditions for the invocation of the of the international agreements by the individuals by saying: “[...] *before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the community which they can invoke before the courts.*”<sup>1220</sup>

As the Court decided, the MS were bound by GATT agreement from which they cannot withdraw, even after concluding a particular agreement among them.<sup>1221</sup> On the contrary, the Court stressed the fact that they desired to observe the provisions of the GATT alongside of the EEC treaty.<sup>1222</sup>

As the Court further stressed the Community assumed the functions inherent to the tariff and trade policy, progressively during the transitional period and in their entirety upon the expiry of that period, as presumed by the Articles

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<sup>1217</sup>The confrontation of the EEC – GATT can be perceived as an outcome of ‘*myriad expansion of treaties and organizations*’ governing the trade in the second half of the 20th century within the rules of the states may be judgment and adding this an additional layer to the complexity to the trade regimes of signatory states in J.ERRICO, *The WTO in the EU: Unwinding the Knot* in *Cornell International Law Journal*, Volume 44, Number 1, 2011, p.183-184.

<sup>1218</sup>C.D.ESPÓSITO, *La organización mundial del comercio y los particulares*, Madrid, 1999, p.89-90.

<sup>1219</sup>ECJ judgments, 12 December 1972, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, joined cases 21-24/72 [1972] ECR, p.1219, para 7.

<sup>1220</sup>ECJ judgments, 12 December 1972, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, joined cases 21-24/72 [1972] ECR, p.1219, para 8.

<sup>1221</sup>ECJ judgments, 12 December 1972, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, joined cases 21-24/72 [1972] ECR, p.1219, para 11.

<sup>1222</sup>ECJ judgments, 12 December 1972, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, joined cases 21-24/72 [1972] ECR, p.1219, para 11.

111 and 113 of the EEC Treaty and admits that the setting up of one of the tools CET was concluded in accordance with GATT rules.<sup>1223</sup>

In the paragraph 18 the ECJ explicitly confirmed that EEC assumed the powers exercised by the MS in terms of GATT Agreement.<sup>1224</sup>

Before examining the question of the possible direct effect, it is necessary to examine the capacity of such a provision to constitute the rights on citizens, sufficiently invocable before the national jurisdiction. As to this aim, there must be in the view of the Court: “[...] examined the spirit, general scheme and the terms of the general agreement.”<sup>1225</sup>

Such a brief paragraph as to the nature of this provision invokes the fundamental logic of the investigation. However, as Mendez not surprisingly states, the ECJ did not deal at all with the question of the relations between the EC law on one hand and the international law on the other one.<sup>1226</sup>

In this sense it is worth to recall the argumentation of GA Mayras, providing more profound analysis. In his opinion, the EC is often forced in the interpretation to refer to the norms of international law of treaties, since the EC is in regard to the international legal order in subordinated position and since the supremacy of the international law over the EEC's acts the organs shall be recognized.<sup>1227</sup> The lack of such type of analysis renders surprising since the MS were bound by the general principle *'pacta sunt servanda'*.<sup>1228</sup> As Berrisch comments, the MS cannot unilaterally liberalize from the GATT obligations, as it is

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<sup>1223</sup>ECJ judgments, 12 December 1972, International Fruit Company NV and others v. Produktschap voor Groenten en Fruit, joined cases 21-24/72 [1972] ECR, p.1219, para 14 and 16..

<sup>1224</sup>ECJ judgments, 12 December 1972, International Fruit Company NV and others v. Produktschap voor Groenten en Fruit, joined cases 21-24/72 [1972] ECR, p.1219, para 14 and 18.

<sup>1225</sup>ECJ judgments, 12 December 1972, International Fruit Company NV and others v. Produktschap voor Groenten en Fruit, joined cases 21-24/72 [1972] ECR, p.1219, para 19-20.

<sup>1226</sup>M.MENDEZ, *The Legal Effects of EU Agreements*, Oxford, 2013, p.178.

<sup>1227</sup>As reproduced by A.OTT, *GATT und WTO im Gemeinschaftsrecht*, Cologne, 1997, p.134.

<sup>1228</sup>J.H.J.BOURGEOIS, *Le Gatt et le traité CEE in Diritto comunitario e degli scambi internazionali*, Volume 19, Number 1, 1980, p.36.

innates explicitly to the provisions of the Article 234(1) EEC Treaty, provision of Article 105 EURATOM Treaty and Article 71 (2) ECSC.<sup>1229</sup>

Upon the initial considerations, the Court starts its analyses of the agreement from the very beginning, with the GATT preamble. Within preamble identifies the principal nature of the agreement as based on *'reciprocal and mutually advantageous arrangements'* and further characterized by *'great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the Contracting Parties.'*<sup>1230</sup> As to further demonstrate the *'soft-law'* nature of the GATT agreement, Court invokes the possibilities of the alternative outcomes of the dispute settlements as *'opportunity for consultation,' 'adoption of the measures'* in case of nullification or impairment, *'recommendations and consultations'* including the authorization of contracting parties to suspend application of the GATT agreement, adoption of unilateral measures *'to suspend the obligation and to withdraw or modify the concession.'*<sup>1231</sup>

In summary, there might be identified three lines of the Court's argumentation for denying the direct effect which can be summarized as follows: 1. reciprocity in the initial balance of the obligations established by the GATT agreement, 2. the possibility of derogating from the obligations established by the agreement 3. method of dispute settlement established by the agreement.<sup>1232</sup>

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<sup>1229</sup>G.M.BERRISCH, *Der völkerrechtliche Status der Europäischen Wirtschaftsgemeinschaft im GATT : eine Untersuchung der Sukzession der EWG in die Stellung ihrer Mitgliedstaaten als Vertragspartei einer internationalen Organisation am Beispiel des GATT*, Munich, 1992, p.83.

<sup>1230</sup>ECJ judgments, 12 December 1972, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, joined cases 21-24/72 [1972] ECR, p.1219, para 21.

<sup>1231</sup>ECJ judgments, 12 December 1972, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, joined cases 21-24/72 [1972] ECR, p.1219, para 22-29, as Kuilwijk states, the argumentation, contained within the article XIX of the GATT Agreement, contained in article XIX GATT and perceives the as sign of weakness of the Court, however, such an argumentation was rebutted by Mendez, being of that view that the: "Court , however, told us nothing of any neglect of Article XIX nor did it need to in order to make the rather axiomatic point that the capacity to resort to unilateral safeguard measures is evidence of the flexibility of the GATT." Reference to M.MENDEZ, *The Legal Effects of EU Agreements*, Oxford, 2013, p.184.

<sup>1232</sup>J.OSTERHOUDT BERKEY, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting in European Journal of International Law*, Volume 9, 1998, p. 630.

The conclusion for Court was that the GATT is an international agreement “[...] based on reciprocal and mutually advantageous agreements, characterized by the great flexibility of its provisions, particularly numerous derogations, the measures to be taken when the states are confronted with exceptional difficulties, and the flexible settlement of the conflicts between the Contracting Parties, moreover not providing the individuals with the rights that these could be invoked before national courts.”<sup>1233</sup>

Mentioning negative stance of the ECJ towards the GATT agreement resulted from the fact that an international agreement is capable of conferring rights on individuals only when a provision of an international agreement is capable to confer the rights on individuals rights which they can invoke before the courts what is not a case of the GATT Agreement.

Thus it may be at first sight summarized that the judgment comes out from conclusion that while confirming the succession principle in regard to the relation MS-EEC<sup>1234</sup> and rejecting the direct effect which means that the individuals could not invoke GATT provisions since they lacked direct effect.<sup>1235</sup>

Antoniadis argues that such an argumentation of the ECJ meant (in the time of the interpretation of the International Fruit Company) that the provisions of the GATT do not have direct effect and they cannot serve as a criterion for legality. As he further adds, taking into account retrospective view on the activities of the ECJ and the conditions that as to the GATT law, the Court adopted an approach which precluded to its provisions to be invoked by individuals before national or

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<sup>1233</sup>J.OSTERHOUDT BERKEY, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting* in *European Journal of International Law*, Volume 9, 1998, p. 628.

<sup>1234</sup>“In so far as under the EEC Treaty the Community has assumed the powers previously exercised by MS in the Area governed by the General Agreement, the provisions of that Agreement have the effect of binding the Community, It is also necessary to examine whether the provisions of the General agreement have the effect of binding the Community. It is also necessary to examine whether the provisions of the General Agreement confer rights on citizens of the Community on which they can rely before the Courts in contesting the validity of a Community measure. For this purpose, the spirit, the general scheme and the terms of the General Agreement must be considered,” reference to ECJ judgments, 12 December 1972, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, joined cases 21-24/72 [1972] ECR, p.1219, para 18-20.

<sup>1235</sup>J.OSTERHOUDT BERKEY, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting* in *European Journal of International Law*, Volume 9, 1998, p. 627.



Community courts and in the same time serving as a standard for the review of the legality of secondary Community law.<sup>1236</sup> In Trachtman's view the existing situation may be characterized as a paradox, since the EEC more broadly pressed on direct effect for EC law on its MS, whereas the MS, as far as it concerns the same MS acting as parties of the GATT facing the fact that the ECJ decided on rejecting the direct effect in terms of GATT de latere ECJ.<sup>1237</sup>

Within the judgment the *International Fruit Company*, the ECJ touched upon several points which raised the discussion on the nature of the GATT agreement. The examination of the very nature of the GATT agreement was subject to investigation on its shape, starting the preamble and moving towards other provisions having '*reciprocal and mutually advantageous basis*' marked by broad flexibility.

This point is the most criticized as the most problematic part of the decision being labelled even '*troubling spot in the Court's motivation.*'<sup>1238</sup> In Petersmann's view, such kind of Court's argumentation is obscure since the Court did not indicate whether its decision is based on reciprocity in terms of principle of negotiations, or rather as legal principle arising from the treaty, mutual gains from trade or on reciprocity as regards judicial control of the observance of directly effective GATT provisions.<sup>1239</sup>

Kuilwijk presumes that the intention of the Court was to emphasize the GATT's objective of maintaining an overall balance of economic benefits between the Parties through continuous negotiations and the possible lack in enforcement of the treaty in the territory of such important trading partners as the US and

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<sup>1236</sup>A.ANTONIADIS, *The European Union and WTO: a nexus of reactive, coactive and proactive approach in World Trade Review*, Volume 45, Issue 6, 2007, p.49.

<sup>1237</sup>J.P.TRACHTMAN, *The international economic law revolution and the right to regulate*, London, 2007, p.518.

<sup>1238</sup>G. WILS, *The concept of reciprocity in EEC law: An exploration into these realms in Common Market Law Review*, Volume 28, Issue 2, 1991, p.254.

<sup>1239</sup>E.U.PETERSMAN, *Application of GATT by the Court of Justice of the European Communities in Common Market Law Review*, Volume 20, 1983, p.397.

Japan.<sup>1240</sup> However, not all authors support this argument, by invoking the basic presumption of the reciprocity. As Simma states, the reciprocity comes to applicability as the general rule of international law. In his view, if a subject of international law supports the provision of a norm of public international law, it is obliged to guarantee the applicability of such a norm also against itself.<sup>1241</sup>

As Götsche states, although the reciprocity principle is not defined within the GATT law, it flows from the provisions of the GATT in its complexity, 'zieht sich wie ein roter Faden durch das Vertragswerk,'<sup>1242</sup> is present in the whole GATT Agreement as a red yarn. Thus, the principle of the reciprocity can have various connotations.

However, as to the legal stance of the principle of reciprocity, the ECJ in the judgment Kupferberg decided that the fact that the courts of one party to an agreement do not recognize direct application whereas the courts of the other party do, does not in itself such as to constitute a lack of reciprocity in the implementation of the agreement.<sup>1243</sup> However, it is not uninteresting the point that the Court '*in itself*' has left door ajar open for any further re-evaluation for the doctrine.

In summary may be stated, that in the judgment International Fruit Company was not fully persuasive in terms of the grounds on which the Court rejected the direct applicability of the GATT agreement. It was doubtful also the argumentation on the reciprocity as the condition for the granting of the direct effect to the GATT agreement. Despite these shortcomings, the judgment rendered more than 30 ago is till now the fundamental stance of the reluctance of the CJ EU

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<sup>1240</sup>K.J.KUILWIJK, *The European Court of Justice and the GATT Dilemma: Public Interest v. Individual Rights*, Beuningen, 1996, p.126.

<sup>1241</sup>B.SIMMA, *Reciprocity* in R.BERNHARDT (ed.), *Encyclopedia of Public International Law*, Amsterdam, 1984, p.29.

<sup>1242</sup>M.HILF, S.OETER, *WTO-Recht: Rechtsordnung des Welthandels*, Baden-Baden, 2010, p.120.

<sup>1243</sup>ECJ judgment, 26 October 1982, Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A., case 104/81 [1982] ECR, p.3641.

to the admission of possibility to invoke the direct effect of the WTO/GATT provisions by the individuals.<sup>1244</sup>

Furthermore, the nature of the GATT agreement was examined on various other occasions.

### 7.2.3 ECJ Judgment *Carl Schlüter v. Hauptzollamt Lörrach*

In the judgment *Schlüter* was the questioned the validity of the regulations in agriculture policy, governing the charges to the import of the cheese. The plaintiff invoked the invalidity under the provisions of the regulation as regard to the GATT agreement.

As to the argumentation the Court repeated the formula as founded by the International Fruit Company as to the principles of the reciprocity and mutually advantageous basis, flexibility of provisions as to the deviation from the rules and also added similar argumentation to the DSM under GATT.<sup>1245</sup> As not really persuasive may be considered the very fact that the ECJ did not at all try to analyse more closely the provision of the Article II of the GATT Agreement and only paraphrased the argumentation provided in the principles of the International Fruit company.<sup>1246</sup> In both cases the Court stressed the '*context principle*' leaving apart any analyses of the provisions of the GATT law.<sup>1247</sup>

### 7.2.4 ECJ Judgment *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*

In next case *Nederlandse Spoorwegen* the ECJ had to examine the question of the validity of the regulation inherent to the obligations of the MS concerning

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<sup>1244</sup>N.ROZEHNALOVÁ, V.TÝČ, *Vnější obchodní vztahy Evropské unie*, Brno, 2008, p.82.

<sup>1245</sup>ECJ judgment, 24 October 1973, *Carl Schlüter v. Hauptzollamt Lörrach*, case 9/73 [1973] ECR, p.1135, para 29-30.

<sup>1246</sup>R.A.BRAND, *Direct Effect of International Economic Law in the United States and the European Union in Northwestern Journal of International Law & Business*, Volume 17, Issue 1, 1997. p.577.

<sup>1247</sup>A.TANDREDI, *EC Practice in the WTO: How Wide is the 'Scope for Manoeuvre'?* in *European Journal of International Law*, Volume 15, Number 5, 2004, p.943.

the CCT. It was examined their validity under the legal system of GATT having significant impact on the prices of the duplicating machines. In the judgment, the Court presumed the fact that the EEC has replaced the MS in their commitments arising from the nomenclature in goods in customs tariffs.<sup>1248</sup>

The ECJ within the judgement adopted rather protective approach taking into account the particularities of the EC law and stressed that the autonomous application of the GATT law, regardless to its applicability at the national level. As the Court decided: “[...] since so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the MS. The mandatory effect, in law, of these commitments must be determined by reference to the relevant provisions in the Community legal system and not to those which gave them their previous force under the national legal system.”<sup>1249</sup> As Holgaard states the Court had exclusive jurisdiction to interpret and determine effects of the GATT in the legal order of the EEC.<sup>1250</sup> However, did not do so. Thus, it must be agreed with Harley saying that the judgment did not make clear under which conditions the EEC was bound by the agreements which came concluded by the MS prior to the EC.<sup>1251</sup>

The answer to the question of binding the Community by the agreements before the entry into power of the EEC Treaty conditioned as follows: 1. the agreement must be concluded prior to the EEC Treaty and all MS must be parties to it, 2. there must be a wish of the MS to pledge the Community to observe the agreement aims of which must be shared with the Community, 3. there must be an action taken by the Community institutions within the framework of the agreement, 4. other parties to the agreement must have recognized that power had been transferred to the Community.

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<sup>1248</sup>ECJ judgment, 19 November 1975, *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, case 38/75 [1975] ECR, p.1439, para 21.

<sup>1249</sup>ECJ judgment, 19 November 1975, *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, case 38/75 [1975] ECR, p.1439, para 6.

<sup>1250</sup>R.HOLDGAARD, L.HOLDGAARD, *External relations law of the European Community: legal reasoning and legal discourses*, Alphen aan den Rijn, 2008, p.200.

<sup>1251</sup>T.C.HARTLEY, *The foundations of European Union law: an introduction to the constitutional and administrative law of the European Union*, Oxford, 2010, p.179.

As correctly Ahmed and Butler, this may happen only under the condition that the agreement (all parts of the agreement) at stake and the competences fall completely under the EEC exclusive competences, thus it must be spoken about complete transfer.<sup>1252</sup> However, such a transfer of the powers does not liberalize the MS from their international commitments. As Pescatore states: “[...]...*whenever functions have been transferred by the MS to the Community in the field of external relations, these functions have been transmitted, to use an expression familiar to civil lawyers, cum onere et emolumento. By transferring certain powers and responsibilities to the Community, the MS could not free themselves from the observation of standards agreed to in relation to third States; respect for the stability of international agreements and good faith in international relations make it essential therefore to admit that the transfer of powers has ipso iure entailed a succession to certain treaty rights and obligation in relation to third States.*”<sup>1253</sup>

#### 7.2.5 ECJ Judgment *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*

The question of the relation to the third states was subject to the case *Conceria Daniele Bresciani v. Amministrazione Italiana delle Finanze*.<sup>1254</sup> The question at stake was the interpretation of the EEC Treaty in relation to the Yaounde Convention in regard to a charge on import of the cowhides fell into the notion of the charge having equivalent effect.

The Court determined the condition that the imbalance of the obligations assumed by the Community towards associated states, inherent in the special nature of the convention does not prevent by the Community that some provision

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<sup>1252</sup>T.AHMED, I.de JESÚS BUTLER, *The European Union and Human Rights: An International Law Perspective in The European Journal of International Law*, Volume 17, Number 4, p.785, supra 81.

<sup>1253</sup>P.PESCATORE, *External Relations on the Case-law of the Court of Justice of the European Communities in Common Market Law Review*, Volume 16, 1979, p.637-638.

<sup>1254</sup>ECJ judgment, 5 February 1976, *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze*, case 87/75 [1976] p.129.

have also direct effect.<sup>1255</sup> As to the Court, the Community undertook within the Convention the same obligations towards the associated states to abolish charges having equivalent effect as the MS towards each other. Such a provision thus is capable to have a direct effect. Thus, the argumentation confirms as a matter of principle, the possible granting of the direct effect even when the agreement contains asymmetric obligations.

The possibility of the direct effect has raised significant attention among the scholars of the EU law. According to Holdgaard the provision of the speciality of the agreement cannot be identified with the notion of reciprocity and thus are in opposition to the reciprocity.<sup>1256</sup> The ratio behind this argumentation can be that the condition of the principle of speciality refers to the particular conditions given to the developing countries.

#### 7.2.6 ECJ Judgments *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*

The very nature of the GATT agreement was questioned also in further cases. In the joined cases *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* joined case 267/81, 268/81 and 269/81, the Italian duties for administrative services levied on the goods imported to Italy, were challenged as incompatible with the concessions under Article II of the GATT agreement.

Thus, at stake was the effect of the GATT Agreement within the legal order of the Community and the possible invocation of the direct effect of the GATT agreement. The Court presented two principal arguments. First of all the Court stressed the importance to attribute to the GATT provisions uniform application. As the Court said: “[...] it is important that the provisions of GATT should, like the

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<sup>1255</sup>ECJ judgment, 5 February 1976, *Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze*, case 87/75 [1976], p.129, para 23.

<sup>1256</sup>R.HOLDGAARD, E.HOLDGAARD, *External relations law of the European Community: legal reasoning and legal discourses*, Alphen aan den Rijn, 2008, p.302.

*provisions of all other agreements binding the Community, receive uniform application throughout the Community. Any difference in the interpretation and application of provisions binding the Community as regards non-MS would not only jeopardize the unity of the commercial policy, which according to the Article 113 of the Treaty must be based on uniform principles, but also creates distortions in trade within the Community, as a result of differences in the manner in which the agreements in force between the Community and non-member countries are applied in the various states.*"<sup>1257</sup>

In terms of the supportive argumentation for that conclusion the ECJ mentions the previously analysed judgments as *International Fruit Company*, *Schlüter*, *Nederlandse Spoorwegen*, but also the judgment *Haegeman*. As the Court states, "It follows that the jurisdiction conferred upon the Court in order to ensure the uniform interpretation of Community law must include a determination of the scope and effect of the rules of GATT within the Community and also of the effect of the tariff protocols concluded in the framework of GATT."<sup>1258</sup> However, the Court repeating the settled case-law did not recognize the direct effect even under these special conditions.<sup>1259</sup>

#### 7.2.7 ECJ Judgment *Federal Republic of Germany v. Council of the European Union*

As to the last case, to be mentioned in terms of the substantive provisions of the GATT law is the decision of the ECJ in the case *Germany v. Council*, case C-280/93. The novelty of the case in respect to the older cases was that in this case for the first time the Germany as one of the MS invoked the direct effect of the GATT law.

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<sup>1257</sup>ECJ judgment, 16 March 1983, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, joined cases 267/81, 268/81 and 269/81 [1983] ECR, p.801, para 14.

<sup>1258</sup>ECJ judgment, 16 March 1983, *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)*, joined cases 267/81, 268/81 and 269/81 [1983] ECR, p.801, para 15.

<sup>1259</sup>G.A.ZONNEKEYN, *De directe werking van de TRIPs overeenkomst: een stand van zaken*, Leuven, 2002, p.13.

The basic story behind the case was the regulation 404/93 which enacted the import regime of the bananas on the Community market. The situation before the adoption of the Community rules was not equivocal. There was a group of MS granting the preference access to the bananas from ACP, on the other hand, there was another one, granting rather more liberal rules. Such a discrepancy, obviously, limited the liberal circulation of the bananas on the common market.

In order to regulate the banana market, there was adopted the regulation 404/93, doctrinally perceived as *'not the wisest piece of EC legislation'* which is example of *'long story of special interest...which established an EC common organization of banana markets in favour of ACP growers closely attached to French, Spanish and Portuguese importers.'*<sup>1260</sup>

The regulation worsened the position of Germany, since it had profit originally from the guaranteed duty-free access to bananas from Central and Latin America on the basis of *'banana protocol'* which was attached to the Treaty of Rome.<sup>1261</sup> The regulation had a negative impact on German banana imports, since they were banned or had restricted access to the bananas at preferential tariffs which meant significant aggravation of the existing conditions of the banana import. Thus, not surprisingly, Germany voted against this regulation, however was overvoted.

Germany filled an action on the basis of the Article 230 and argued for the cancelation of this regulation since the regulation was created in the way that it was incompatible with GATT rules. Maybe surprisingly, Germany did not argue with the direct effect of the GATT, but by the fact that the compatibility with the GATT agreement is the precondition for the validity of the EC acts.

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<sup>1260</sup>N.REICH, *Judge-made 'Europe a la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation* in *European Journal of International Law*, Volume 7, Number 1, 1996, p.108.

<sup>1261</sup>K.J.ALTER, S.MEUNIER, *Nested and overlapping regimes in the transatlantic banana trade dispute* in *Journal of European Public Policy*, Volume 13, Issue 3, 2006, p.370-371.



Germany within this judgment invoked several reasons why the regulation shall be considered invalid – violation of the formal shortcomings of the regulation (the lack of the justification on which is the regulation was based), the violation of the primary law and the principles of the EC, violation of the primary law and the fundamental principles of the EU law and international agreements from Lomé, GATT Agreement and the Banana protocol.<sup>1262</sup>

However, the Court has ruled as in the previous cases by accenting the fact that the provisions of the GATT law cannot have direct effect since there are several reasons for that: 1. uncertainty of the obligations arising from the GATT law, 2. lack of reciprocity from the agreement partners for the insurance of the direct effect of the GATT law, 3. flexibility of the provisions of the GATT which does not enable the obligatory character of the decision of the DSB.

As the summary, the Court recalled that neither the international law, nor the GATT agreement determines the duty of the contracting parties the direct effect invocable by the individuals. If the international law or the GATT agreement does not determine the duty to attribute the direct effect, there is no duty to for the EC to grant the direct effect to its provisions in regard to the individuals.

Moreover, in terms of unconditionality, the Court recalled that the provisions of the GATT law are not sufficiently unconditional which hinders the applicability of the GATT law directly. If the EC granted a direct effect to its provisions, it would be in the disadvantages against the parties which do not grant the direct effect.

Thus, as the Court states, the only exceptions remain the cases when the Community explicitly intends to implement a particular obligation within the framework of GATT, or if the Community acts expressly refer to specific

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<sup>1262</sup>ECJ judgment, 5 October 1994, Federal Republic of Germany v. Council of the European Union, case C-280/93 [1994] ECR, p.I-4973, para 26.

provisions of GATT, referring thus back to the judgments 70/87 *Fediol v. Commission*<sup>1263</sup> and C-69/89 *Nakajima v. Council*<sup>1264</sup>.

### 7.2.8 *ECJ Judgments Nakajima and Fediol*

First case, in which was broken the reluctance of the ECJ to grant the direct effect to the GATT provisions was the case *Fediol*. The company *Fediol* submitted a complaint to the European Commission on the basis of the regulation 2641/84 granting to the individuals the right to challenge the commercial practices of the third states contradictory to the GATT law. Under the regulation, once the complaint is filed, the Commission shall evaluate whether these practices are in accordance to the GATT law and eventually initiate the dispute under the relevant provisions of the GATT.

Since the Commission did not initiate the dispute settlement procedure according to the GATT, the company *Fediol* filed an action against the Commission.

The Court repeated again its principal case-law, however, added more points to be stressed. The nature of the GATT law does not prevent the Court from interpretation and application of GATT rules as to the fact, whether the commercial practices to be investigated shall not be considered incompatible with those rules. Nonetheless, the Court recalls the fact that the GATT provisions have an independent meaning which for the purposes of their application shall be determined by interpretation.<sup>1265</sup> The key sentence of the ECJ was wording as

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<sup>1263</sup>ECJ judgment, 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities*, case 70/87 ECR [1989], p.1781.

<sup>1264</sup>ECJ judgment, 7 May, 1991, *Nakajima All Precision Co. Ltd v. Council of the European Communities*, case C-69/89, ECR [1991], p.I-2069.

<sup>1265</sup>ECJ judgment, 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities*, case 70/87 [1989] ECR p.1781, para 20.

follows: “[...] the GATT provisions have an independent meaning for the purposes of their application in specific cases,” is correctly emphasised by Berkey.<sup>1266</sup>

The interpretation by the Court cannot be doubted by the existence of the DSM. As the Court continues, the fact that the Contracting Parties established an institutional framework for consultations and negotiation for the implementation of the GATT Agreement, does not exclude all judicial application of that agreement.

The Court in its paragraph 22 stated that the regulation 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint which they lodge with the Commission, to determine that illicit nature of the commercial practices they consider to harmful for them and the Court is entitled to exercise its powers to review the decision of the Commission applying those provisions. Nonetheless, the Court rejected in this case any reference to the GATT provision as justified one.<sup>1267</sup>

Thus, it must be concluded that the ECJ demonstrated that GATT an international agreement can be invoked also in cases when this is within EC law is not directly applicable.<sup>1268</sup> This has for consequence that the invocability entails two important elements, indirect effect (conformist application) and the liability for the breach of international treaty.<sup>1269</sup>

In the second case Nakajima, the Japanese printer producer challenged the anti-dumping regulation of the EC on the basis of which there were imposed the anti-dumping customs on the import of its products serial-impact dot-matrix printers to the EC. Nakajima filed an action on the basis of the Article 184 EEC

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<sup>1266</sup>J.OSTERHOUDT BERKER, *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting in European Journal of International Law*, Volume 9, Number 4, 1998, p.628.

<sup>1267</sup>ECJ judgment, 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities*, case 70/87 ECR [1989], p.1781, para 22.

<sup>1268</sup>V.TÝČ, *Direct effect and invocability of EC law before national courts: international treaties* in *Dny práva – 2008 – Days of Law*, Brno, 2008, p.820.

<sup>1269</sup>V.TÝČ, *Direct effect and invocability of EC law before national courts: international treaties* in *Dny práva – 2008 – Days of Law*, Brno, 2008, p.820.

Treaty on non-applicability of the anti-dumping regulation of the EC due to its contradiction to the anti-dumping code of the GATT.

The key argumentation of the ECJ was provided in this case may be traced in the paragraphs 30-32 of the judgment. Within those paragraphs the Court decided as follows: *“According to the second and third recitals in the preamble to the new basic regulation, it was adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement and from the Anti-Dumping Code. It follows that the new basic regulation, which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures (as decided in the Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, paragraph 11 and in Case 266/81 SIOT v. Ministero delle Finanze and Others [1983] ECR 731, at paragraph 28). In those circumstances, it is necessary to examine whether the Council went beyond the legal framework thus laid down, as Nakajima claims, and whether, by adopting the disputed provision, it acted in breach of Article 2(4) and (6) of the Anti-Dumping Code.”*<sup>1270</sup>

In fact, the point was not very clear in regard to the situation which was intended by the Court. More light in regard to this point presented the GA Geelhoed presented the ratio of the Nakajima exception in the following way: *“It is a case where it is clear that a Community measure was specifically intended to implement a particular obligation of WTO law, the Community legislature has essentially chosen to limit its own scope of manoeuvre negotiation by itself “incorporating” that obligation into Community law.*<sup>1271”</sup>

Thus, the ECJ considered that the anti-dumping regulation of the GATT constitutes a transposition of the specific provisions of the GATT Agreement into

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<sup>1270</sup>ECJ judgment, 7 May, 1991, Nakajima All Precision Co. Ltd v. Council of the European Communities, case C-69/89 [1991] ECR, p.I 2069, para 30-32.

<sup>1271</sup>Opinion GA Geelhoed, 1 December 2005, case C-313/04, Franz Egenberger GmbH Molkerei und Trockenwerk v. Bundesanstalt für Landwirtschaft und Ernährung [2006] ECR, p.I-6331, para 64.

Communitarian law and the regulation adopted was intended to adopt a GATT-specific obligation. However, in the case Nakajima the Court did not find the violation of the EC law. It may be agreed with the doctrine that both judgments introduced into the practice the principle of *'implementation of the GATT law'*, despite the lack of the real content of this notion. However, some general conclusion may be identified that the Nakajima exception as the exception relates to the implementation of a particular obligation from the GATT law. The Fediol exception relates to the admissibility of the challenging the GATT provision in case the regulation explicitly refers to the GATT law.<sup>1272</sup> There is no doubt that similar approach is applicable also to WTO law.

### 7.3 EU and the WTO Law

#### 7.3.1 Introduction

As the outcome to the relation EU/EC law- GATT law it might be concluded that the Court decided that provisions of the GATT cannot have a direct effect, and in consequence they cannot be invoked by the individuals to challenge the provisions of the GATT law. However, in the same time the Court has admitted that the Community has an obligation to ensure that the Community shall ensure that the provisions of the GATT are observed in relations to non-MS of the GATT.<sup>1273</sup>

There were many expectations upon the entry into power of the WTO Agreement approved by the Opinion of the ECJ 1/94 concluding that in terms of the GATT law part of the WTO agreement the Community has the exclusive competence, unlike the shared nature of the competences in regard to GATS and TRIPs.

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<sup>1272</sup>J.ERRICO, *The WTO in the EU: Unwinding the Knot* in *Cornell International Law Journal*, Volume 44, Number 1, 2011, p.190-191.

<sup>1273</sup>Opinion ECJ, 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, opinion 1/94 [1994 ] ECR, p.I-5267, para 28.

The ECJ was thus in the position that it was needed to re-investigate the changed legal nature of the WTO Agreement with new institutional structure. The WTO Agreement which created standard international organization with own legal personality and clear decision-making procedures. Paradoxically, shortly after the ruling of the first case was published the decision of the WTO panel US Section 301-310 where the Panel decided as follows: *“Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach the GATT/WTO did not create a new legal order the subjects of which comprise both Contracting Parties or Members and their nationals. Thus, the ECJ started to be exposed by the WTO law, as it was expressed by general director of Klabbers who stated that under the WTO law is to be understood as a complex of generally valid international agreements which were adopted on the field of the WTO which regulate within its applicability the mutual relations between contracting parties and the WTO itself.”*<sup>1274</sup>

Unlike the previous situation when there was in power the GATT agreement, there was significant change, mainly that the WTO Agreement was accepted by the Council Decision 94/800/EC concerning of the conclusion of the WTO Agreement on behalf of EC in regard to the agreements reached in the Uruguay Round of negotiations.<sup>1275</sup>

All these facts have brought much attention to the decision of the ECJ in the first WTO related case - Portugal v. Council C-149/96. Principal changes of the system of its improvements were for the legal doctrine main reasons why the ECJ should have reinvestigated its stance, reluctant to grant direct effect on the basis of the GATT 1947 law.

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<sup>1274</sup>As reproduced in J.KLABERS, *An introduction to international institutional law*, Cambridge, 2009, p.258.

<sup>1275</sup>Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, with regard to matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), OJ L 336 of 23.12.1994.

The reasons and the expectation were linked to the different context, legal nature of the agreement, based on multilateral trade negotiations and stricter conditions of the dispute settlement.

Thus, as Doctrilan and Tsagourias state, especially upon the Opinion 1/94 WTO Agreement the judgment *Portugal v. Council* was heralding the new period in the external dimension of the EC/EU, received abundant attention, as there were reflected issues related to the EU and its external relations.<sup>1276</sup>

### 7.3.2 *ECJ Judgment Portuguese Republic v. Council*

But let's look on the case, doctrinally perceived as the judgment providing the most detailed analyses of the direct effect issues in the EU law.<sup>1277</sup>

The core the dispute between the Council and Portugal was the action, filed by Portugal for the annulment of the Council decision on the conclusion of the Understandings between the EC and Pakistan and India, regulating the access to the market for textile products.

Portugal insisted on the unlawful nature those decisions were in contradiction to the WTO Agreements. Hence, Portugal filed an action for annulment of the Council decision on the conclusion of the Memoranda on understandings between the EC and Pakistan and India for the access to the market for textile products.

Portugal claimed in the direct action before the ECJ that the Decision at stake (Council Decision 96/386/EC of 26 February 1996 concerning the Conclusion of Memoranda of Understanding Between the European Community and the Islamic Republic of Pakistan and the EC and the Republic of India), violated the rules contained in the WTO Agreement, with emphasis given to the new GATT

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<sup>1276</sup>N.TSAGOURIAS, *Transnational constitutionalism: international and european models*, Cambridge, 2007, p.170.

<sup>1277</sup>R.HOLDGAARD, L.HOLDGAARD, *External relations law of the European Community: legal reasoning and legal discourses*, Alphen aan den Rijn, 2008, p.275.

1994 Agreement and the Agreement on Import Licensing Procedures and the Agreement on Textiles and Clothing. To be more precise, those Memoranda were negotiated and concluded as an outcome of the Uruguay round of negotiations in the context of the negotiations of the WTO discussions on textile.<sup>1278</sup>

In terms of the Agreement with Pakistan, Pakistan was obliged to eliminate all quantitative restrictions to the series of textile products, on the other hand, the Commission was obliged to take the appropriate steps to give favourable consideration to requests which the Government of Pakistan might introduce in respect of the management of existing tariff restrictions for exceptional flexibility and to initiate the internal procedures to ensure that: “ [...] *all restrictions currently affecting the importation of products of the handloom and cottage industries of Pakistan are removed before entry into force of the WTO.*”<sup>1279</sup> The Agreement with India provides that the Indian Government is bound to the tariffs listed in the Memorandum of Understanding these trades.

The main point was acutely expressed by the GA Saggio, pointing to the fact that the main issue is the determination of the direct effect of the WTO Agreements, more precisely also taking into account the legal effects of the GATT Agreement.<sup>1280</sup>

In his opinion the GA first of all summarized its the constant jurisprudence of the ECJ of justice stating that in numerous judgments on the interpretation of international agreements, whether a provision has the direct effect within the legal order of the MS within which it is necessary first to ascertain whether the content of

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<sup>1278</sup>The fact is that at the Marrakesh meeting in Morocco, although the negotiations on access to the market in textiles with Pakistan and India have not been completely concluded, the President of the Council and Members of the Commission for external relations signed the Final Act concluding the multilateral trade agreements of the Uruguay Round – the Final Act - the Agreement establishing the World Trade Organisation and all agreements and memoranda on behalf of the EU.

<sup>1279</sup>ECJ judgment, 23 November 1999, Portuguese Republic v. Council of the European Union, case C-149/96 [1999] ECR, p.I-8395, para 10.

<sup>1280</sup>Opinion GA Saggio, 25 February 1999, Portuguese Republic v. Council of the European Union, case C-149/96 [1999] ECR, p.I-8397.



that provision is clear, precise and unconditional, and then to evaluate the content in the light of the aims and context of the agreement.<sup>1281</sup>

Further on, Saggio presented his analysis of the judgment *Germany v. Council* where the ECJ repeated the great flexibility of the GATT provision and loose nature of the provisions of the dispute settlements within which: “[...]...an individual within the Community cannot invoke it in a court to challenge the lawfulness of a (Community act), but also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a Community act in an action brought by a MS under the first paragraph of Article 173 of the Treaty.”<sup>1282</sup>

As he rather critically adds, as the GATT does not have not have direct effect, national courts may not apply the rules of the agreement or refer questions for preliminary ruling on any conflict between two sources of law, nor may the Court give a ruling on the lawfulness of a Community act which is claimed to be contrary to the GATT rule in an action of annulment, unless it is not the case as presumed by the judgments *Fediol* or *Nakajima*.<sup>1283</sup>

As de Cremona states in her observation to the Opinion of the GA Saggio, the compliance with international obligations is one of the fundamental elements within the Community legal order.<sup>1284</sup> However, as she recalls, such a rule cannot be elevated into a norm which replaces the need for the Community to establish its own constitutional and regulatory principles. Thus, as she concludes, if the argument of the autonomy of the Community legal order is accepted, it becomes all the more important for that legal order to develop its own constitutional

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<sup>1281</sup>ECJ judgment, 23 November 1999, *Portuguese Republic v. Council of the European Union*, case C-149/96 [1999] ECR, p.I-8395, para 15.

<sup>1282</sup>ECJ judgment, 5 October 1994, *C-280/93, Federal Republic of Germany v Council of the European Union* [1994] ECR, p.I-4973.

<sup>1283</sup>ECJ judgment, 23 November 1999, *Portuguese Republic v. Council of the European Union*, case C-149/96, [1999] ECR, p.I-8395, para 17.

<sup>1284</sup>Article 300 (7) Treaty establishing the European Community (Consolidated version 1997), OJ C 340, 10.11.1997.

principles which are designed to underpin the external dimension of Community policy.<sup>1285</sup>

The ECJ in its analysis refers back to the judgment *International Fruit Company* and subsequent cases as *SIOT*, *SAMI* and *Chiquita*, concluding from them the constant case-law saying that the GATT Agreement cannot be invoked before the ECJ, essentially because of two reasons – 1. great flexibility of its provisions with the unilateral possibilities of the derogations, 2. inadequacy of the agreements for the dispute settlement. However, the situation has changed upon adaptation of the WTO Agreement.

Thus, the key argumentation of the ECJ is contained in the paragraphs 41-45. Initially, the ECJ recalls that the general principle of international law *'pacta sunt servanta'* is applicable also to WTO Agreement. As the Court states, the WTO Agreement does not provide the legal means to ensure its applicability, however, it shall be applied in the good faith.<sup>1286</sup>

In the next paragraphs the ECJ provides the reasoning why it is not possible to grant the direct effect to the WTO Agreement. The Court has confronted its view with the relation between the GATT Agreement and WTO one, perceiving them not much different from each other.<sup>1287</sup>

The Court does not forget to mention the fact that the most significant trade partners of the Community do not require from their judicial organs to review their rules via WTO Agreements. However, the fact that the courts of one of the

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<sup>1285</sup>M.CREMONA, *Neutrality or Discrimination?* in G. De BÚRCA, J.SCOTT, *The WTO, the EU and External Trade in EU & the WTO: Legal & Constitutional Aspects*, Oxford, 2001, p.184.

<sup>1286</sup>ECJ judgment, 23 November 1999, *Portuguese Republic v. Council of the European Union*, case C-149/96 [1999] ECR, p.I-8395, para 41

<sup>1287</sup>ECJ judgment, 23 November 1999, *Portuguese Republic v. Council of the European Union*, case C-149/96 [1999] ECR, p.I-8395, para 42 as regards, more particularly to the application of the WTO Agreements in the Community legal order stating: “*It must be noted that according to its preamble, the agreement establishing the WTO, including its annexes is still founded like GATT 1947, on the principle of negotiations with a view to „entering into reciprocal and mutually advantageous agreements“ 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 with the Community, such as the agreement which the Court was required in Kupferberg.*”

parties consider that some of the provisions of the Agreement concluded by the Community are directly applicable<sup>1288</sup> does not constitute a lack of reciprocity in the implementation of the Agreement. The lack of reciprocity was stressed with special attention paid to the WTO Agreement.<sup>1289</sup>

In Court's view, the GATT was conceived as a general agreement that would apply to all merchandise trade. Therefore, GATT rules on non-discrimination, transparency, tariff binding apply to all sectors. In practice, however, industry-specific pressures for protection in major trading nations created strong incentives for governments to grant '*special*' treatment to '*special*' sectors.<sup>1290</sup>

In the previous paragraphs, there have been showed several aspect and shortcomings of the GATT Agreement. Some authors despite these shortcomings do not hesitate to admit that the GATT Agreement was a complex agreement, based on the three constitutional Articles, which are fundamental in the WTO.<sup>1291</sup>

In further argumentation, the for the Court opined that the WTO Agreements must be distinguished from the agreements concluded by the EC and the special nature of these agreements contributes to the fact that the Agreement belongs to the rules in the light of which the Court investigates the legality of the Community institutions. For the exclusion of the direct effects speaks in the Court's view also the fact that the Decision 94/800 which excludes the direct

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<sup>1288</sup>US Section 301-310 section of the Trade Act of 1974, Report of Panel, WT/DS152/R of 22 December 1999, at para 7.72 states: "*Neither the GATT, nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach the GATT/WTO did not create a new legal order the subjects of which comprise both Contracting Parties or Members and their nationals.*"

<sup>1289</sup>ECJ judgment, 23 November 1999, Portuguese Republic v. Council of the European Union, case C-149/96 [1999] ECR, p.I-8395, para 45 regarding to the lack of reciprocity in that regard on the part of the Community's trading partners: "[...] *in relation to the WTO agreements which are based on "reciprocal and mutually advantageous arrangements" and which must ipso facto be distinguished fro the agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules.*"

<sup>1290</sup>B.M.HOEKMAN, M.M.KOSTECKI, *The political economy of the world trading system: WTO and beyond*, Oxford, 2001, p.269.

<sup>1291</sup>D.PALMETER, *The WTO as a legal system: essays on international trade law and policy*, London, 2003, p.260.

applicability of the WTO Agreement.<sup>1292</sup> By summarizing this argumentation, the Court argued similarly to the case *International Fruit Company* and rejected direct effect of the WTO law.<sup>1293</sup>

### 7.3.3 *ECJ Judgment Commission of the European Communities v. Federal Republic of Germany*

Although the judgment of the Court may appear unfriendly towards the WTO obligations as unfriendly, the ECJ corrected its attitude to the WTO in four principal judgments, *International Dairy Agreement*, *Hermès* and *Dior*.

In the first of them, the Court decided on the actions of the European Commission against Germany to fail to fulfil its obligations under the Treaty by the authorizing the import of the dairy product customs value of which was lower than minimum price under *International Dairy Agreement*. The Agreement was concluded under the GATT agreement pursuing the Ministerial Declaration on 14 September 1973 which in regard to the economic conditions implemented by the Council regulation 1999/85 on inward processing relief arrangements. Within that the Court decided that: *“When the wording of secondary Community legislation is open to more than one interpretation, preference should be given as far as possible to the interpretation which renders the provision consistent with the Treaty. ... the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.”*<sup>1294</sup>

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<sup>1292</sup>ECJ judgment, 23 November 1999, *Portuguese Republic v. Council of the European Union*, case C-149/96 [1999] ECR, p.I-8395, para 46-48.

<sup>1293</sup>ECJ judgment, 23 November 1999, *Portuguese Republic v. Council of the European Union*, case C-149/96 [1999] ECR, p.I-8395, para 94.

<sup>1294</sup>ECJ judgment, 10 September 1996, *Commission of the European Communities v. Federal Republic of Germany*, case C-61/94 [1996] ECR, p.I-3989 para 52, thus, it may be considered the doctrinal approach saying that there is settled case law wording: *“[...] the primacy of international agreements concluded by the Community (Union) over secondary legislation require the conform interpretation with those agreements. Thus, the international agreements concluded by the Union require consistent interpretation of secondary law,”* reference to C.ECKES, *International law as law of the EU: The role of the Court of Justice*, Hague, 2010, p.10.

The judgment is doctrinally perceived as the expression of the selectivity of the ECJ to grant direct effect to the international agreements binding the Union, which means that the international agreements binding the Union have primacy over the secondary law, but not over the EU law. Thus, they may be used to challenge the validity of EU law, but they cannot derogate from the EU norms.<sup>1295</sup> Therefore, the doctrine understands the outcome of the judgment that the ECJ has accepted the position that the WTO law forms the integral part of the EC legal order, having hierarchical position superior to the secondary legislation.<sup>1296</sup>

#### 7.3.4 ECJ Judgment *Hermès International v. FHT Marketing Choice BV*

The rules of interpretation were further subject to analysis under the judgment *Hermès International v. FHT Marketing Choice BV*. The question at stake was the interpretation of the TRIPs Agreement attached as Annex 1C to the Agreement establishing the World Trade Organization. The question concerns the trade-mark rights owned by Hermès, in the light of the TRIPs Agreement – especially the Article 50(6) of the TRIPs Agreement. It shall be recalled the principle of the shared competence in terms of intellectual property rights between the MS and the EC, as admitted by the Court in the Opinion 1/94.

As the Court further evaluates, the WTO was concluded by the Community and ratified by the MS without allocating them any obligations. According to Court the TRIPs Agreement in its Article 50 (1) requests the judicial authorities to adopt provisional measures to protect interest of the proprietors of the trade-marks and lays down the provisional measures for the application of these measures. These are also entailed in the regulation on the Community trade mark.

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<sup>1295</sup>T.MYLLY, *Constitutional Functions of the EU's Intellectual Property Treaties* in J.DREXLER, H.G.RUSE-KHAN, S.NADDE-PHLIX, *EU bilateral trade agreements and intellectual property : for better or worse?*, Berlin, 2013, p.255.

<sup>1296</sup>T.PERISIN, *Balancing sovereignty with the free movement of goods in the EU and the WTO – non-peculiar restrictions on the free movement of goods* in *Croatian Yearbook of European Law and Politics*, Volume 1, 2005, p.2.

The Court declared the admissible the interpretation in which the Court decided that the provisional measures under Community shall be interpreted as much as possible in the light of the TRIPs Agreement.<sup>1297</sup>

As reference to the actual case the Court decided that the provision of the Article 50 applies to Community as well as national trade marks.<sup>1298</sup>

It might be agreed with Eeckhout saying that the ECJ decided to rule over the whole subject-matter of the TRIPs Agreement, including the exclusive and those non-exclusive competences.<sup>1299</sup>

The Court insisted on the fact that WTO rules are to be interpreted in the consistent way, by virtue which the WTO rules are to be interpreted in accordance and in the light with the EC obligations.<sup>1300</sup> This stance of the Court was expressed as follows: *“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 ... in the light of the wording and purpose of Article 50 TRIPs Agreement.”*<sup>1301</sup>

### 7.3.5 ECJ Judgment *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV*

The indirect effects of the TRIPs Agreement as part of the WTO law were further elaborated by the judgment Dior.

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<sup>1297</sup>ECJ judgment, 16 June 1998, *Hermès International (a partnership limited by shares) v. FHT Marketing Choice BV*, case C-53/96 [1998] ECR, p. I-3603, para 28.

<sup>1298</sup>ECJ judgment, 16 June 1998, *Hermès International (a partnership limited by shares) v. FHT Marketing Choice BV*, case C-53/96 [1998] ECR, p. I-3603, para 32.

<sup>1299</sup>P.EECKHOUT, *External relations of the European Union: legal and constitutional foundations*, Oxford, 2004, p.240.

<sup>1300</sup>A.TANCREDI, *EC Practice in the WTO: How Wide is the ‘Scope for Manoeuvre’?* in *European Journal of International Law*, Volume 15, Number 5, 2004, p.940.

<sup>1301</sup>ECJ judgment, 16 June 1998, *Hermès International (a partnership limited by shares) v FHT Marketing Choice BV*, case C-53/96 [1998] ECR, p. I-3603, para 32.

In the Dior case the ECJ decided on the applicability of the Article 50 TRIPs Agreement in regard to other situation as the trade-mark law. The Court repeated the standard requirement for the direct effect of the provision of the international agreement and confirmed that the TRIPs Agreement does not have the direct effect.<sup>1302</sup> Subsequently, the Court confirmed that the national provisions shall be as much as possible interpreted in the light, wording and purpose of the Article 50 of the TRIPs Agreement. However, the Court précised that the EC did not legislate in the field of the protection of the intellectual property rights and the measures for this purpose which fall outside of the scope of the Community law.

However, in the lack of the competences of the Community law the Court stated that: *“Community law neither requires nor forbids that the legal order of a MS 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.”*<sup>1303</sup>

As Wessel comments, the Court in principle did not precluded from interpreting the mixed agreements or from defining the obligations of the Community to which may come.<sup>1304</sup> Thus it cannot be fully agreed that the competences do not play any role in the decision-making procedure as some authors state,<sup>1305</sup> since the Court presented some difference in regard to the competences, however, subjected them to some precedent conditions.

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<sup>1302</sup>ECJ judgment, 14 December 2000, Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV, joined cases C-300/98 and C-392/98 [2000] ECR, p. I-11307, para 44.

<sup>1303</sup>ECJ judgment, 14 December 2000, Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v. Wilhelm Layher GmbH & Co. KG and Layher BV, joined cases C-300/98 and C-392/98 [2000] ECR, p. I-11307, para 48.

<sup>1304</sup>R.A.WESSEL, *Cross-pillar Mixity: Combining Competences in the Conclusion of EU International Agreements* in C.HILLION, P.KOUTRAKOS, R.A.WESSEL, *Cross-Pillar Mixity: Combining Competences in the Conclusion of EU International Agreements*, Oxford, 2010, p.47.

<sup>1305</sup>B.HOFSTÖTTER, *Can she excuse my wrongs? The European Court of Justice and international courts and tribunal in Croatian Yearbook of European Law and Policy*, Volume 3, Number 3, 2007, p.412.

### 7.3.6 ECJ Judgments *Biret International v. Council*

As it was indicated above, one of the key bodies of the WTO is the DSB which overcame significant changes in regard to the new DSM. The new DSM was largely analysed in the previous chapter. As the main innovation in regard to the new DSM may be mentioned the fact the DSU in its Article 23 explicitly prohibits the use of alternative methods as it stipulates the DSU. The dispute settlement system has thus obligatory character which is open to any member and no member can escape from its jurisdiction.

The question at stake was which effects do the DSB decision have in the legal order of the EC/EU. This question was answered by the ECJ in the case *Biret*.<sup>1306</sup> As Boni states, the key question within the judgment *Biret* was clearly concerning the effects of the DSB in the legal order of the EC.<sup>1307</sup>

The company *Biret* claimed the damage recovery caused by the adoption of an act of secondary law, contradictory to the decision of the DSB of the WTO. Many scholars, as e.g. Griller hoped that in this case the ECJ will authorize the recovery of the damages under the Article 340 (2) TEU as the result of non-contractual responsibility of the Community, as resulting from express violation of the WTO, as determined by the WTO body – DSB.<sup>1308</sup>

In the view of Mohammad and Nsour, the lack of direct effect of WTO law in the EC's legal system led inevitable to the investigation of the consequences for the EC, if it does not implement WTO panel decision.<sup>1309</sup>

According to van den Hende, the *Biret* judgement (together with *Petrotub*, *Biotechnologies* and *Kloosterboer*) belongs to the category of cases in which the

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<sup>1306</sup>ECJ judgment, 30 September 2003, C-93/02 P - *Biret International v. Council*, case C-93/02 P [2003] ECR, p.I-10497, ECJ judgement, 30 September 2003, case C-94/02 P [2003] ECR, p. I-10565.

<sup>1307</sup>D.BONI, *Accordi OMC, norme comunitarie e tutela giurisdizionale*, Milano, 2008, p.253.

<sup>1308</sup>S.GRILLER, *Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/96, Portugal v. Council* in *Journal of International Economic Law*, Volume 3, Issue 3, 2000, p.472.

<sup>1309</sup>M.F.A.NSOUR, *Rethinking the world trade order: towards a better legal understanding of the role of regionalism in the multilateral trade regime*, Leiden, 2010, p.193.



ECJ in fact reviews the measures in the light of WTO but without explicit reference to Nakajima doctrine, none the less the Court mentions the wording *'Community's intention to comply.'*<sup>1310</sup> Completing the introductory notes, the DSB decision may represent a source from which can be derived the direct applicability. However, it is habitually known fact that the WTO law itself does not contain any explicit reference to direct effect.<sup>1311</sup>

The GA Alber before the judgment posed rather provocative statement as to the length of the compliance within which there were not adopted the compliance measures: *"It seems unfair to deny a citizen a right to claim damages where the Community legislator, by failing to act, maintains a state of affairs that is contrary to WTO law more than four years after the expiry of the period allowed to comply...and it continues to reduce the citizen's fundamental rights."*<sup>1312</sup>

As the Court decided, in regard to the liability of the Community, there must be fulfilled the conditions for that. Among those can be mentioned the illegality of the conduct of the Community institutions, actual damage and the existence of the causal link. The Court further mentions the known fact that the WTO Agreements in principle do not belong among those rules in the light of which the ECJ reviews the legality of the measures of the Community institutions, while recognizing the exceptions to this rule – the cases Nakajima and Fediol.<sup>1313</sup>

The Court recalled that for the compliance with the WTO ruling, it is needed for the implementation of the DSB decision. Within the implementation period any review would render the DSB decision ineffective<sup>1314</sup>. Thus, the Court founded the argumentation in favour of the direct effect of the DSB decision

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<sup>1310</sup>L.van den HENDE, *The EC as a Collective Member of the WTO: What role for the European Courts?* in K.BYTTEBIER, K.van der BORGHT, *WTO obligations and opportunities: challenges of implementation*, London, 2007, p. 268.

<sup>1311</sup>S.HELD, *Die Haftung der EG für die Verletzung von WTO Recht*, Tübingen, 2006, p.109.

<sup>1312</sup>Opinion GA Alber, 15 May 2003, *Biret and Cie v Council*, case C-94/02 P [2003] ECR, p. I-10565, para 110.

<sup>1313</sup>ECJ judgment, 30 September 2003, C-93/02 P - *Biret International v. Council*, case C-93/02 P [2003] ECR, p.I-10497, para 51-53.

<sup>1314</sup>ECJ judgment, 30 September 2003, C-93/02 P - *Biret International v. Council*, case C-93/02 P [2003] ECR, p.I-10497, para 61-62.

within the implementation argumentation unfounded. However, the Court avoided answering the question whether the DSB decisions can have direct effect.

### 7.3.7 ECJ Judgment *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau*

Another important judgment is the decision *Van Parys*, where the ECJ declared that the invalidity of the legal acts of the EC contradictory to the Treaties of the WTO cannot be invoked, even if the contradiction is determined by the DSB.

Within the *Parys* judgment was at stake the interpretation of the Council regulation on the organization of the market with the bananas 404/93 adopted 13 February 1993 on the common organisation of the market in bananas in the light of the Articles I and XIII GATT. Since there Belgium authorities rejected to grant the import license to the company *van Parys*.

However, the regulation was subject to WTO dispute settlement procedure within which was decided that the regulation is contrary to the WTO law and was set up 15 months period for the implementation of the DSM decision.

Thus, the fundamental question of the procedure was, whether the WTO agreements give to the citizens of the EC right to rely on those agreements in the legal proceedings challenging the Community legislation where the DSB decided that those EC legislation was incompatible with WTO rules.<sup>1315</sup> The ECJ also in this case repeated the standard case-law, reluctant to the direct effect of the WTO law.

In regard to the DSB decision, the Court states that the DSB: “[...] *did not intend to assume a particular obligation in the context of the WTO, capable of justifying and exemption of relying on WTO before the Community Courts and enabling the*

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<sup>1315</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 38.

*Community Courts to exercise judicial review of the relevant Community provisions in the light of those rules.*<sup>1316</sup>

As further arguments mentioned by the Court are that the WTO DSM is still considerably depending upon the negotiations between the parties,<sup>1317</sup> within which is one of the principal purposes of the DSM the withdrawal of the unlawful measure.<sup>1318</sup>

The Court admitted that the DSM presumes also compensations and suspension of the concessions in case of the non-compliance with the ruling, if it is not complied with reasonable time, however, if the member concerned fails to enforce the recommendations and decisions, it is possible to enter negotiations and upon specific time-periods to enforce these rulings.<sup>1319</sup>

The further argument is that the inconsistent measure can stay in power, till it is not removed, or parties find a mutually satisfactory solution. The Court further mentions that, if no agreement is reached in terms of the compatibility of the measures to be taken, the DSB understanding provides the possibility of recourse, including the possibility to reach a negotiated solution.<sup>1320</sup>

As the Court concludes, the requirement to refrain from the domestic law, inconsistent with the WTO agreements would have for consequence to deprive the Contracting Parties from the possibility to reach a negotiated settlement.<sup>1321</sup>

Upon that the Court summarized the efforts of the EC to comply with the obligations as those arose from the DSB decision. However, as the Court recalls

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<sup>1316</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 41.

<sup>1317</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 42.

<sup>1318</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 43.

<sup>1319</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 45.

<sup>1320</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 47.

<sup>1321</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 48.

the merely expiration of the time limit does not mean that the Community has exhausted all possible means for the conformity of the decision of DSB.<sup>1322</sup>

As the Court further states, that Community courts are responsible for the compliance with the WTO law and taking into account that the major trade partners do not recognize the direct effect. Thus, granting of the direct effect would cause the abnormality in the application of the WTO rules.<sup>1323</sup> Thus, as the Court states, it cannot be plead before the Court that the Community legislation is not compatible with the WTO rules, even when the DSB stated that this legislation is incompatible with those rules.<sup>1324</sup>

The judgment has raised much attention. As to GA Tizzano dealing with the case as the first one, recalled the Nakajima principle as the result of the fact that the Community regime was amended after the DSB decision and thus the Community was obliged to implement a particular obligation arising from the WTO law, recalling thus Nakajima principle.<sup>1325</sup>

As to Lavranos states, by the judgment the ECJ shut the door for the possibility for the real possibility of invoking WTO law before the national and European courts.<sup>1326</sup> It may be agreed also with di Giani and Antonini saying that the case-law of the ECJ on non-recognition of the direct effect in the situations when there was a ruling of the WTO on non-validity of the EU measure and even the reasonable period for the implementation expired means that there is still a

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<sup>1322</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 51.

<sup>1323</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 53.

<sup>1324</sup>ECJ judgment, 1 March 2005, *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau*, case C-377/02 [2005] ECR, p. I-1465, para 54.

<sup>1325</sup>Opinion GA Tesouro, 18 November 2004, case C-377/02, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR, p.I-1465, para 89 ff.

<sup>1326</sup>N.LAVRANOS, *The Chiquita and Van Parys Judgments: An Exception to the Rule of Law Case T-19/01, Chiquita, judgment of 3.2.2005, case C-377/02, Van Parys, judgment of 1.3.2005 in Legal Issues of Economic Integration*, Volume 32, Number 4, 2005, p.456.

presumption that there shall be reached a mutually acceptable solution whereby the DSB decision can be satisfied.<sup>1327</sup>

Not interesting is also the opinion of De Mey, asking whether the non-implementation of the WTO-specific obligation as arising from the DSB decision is not violation of the Nakajima principle.<sup>1328</sup> The Van Parys is without any doubts in no way a judgment which brought uncertainty on the effects of the WTO agreements and DSB decision in the EC law.<sup>1329</sup> Yet, the reluctance of the ECJ remained further confirmed also confirmed by the ECJ also in regard to the DSB decisions.

### 7.3.8 ECJ Judgments *Technologies v Council and Commission and Fedon & Figli and Others v. Council and Commission*

The next question needed to be answered within the question of the responsibility of for the non-application of the WTO law, was the question of the liability of the EU for the non-compliance for the WTO non-compliance of the DSB decisions.

The judgments are the result of the appeals to the decisions of the CFI in case seeking the compensation for the damage suffered to the appellants in the form of the increased of customs duty which the DSB authorized to impose. More concretely, the DSB authorized the USA to levy the customs on imports of EU products as a consequence of the finding that the DSB came to the conclusion that the Community regime of banana imports of bananas was incompatible with the agreements and understandings annexed to the Agreements establishing the WTO.

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<sup>1327</sup>F.Di GIANNI, R.ANTONINI, DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be More Flexible when the Flexibility of the WTO System has Come to an End? in *Journal of World Trade*, Volume 40, Number 4, 2006, p.790.

<sup>1328</sup>D.de MEY, *The Effect of WTO Dispute Settlement Rulings in the EC Legal Order: Reviewing Van Parys v Belgische Interventie- en Restitutiebureau (C-377/02)* in *German Law Journal*, Volume 6, Number 6, 2005, p.1032.

<sup>1329</sup>P.EGLI, *Léon Van Parys NV v. Belgisch Interventie- en Restitutiebureau (BIRB). Case C-377/02* in *American Journal of International Law*, Volume 100, Number 2, p.454.

As to the facts, in February 1993 the Council adopted the regulation (EEC) 404/93 on the common organisation of the market in bananas within which there was a special part devoted to the trade with third countries and containing preferential provisions for bananas originating from the African, Caribbean and Pacific States.<sup>1330</sup>

The EEC regulation was subject to procedure under the AB which founded that certain elements of the trading system were incompatible with the obligations of the Community under the WTO Agreements and recommended that the DSB requested the Community to bring the regime in conformity with WTO obligations.<sup>1331</sup>

The arbitrators of the AB founded several violations of the WTO law and alleged several violations governing the import of bananas as contrary to the WTO law. The AB and set the level of nullification or impairment to the total amount suffered by the USA at 191,4 milion USD per year, and consequently authorized the USA to levy customs duty up to 191,4 milion USD per year on imports originating in the Community.<sup>1332</sup> In the practice, the USA imposed an import duty on various products, sometimes even 100 per cent ad valorem.<sup>1333</sup> In reaction the EU adopted a new regulation 216/2001 providing for the African, Caribbean and Pacific group of countries proper conditions of competition, application to imports of bananas within which the Commission shall be authorized to open

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<sup>1330</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 13.

<sup>1331</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 15.

<sup>1332</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 23.

<sup>1333</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 24.

negotiations with supplier countries to achieve a negotiated allocation of tariff quotas.<sup>1334</sup> The Commission and consequently concluded with the USA the Memorandum of Understanding.<sup>1335</sup> After all, the Commission's regulation 896/2001 laid down the arrangements for importing bananas into the Community and persuaded the USA to suspend the increased customs duty to the initial rates.<sup>1336</sup>

The initial dispute arose from the activities of the company FIAMM related to the stationary batteries and the company Fedon having the core business in the sector of associated accessories of the products which are normally carried in the pocket.<sup>1337</sup> Both companies FIAMM and Fedon belonged to the group of six companies which filed an action against the EC for holding it responsible for the violation of the WTO law.

Both subjects considered the Community liable for the damage caused to them as a result of the fact that their products were subjects to the increased custom duties levied by the USA.<sup>1338</sup> The claim of FIAMM and Fedon were based on the non-contractual liability of the Community as a result of unlawful conduct of institutions. This was alleged by the fact that the Council and the Commission failed to adopt amendments to the Community regime governing the import of bananas and to bring into conformity with the WTO obligations to adopt the

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<sup>1334</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR p.I-6513, para 26.

<sup>1335</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 27.

<sup>1336</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 28.

<sup>1337</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 29.

<sup>1338</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 30.

suitable amendments to the Community regime governing the regime of import of bananas. This should have been done within the time-limit as set by the DSB, in accordance with the principle of *'pacta sunt servanda'*, protection of legitimate expectation, legal certainty, rights to property, pursuit of an economic activity and proper administration.

The ECJ declared the review of the judgment of the CFI admissible.<sup>1339</sup> In investigation of the liability of the Community, it shall be according to the Court taken into account the international origin of the provision at stake. Doing so, the Court recalls the principles of the granting of direct effect according to principle Kupferberg judgment, Portugal v. Council and the general spirit, scheme and terms of the international agreement.

Thus, it remained up to the Court to determine, if the individual may invoke the rights from international agreements. As the result of this procedure, the Court examines also the validity of the secondary legislation in the light of the international agreement when the nature, broad logic does not preclude it and in addition when the provision is unconditional and sufficiently precise.<sup>1340</sup>

Upon the investigation of these arguments, the Court decided that the precise judicial effects of an act, does not have an impact on the nature of the right to be invoked and as to the effects this shall produce.<sup>1341</sup> However, as a matter of

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<sup>1339</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P, [2008] ECR, p.I-6513, para 90 and 96.

<sup>1340</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P, [2008] ECR, p.I-6513, para 108-110.

<sup>1341</sup>G.L.GOGA, *The Sources of Administrative Law and their Role in Consecrating the Administrative Space of European Union in European Integration - Realities and Perspectives (7th edition of international conference)*, Galati, 2012, p.971.



principle, it seems clear that the Court despite small changes in the evaluation does not want to change its stance to the direct effect in regard to the WTO law.<sup>1342</sup>

The Court repeated its key aspects of the negative stance to the direct effects also in terms of the DSB decisions. As to the nature of the DSB decision, the Court ruled that the DSB decision as the matter of the principle cannot be distinguished to the WTO obligations.<sup>1343</sup> According to the Court further, the reason for that are the flexibility of the WTO obligations and the possibility of the discretion given to the Community institutions, the scope for negotiations vis-à-vis the trade partners and flexibility to respond to the rulings or recommendation resulting from WTO rules.<sup>1344</sup> In the Court's view, the DSB finding of infringement of an obligation cannot be considered as having the direct effect.<sup>1345</sup> Thus, the Court rejected to direct effect to the WTO DSB as not much different to the WTO obligations.

Following question, that needed to be investigated are the conditions for the liability of the Community. As first condition, the Court put an accent on the fact that it must be investigated is the question whether the rule of law is intended to confer rights on individuals.<sup>1346</sup>

In terms of the strict perception in terms of the legislative activities, there are needed to take into consideration two aspects. The first aspect is relates to the legislative measures which cannot be hindered by action for damages whenever

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<sup>1342</sup>C.WOHLFAHRT, *Veränderungen des Lissabon-Vertrages im Hinblick auf die Doktrin der unmittelbaren Wirkung in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Volume 70, Number 3, 2010, p.536.

<sup>1343</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 128.

<sup>1344</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P, [2008] ECR, p.I-6513, para 130.

<sup>1345</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 139.

<sup>1346</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 173.

the general interest of the legislative measures are required to affect individual interests. Secondly, in the context of wide implementation discretion, the Community cannot be liable for legislative activities, unless it is not proved that the institution has manifestly and gravely violates the rights on the exercise of its powers.<sup>1347</sup>

The Court concluded that no liability exists under the Community law for the conduct falling in the sphere of legislative competence, if the WTO agreement cannot be invoked before the Community court<sup>1348</sup>. Thus the Court clearly held that there is no liability of the Community for legislative action of the Community<sup>1349</sup>. In *Turks* view, the Court rule out the liability of the Community for the legislative action or inaction, however, left the possibility for the review of the administrative conduct according to the Article 288 (2).<sup>1350</sup>

The Court admits that as a matter of principle the failure of the Community institutions may include the acting of the Community institutions.<sup>1351</sup> Moreover, the Court recalled that the economic operators must be aware of the fact that economic position of the economic actors may change over the time.<sup>1352</sup> However, it called implicitly upon the EC legislation to provide adequate instruments for the affected parties in case of retaliation,<sup>1353</sup> saying that as follows: *“It follows that a*

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<sup>1347</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 174.

<sup>1348</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 176.

<sup>1349</sup>G.MOENS, J.TRONE, *Commercial Law of the European Union*, Dordrecht , 2010, p.404.

<sup>1350</sup>A.TÜRK, *Judicial Review in EU Law*, Cheltenham, 2008, p.280.

<sup>1351</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 178.

<sup>1352</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P [2008] ECR, p.I-6513, para 178.

<sup>1353</sup>M.DANI, *Remedying European Legal Pluralism: The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders in European Journal of International Law*, Volume 21, Number 2, p.316.

*Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community.”*<sup>1354</sup>

In reference to this case, according to Živinčjak, the ECJ excluded for the only hope for traders to obtain compensation – non-contractual liability in absence of unlawful conduct and in the same time not willing to change its posture<sup>1355</sup>.

Within this, the judgment FIAMM/Fedon shall be considered as the ruling out the possibility for the by sides facing the non-compliance for the violation of the WTO law.<sup>1356</sup>

The Court stressed that the current legal regime does not provide the regime enabling the liability of the Community for the legislative conduct for its legislative conduct. Thus, an action in regard to the situation to be complied with the WTO agreements in legislative way is not of such kind that it could be relied before the Community courts.<sup>1357</sup>

## **7.4 MERCOSUR as a System**

### *7.4.1 History and Nature of MERCOSUR*

Without going beyond the necessary, it appears suitable to recall the fundamental features of the MERCOSUR system. MERCOSUR as an international

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<sup>1354</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P, ECR [2008], p.I-6513, para 184.

<sup>1355</sup>I.ŽIVIČNJAK, *Effect of WTO law in the EU and individual's right to damages caused by a breach of WTO law in Croatian Journal of European Law and Policy*, Volume 8, 2012, p.550.

<sup>1356</sup>A.ALEMANNI, *European Court Rejects Damages Claim from Innocent Bystanders in the EU-US 'Banana War'* in *American Society of International Law Insight*, Volume 12, Number 21, 2008, p.1.

<sup>1357</sup>ECJ judgment, 9 September 2008, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC Giorgio Fedon & Figli SpA and Fedon America, Inc. V. Council of the European Union and Commission of the European Communities*, joined cases C-120/06 P and C-121/06 P, ECR [2008], p.I-6513, para 186.

organization was not an act of an accident. The Latin-American integrational processes started to intensify, especially, in the sixties, where the Latinoamerican state created the free trade area and the Laplata pact in 1969, later replaced by the Latin American Integration Association, associating 13 Latin American states with an aim to reach the common market. As Mecham states, the integrational process is the outcome of the historical process and the adoption of the contemporary political climate.<sup>1358</sup>

The history of the MERCOSUR itself (or in Brazilian Portuguese MERCOSUL) dates back directly to the year 1985 when the process of the development of the bilateral integrational process between Argentina and Brazil started and the existence of the CCT concluded among them was lanced.<sup>1359</sup> As the outcome of the negotiations, there was established MERCOSUR having the four founding members – Argentina, Brazil, Paraguay, and Uruguay, entering in power from November, 29, 1991. As Pereira states: *“From the beginning we are experiencing of the creation of a new legal entity, to which is transferred the right to direct the relations between the four states of the MERCOSUR falling under the scope of the integration.”*<sup>1360</sup>

The funding Treaty, known under the notion Treaty of Asunción, expresses the intention to create a common market till the end of the year 1994. As the Treaty provides, the members benefited from the free trade area created among and towards non-MS. Moreover, the MS concluded free trade agreements with Bolivia and Chile.<sup>1361</sup> To be precise, the MERCOSUR resulted as the gradual movement from the sectorial approach to the common market.<sup>1362</sup>

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<sup>1358</sup>M.MECHAM, *Mercosur: A Failing Development Project?* in *International Affairs*, Volume 79, Issue 2, 2003, p.376.

<sup>1359</sup>H.JAGUARIBE, *Problemas e perspectivas do Mercosul* in M.BASSO, *Mercosul--Mercosur. Estudos em Homenagem a Fernando Henrique Cardoso*, São Paulo, 2007, p.10.

<sup>1360</sup>A.C.P.PEREIRA, *Direito institucional e material do MERCOSUL*, Rio de Janeiro, 2005, p.1.

<sup>1361</sup>F.DOMÍNGUEZ, M.A.GUEDES de OLIVEIRA, *Mercosur: Between Integration and Democracy*, Oxford, 2004, p.11.

<sup>1362</sup>S.GRATIUS, *MERCOSUR y NAFTA: instituciones y mecanismos de decisión en procesos de integración asimétricos*, Madrid, 2008, p.16.

Upon that time, the conditions in the post transition period are set forth by the Protocol of Ouro Preto, providing means for implementation of the MERCOSUR rules in the post transitional period. These two fundamental treaties alongside the 3 protocols<sup>1363</sup> constitute the *'institutional skeleton and juridical backbone of MERCOSUR.'*<sup>1364</sup>

Thus, as Fuders states: *"The MERCOSUR is ambitious economic integration project between Argentina, Brazil, Paraguay and Uruguay (since December 2012 Bolivia as well) aimed as its name says the creation of common market. Through the equalization of the competition conditions on the markets shall be achieved the economic growth, efficiency and the competitiveness with the observation of the social justice."*<sup>1365</sup>

Thus, the main objective of the Agreement was to create the zone of the free trade and the customs Union till January 1, 1995. The *'transition period'* dealt with the subsequent liberalization of the mutual trade and coordination of the macroeconomic and sectorial policy, however granting significant exceptions to the states.

The MERCOSUR did not leave apart the relations with third subject. In 1995 came to the conclusion of the Frame agreement on cooperation between EC, shortly afterwards became associate members Bolivia and Chile, concluded free trade agreement with Andean Pact (Andean Community of Nations) with an aim to liberalize the commercial exchange.

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<sup>1363</sup>Involving Protocol of Brasilia for the Solution of Controversies, 17 December 1991, Ushuaia Protocol on Democratic Commitment in the MERCOSUR, the Republic of Bolivia and the Republic of Chile, opened for signature 24 July 1998, Olivos Protocol for the Settlement of Disputes in MERCOSUR, 18 February 2002.

<sup>1364</sup>A.MALAMUD, *Theories of Regional Integration and the Origins of MERCOSUR* in M.TOSCANO FRANCA, L.LIXINSKI, M.B.OLMOS GIUPPONI, *The law of MERCOSUR*, Oxford, 2010, p.25.

<sup>1365</sup>F.FUDERS, *Die Wirtschaftsverfassung des MERCOSUR : eine rechtsvergleichende Darstellung unter besonderer Berücksichtigung des Rechts der Europäischen Union*, Berlin, 2008, p.34.

#### 7.4.2 Organizational Structure

The MERCOSUR's organizational structure was completed by the Protocol of Ouro Preto and further deepened in terms of the framework for the dispute settlement.

The key decision making body of the MERCOSUR is the CMC, composed by the ministers of foreign affairs and finance of the Members.<sup>1366</sup> The meetings of the Council are held in two formations. First part is held on the ministerial level, second one on the level of the presidents. It observes the fulfilment of the treaties and the main aims contained in the treaties. The Council may delegate its competences to the GCM. Thus, the CMC decides on the affairs of bigger importance as establishing of principal political aims and of the key modus operandi of the MERCOSUR.<sup>1367</sup>

Another institution is the CMG as an executive organ. It is considered premier institution of MERCOSUR. It is an institution composed by Foreign Relations and Economic ministers.<sup>1368</sup> Thus, the Group is the most powerful institution within MERCOSUR which is responsible for the political leadership of the MERCOSUR.<sup>1369</sup>

The CMG has several functions, including the adoption of the measures necessary to implement the measures for enforcing the Group's decision, monitoring of the compliance with the existing Treaties, approving of the budget and any financial agreements, negotiating and signing of the agreements with third states and international organizations.<sup>1370</sup>

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<sup>1366</sup>Article 3-4 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1367</sup>Article 8 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1368</sup>Article 11 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1369</sup>M.ROWAT, M.LUBRANO, R.PORRATA, *Competition Policy and MERCOSUR*, Washington, 1997, p.14.

<sup>1370</sup>Article 14 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

The GMC is the surrounded by various consultative and negotiation groups, containing relevant subgroups having different subjects and fields as groups for technical rules, transport, financial affairs, industry etc. There can be also established many specialized committees, ad hoc groups.

CPP is the representative organ composed by the MS of the MERCOSUR. It is built-up by parliamentary representatives executing its mandate. The organ has consultative powers and acts via declarations, provisions and recommendations.<sup>1371</sup>

Another institution is the CCM is similar to the GCM. It is composed by four and four representatives from any MS. It is responsible for the MERCOSUR CCP and for the measures for the dispute settlement and consultations.<sup>1372</sup>

The administrative tasks of the MERCOSUR are the main task of the administrative secretary of MERCOSUR, subordinated to the GCM.<sup>1373</sup>

#### 7.4.3 *Legal System of MERCUSUR*

The Treaty of Asunción provides among its aims the creation of the common market. Within this concept, clearly stipulates the ambitious aims among which are formulated free movement of goods, services and factors of production between countries through inter alia, elimination of customs duties and non-tariff restrictions on the movement of goods and any other equivalent measures.

The MERCOSUR countries established a CET and decided on adoption of a common trade tariffs in relations to third states or group of states and co-ordinating of the positions in regional economic and commercial forums including foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange,

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<sup>1371</sup>Article 22 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1372</sup>Article 16 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1373</sup>Article 31-32 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

capital, services, customs, transport and other areas.<sup>1374</sup> Furthermore, the MERCOSUR disposes by own legal personality.<sup>1375</sup>

According to the doctrine, MERCOSUR, is perceived as *'a scheme of economic integration in the South America arising out of the political, economic and legal will of four states- Federal Republic of Brazil, Argentina, Paraguay and Uruguay. It is an economic bloc promoting the exchange and the movement of the persons, capital between the MS and the advance with the major political and cultural integration between the members and associates.'*<sup>1376</sup>

The integrational model of the integration in the case of MERCOSUR in economic terms can be actually in 3 steps:

The first phase which was achieved includes the free movement of products and elimination of any tariff and duties among the MS. Second, customs union was reached by the adoption of the Decision 7/94 on the adoption of the CET.<sup>1377</sup> Final phase that shall be according to the MERCOSUR reached is the free movement of the labour and capital.<sup>1378</sup> It must be concluded; recalling the Balassa's model that the MERCOSUR did not attained actually, higher level of integration than the customs union.

From the legal point of view, there can be distinguished between the original norms of MERCOSUR which emanate from the Article 41 of the Protocol of Ouro Preto, involving into the original ones the Treaty of Asunción, its protocols and the additional or supplementary instruments and the agreements

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<sup>1374</sup>Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, 26 March, 1991.

<sup>1375</sup>Article 31 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1376</sup>M.AVENDAÑO BOLÍVAR, I.F.VILLARREAL, *Viabilidad de un ordinamiento jurídico supranacional entre los estados partes del MERCOSUR* in *Rivista de Ciencias Jurídicas de la Universidad de Rafael Urdaneta*, Volume IV, Number 2, 2010, p.17.

<sup>1377</sup>Mercado Común del Sur, MERCOSUR/CMC/DEC. N. 07/94: Arancel externo comun.

<sup>1378</sup>United Nations Conference on Trade and Development, *Dispute Settlement – Regional approaches*, 6.2 MERCOSUR, New York, 2003, p.11.



concluded within the framework of the Treaty of Asunción.<sup>1379</sup> Thus, the sources of primary law are governed by the regime of the international law.

The secondary legislation is enumerated in the third section of the same Article providing as secondary legislation - CCM decisions, the Resolutions of the CMG and the Directives of the MERCOSUR Trade Commission adopted since the entry into force of the Treaty of Asunción.<sup>1380</sup>

The secondary legislation is specific in the terms of its incorporation into national legal orders of the MS where the Protocol states that these *'when necessary, must be incorporated in the domestic legal system in the domestic legal system in accordance with the procedures provided for in each country's legislation.'*<sup>1381</sup> As Steger states, MERCOSUR law thus remains the law depending on the will of the MS, to incorporate the rules of MERCOSUR into the national legal order and thus has similar nature as the WTO law.<sup>1382</sup>

Analogous to the EU, the MERCOSUR, as an international organization does not contain any hierarchy of the legal acts of the MERCOSUR.<sup>1383</sup> However, unlike the EU, all decisions within MERCOSUR are to be adopted by the requirement of unanimity as the as standard decision-making procedure.<sup>1384</sup>

Moreover, within MERCOSUR was not created the Community law in sense of the EU law. Thus, it cannot be spoken about direct effect in sense of the EU law, however there is a requirement of the transformation of the important decisions in the internal legal orders of the MERCOSUR MS. Thus, it cannot be

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<sup>1379</sup> Article 41 (1) and (2) Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1380</sup> Article 41 (3) Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1381</sup> Article 42 Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR Protocol of Ouro Preto, 17 December 1994.

<sup>1382</sup> Y.BONZON, *Options for Public Participation in the WTO: Experience from Regional Trade Agreements* in D.P.STEGER, *Redesigning the World Trade Organization for the twenty-first century*, Waterloo, 2009, p.292.

<sup>1383</sup> M.V.PERRINO, *La supremacía del ordinamiento jurídico de integración sobre las normas de derecho interno de los estados miembros*, *Unión Europea – MERCOSUR in Informe Integrar*, Number 77, 2013, p.12.

<sup>1384</sup> A.MALAMUD, *Theories of Regional Integration and the Origins of MERCOSUR* in M.TOSCANO FRANCA, L.LIXINSKI, M.B.OLMOS GIUPPONI, *The law of MERCOSUR*, Oxford, 2010, p.26.

spoken about full supremacy of the MERCOSUR international law. So, the positioning of the MERCOSUR law shall be investigated in the light of the basic principles as stipulated by the Treaty of Asunción agreement, having in mind the idea of the integration.

In conclusion to brief overview on the nature of the legal system of MERCOSUR, it can be stated that many elements of the MERCOSUR law have not been fully resolved till now, as the question of supremacy, however it is strong tendency to resolve them recently.<sup>1385</sup>

#### *7.4.4 Intersection Between MERCOSUR and WTO*

##### *7.4.4.1 AB Case Brazil – Measures Affecting Imports of Retreaded Tyres*

According to the rules in power, the dispute settlement system is regulated by the Protocol de Olivos, entering into power since the 1 January 2004.

MERCOSUR as a legal system was confronted with the nature of WTO law within the first case Brazil-Measures Affecting Imports of Retreated Tyres. The origins of the case date back to the year 1991 when Brazil adopted a piece of legislation, prohibiting the import of removable tyres to Brazil. Uruguay challenged the measures of Brazil before MERCOSUR Ad Hoc Arbitral Tribunal which declared such measure incompatible with the MERCOSUR legislation. On the basis of this decision, Brazil amended its legislation to comply with the ruling and for the MERCOSUR MS granted an import exemption.

Since the exemption was granted only to the MERCOSUR states, the legislation was challenged by EU before the Panel and subsequently before the AB. In summary, there were at stake not only adopted measures as such, but also the relation between the WTO and MERCOSUR, or as a matter of principle the relation between the 'world trade law' and RTA.

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<sup>1385</sup>J.BERGAMASCHINE MATA DIZ, *El Sistema de Internalización de normas en el Mercosur: la supranacionalidad plena y la vigencia simultánea in Ius et Praxis*, Volume 11, Number 2, 2005, p.227.

In the investigation the AB needed to rule on the import ban, since in its view, there was a need to contribute to the achievement of the objectives, such as the protection of public health or environmental objectives which could consist of qualitative reasoning based on a set of hypotheses that are to be tested and supported by the sufficient evidence.<sup>1386</sup> The AB however, admitted that the management of the retreaded tyres may be integral part of the scheme of the national strategy for the management of their processing. However, the import bans cannot be considered as the reasonable alternatives for such a strategy.<sup>1387</sup>

In terms of the possibility to restrict the access to the market in sense of the Article XX (b), there must be taken into account the contribution to the achievement of the measure's objective, and its trade restrictiveness. Thus, in this process shall be evaluated all alternatives taking into account those measures which are the least trade restrictive. Doing so, the choice of these measures shall be done upon an analysis of necessity and to the objective achievement of this objective.

As to the nature of the objective, the AB did not identify the violation of the import ban, on the basis of the protect human, animal and plant life or health.<sup>1388</sup> Further, the AB examined the MERCOSUR exception. As the AB stated to the exceptions according to the Article XX WTO, is to be applied in accordance with the principle of good faith and the line of equilibrium between the right of the Members to invoke the exception and on the other side, and the right of another Members under vary substantive provisions, in regard to the alternative to cancel out the other, distort and nullify the balance of rights and obligations.<sup>1389</sup>

According to AB was important to evaluate the possible discrimination between the MERCOSUR and non-MERCOSUR states within which is principal point the objective evaluation of the adopted measure.

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<sup>1386</sup>WT/DS332/AB/R, Brazil – measures affecting imports of retreaded tyres, 3 December 2007, para 150.

<sup>1387</sup>WT/DS332/AB/R, Brazil – measures affecting imports of retreaded tyres, 3 December 2007, para 174.

<sup>1388</sup>WT/DS332/AB/R, Brazil – measures affecting imports of retreaded tyres, 3 December 2007, para 174.

<sup>1389</sup>WT/DS332/AB/R, Brazil – measures affecting imports of retreaded tyres, 3 December 2007, para 224.

Second part of the judgment concerns the investigation of the decision of the MERCOSUR tribunal. Thus, the second part represents the investigation of the relation between the WTO norms v. RTA with regard to the deference to the RTA paid by the WTO. In particular, there is at stake the relation between the WTO and MERCOSUR law.<sup>1390</sup> Some scholars do not portray the RTA in the positive light, as having pernicious effect on the WTO negotiations impeding thus the negotiations under the umbrella of WTO.<sup>1391</sup>

Before going back to the details of the Retreated tyres case, it is necessary to recall the judgment of the MERCOSUR Tribunal, on the subsidies on the production and export of the pork meat.<sup>1392</sup>

As the MERCOSUR Tribunal decided, characterizing the relation WTO-MERCOSUR in the following way: *“On the broader level than the national one the international commercial relations by the rules of WTO, within which the granting of the subsidies for the export are stipulated by the Agreement on the subsidies. The rules of Latin American Integration Association were inserted into the core of WTO, in the more internally in the sphere the norms of the MERCOSUR. All these rules characterize and give the support to the process of the integration.”*<sup>1393</sup>

In the opinion the Tribunal paid respect to the WTO norms, as a clear reference point for the MERCOSUR norms which are to be understood as the concretization of the WTO norms.

Yet, the doctrinal perception and the practice of the WTO AB seemed to be univocal in terms of its stance towards RTA as MERCOSUR. However, the

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<sup>1390</sup>N.LAVRANOS, N.VIELLIARD, *Competing Jurisdictions Between MERCOSUR and WTO* in *The Law and Practice of International Courts and Tribunal*, Volume 7, 2008, p.226.

<sup>1391</sup>C.B.PICKER, *Regional Trade Agreements v.The WTO: A Proposal for Reform of Article XXIV to Counter this Institutional Threat* in *University of Pennsylvania Journal of International Economic Law*, Volume 26, 2005, p.301.

<sup>1392</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para entender en la reclamación de la República Argentina a la República Federativa del Brasil, sobre subsidios a la producción y exportación de carne de cerdo, 27 September 1999.

<sup>1393</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para entender en la reclamación de la República Argentina a la República Federativa del Brasil, sobre subsidios a la producción y exportación de carne de cerdo, 27 September 1999, para 57.

principle, as contained in this judgment seems to be univocal also in terms of the EU primary law which may be equally considered RTA (in regard to WTO) and giving precedence of the understanding of the WTO law as the constitutional law for the regulation of the world trade. However, the stance of the EU to WTO was analysed sufficiently as not going into this direction.

Now, it is time to turn back attention to the second part of the judgment of the original case.

As the AB recalled, the measures adopted by Brazil were adopted as the result of the proceeding before the MERCOSUR Tribunal which considered the import ban as restrictive measure under MERCOSUR law. Nonetheless, the AB did not consider the MERCOSUR arbitral tribunal decision as '*an acceptable rationale for the discrimination,*' because it goes even against its objective. The AB thus comes to the conclusion that this represents arbitrary or unjustifiable discrimination.<sup>1394</sup> The AB ruled that certain kind of the discrimination can be based on the justifiable grounds depending on the nature of the case when it is acceptable or defensible.<sup>1395</sup> The AB decided that the measures were held discriminatory.<sup>1396</sup>

Thus, the AB decided that the MERCOSUR exemption under the import ban is applied in the manner inconsistent with the GATT 1994 and thus, confirmed the fact that the exception is not justified under GATT 1994.<sup>1397</sup>

As Lavrandos states, the judgment in this case shall be considered having the same logic as the relation between the MS and the EEC, as it comes out of the case Enel and van Gend en Loos and thus came to the conclusion that tat the Brazil was obliged to bring the measures in compatibility with WTO law obligations,

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<sup>1394</sup>WT/DS332/AB/R, Brazil – measures affecting imports of retreaded tyres, 3 December 2007, para 228.

<sup>1395</sup>WT/DS332/AB/R, Brazil – measures affecting imports of retreaded tyres, 3 December 2007, para 232.

<sup>1396</sup>WT/DS332/AB/R, Brazil – measures affecting imports of retreaded tyres, 3 December 2007, para 233.

<sup>1397</sup>WT/DS332/AB/R, Brazil – measures affecting imports of retreaded tyres, 3 December 2007, para 252.

regardless, the judgment of the MERCOSUR tribunal.<sup>1398</sup> Second argument may be concluded that Brazil should have presented a defence in accordance on the GATT law, not the MERCOSUR one in order to justify properly the measure at stake<sup>1399</sup>

Acosta Pérez shares the same view that by this judgment brought friction between the existing regional commercial agreements and the system of WTO. The decision makes clear that no resolution of any international court may be found used as an excuse for non-fulfilment of the obligations of the WTO.<sup>1400</sup> In Petersmann's view, the AB refrained from 'judicial comity' vis-à-vis the Brazilian Court injunction and as well the MERCOSUR arbitral body allowing imports of retreated tyres under the MERCOSUR exception.<sup>1401</sup>

#### 7.4.4.2 *Case República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros*

The main point of the dispute in the second case was the controversy between Brazil and Argentina on the use of anti-dumping means against the exportation of the whole chickens coming from Brazil. This judgment is significant since it in the clearer way defines the relation between MERCOSUR and the WTO.

The Tribunal was obliged to give a response on the questions, related to the fact whether there are MERCOSUR norms which regulate exclusively the intra-MERCOSUR antidumping and which effect these have. If these are not contained in the MERCOSUR agreement which legal regime is applicable to them and which legal effects do these have.

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<sup>1398</sup>N.LAVRANOS, *The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals* in *Loyola of Los Angeles international & comparative law review*, Volume 30, Number 3, p. 275.

<sup>1399</sup>N.LAVRANOS, *The Brazilian Tyres case: A case-study of Multilevel Judicial Governance* in N.LAVRANOS (ed.), *Multilevel judicial governance between global and regional economic integration systems: institutional and substantive aspects*, EUI Working Papers, MWP 2009/41, Florence, 2009, p.19.

<sup>1400</sup>Y.ACOSTA PÉREZ, *Brasil — Neumáticos recauchutados*, *Informe del Órgano de Apelación* in *Revista de Derecho Económico Internacional*, Volume 1, Number 2, 2011, p.57.

<sup>1401</sup>E.U.PETERSMANN, *Administration of Justice in the World Trade Organization: Did the WTO Appellate Body Commit 'Grave Injustice'?* in *The Law and Practice of International Courts and Tribunals*, Volume 8, Number 3, 2009, p.350.

The basic presumption is that MERCOSUR is customs union, with tendency of the stronger liberalization of the commerce between the MS of MERCOSUR, with the elimination of the tariff and non-tariff restrictions and on the other hand, an entity which adopts the commercial policy towards the third marketplaces.

As the Ad Hoc Tribunal decided, all decisions in the institutional and economic framework have an aim to reflect these aspects.<sup>1402</sup> Furthermore, according to the Tribunal the MS of MERCOSUR shall realize the efforts to defend the domestic industry of the MERCOSUR against the third subjects which were internally subject to harmonization avoiding the separate application of the MECOSUR rules in every single MS of MERCOSUR,<sup>1403</sup> confirming thus the tendency towards the uniform application of the MERCOSUR law.

As to the response to the posed questions, the Tribunal mentions that there are several norms which concern the issue of dumping outside of MERCOSUR. As the Tribunal admits, these external sources may be illustrative in terms of the intentionality of the MS to be followed and do not represent any binding source of law and cannot be applied by the extension or by analogy to the regional commerce.<sup>1404</sup> The Ad Hoc Tribunal applied rather opposite view in comparison to the WTO AB in the Retreated Tyres case.

In further investigation, the Tribunal recognized the decision-making capacity of the MERCOSUR organs, which as the matter of fact excludes the direct applicability of the norms emanating from the MERCOSUR's legal order. This

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<sup>1402</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 13.

<sup>1403</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 14.

<sup>1404</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 111.

view is supported by requirement of incorporation of the MERCOSUR acts in the legal orders of the MS.<sup>1405</sup>

Yet, it shall be spoken about the simultaneous entry into power of the MERCOSUR norms, including the duty of the MS to adopt the necessary measures to make sure the completing of the MERCOSUR norms by their implementation to the national legal orders. According to Court no subject may substitute the MS in the incorporation into the national this legislation.<sup>1406</sup> The question whether or not to incorporate the norm into national order depends on every single MS. This shall consider the necessity to adopt the measures for the incorporation.<sup>1407</sup> This may be viewed as a specificity of the MERCOSUR system and further enforcement of its intergovernmental principles.

The Tribunal further states that the existence of the ratified norms in all the MS of MERCOSUR goes beyond the normative requirements of MERCOSUR law which disciplines the relations having the regional nature of the integration. The same statement view is valid for the WTO Agreement in terms of the similarity to the legislation from which cannot be derived no specificity of the regional integrational agreement.<sup>1408</sup> The very existence of the parallelism (between the legal regulation in WTO and MERCOSUR) is not sufficient to consider the norms of MERCOSUR to be considered the WTO piece of legislation.<sup>1409</sup>

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<sup>1405</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 114.

<sup>1406</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 117.

<sup>1407</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 119.

<sup>1408</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 127.

<sup>1409</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra



Even the implemented legislation is part of the national legal order, detached from the MERCOSUR system. However, the Tribunal admits the restricted approach in regard to the MERCOSUR's legal system. Thus, the reference to the WTO system is possible under the condition that the MERCOSUR law expressly refers to such a norm of WTO.

Doing so, the Tribunal referred to the case in which the decision of the CMC clearly referred to GATT provisions, CMC decision 10/94. Thus, the Court rejected to examine the normative of the MERCOSUR in the light of the WTO, namely the Anti-Dumping Agreement. Hence, the Tribunal rejected the applicability of the WTO norms as the norms of the MERCOSUR.<sup>1410</sup>

Yet, the CJ EU considers towards the WTO restrictive approach, since it constantly considers the GATT/WTO law system as not suitable the reference point in terms of invocation of the rights of individuals (unlike other international agreements), even shuns to recognise the responsibility for the implementation measures as adjudicated by the DSB. Accordingly, the CJ EU rejected to review the EU law via the provisions of the GATT/WTO law. Similar approach can be traced in the decisions of the MERCOSUR Tribunal which rejects invoke the provision of the WTO law, even in the similarity between the MERCOSUR and WTO law. However, in order to provide more objective information, there was only few decisions of the MERCOSUR Tribunal on this point and thus this question shall be clarified further.

However, as a general rule, the international law does not determine the way how to comply with the obligations arising from the international obligations, mainly how to implement them in the national legal order. Nonetheless, the AB

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la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 128.

<sup>1410</sup>Laudo del Tribunal Arbitral Ad Hoc del MERCOSUR constituido para decidir sobre la controversia entre la República Federativa de Brasil y la República Argentina sobre aplicación de medidas antidumping contra la exportación de pollos enteros, provenientes de Brasil (RES. 574/2000) del Ministerio de Economía de la República Argentina, 21 May 2001, para 130.

WTO rejected to consider the MERCOSUR law within the dispute before it and did not pay any respect to the previous decision judicial arising from of the regional trade agreement and not recognising to it any legally significant role.

Thus, the EU must be clearly aware of the fact that its reluctance to grant more significant role WTO (as the Nakajima and Fediol exception) and the principles of indirect effect, will not be respected by the WTO law on the other side.

## 7.5 Conclusion

The subject of the investigation of the last chapter of the dissertation was the analysis of the relation between the EU law and WTO law and a comparative study in regard to the particularities of the MERCOSUR law. The WTO law is by some authors perceived as a legal order having constitutional nature, since it is perceived as overwhelming trade law, having thus constitutional quality.

Obviously, the economic features of the EEC/EC/EU led to strong interaction to the states outside its territory and led to the confrontation between the EEC, EC, EU and GATT/WTO legal order. The same conclusion of may be given also in terms of the MECOSUR as legal system. The EU in the history presented itself as an entity with international law friendly approach towards the obligations arising from the international obligation. However, it remained unclear whether there will be applied the same approach to the obligations arising out of GATT/WTO obligations.

First of all the ECJ was confronted with the question of the invocability of the rights arising from the GATT Agreement in the case which came to history as International Fruit Company case. In the reasoning the Court admitted that the EEC succeeded in the rights and duties of the MS as they arise from the GATT Agreement and confirmed thus the powers of the EEC to act in this domain. Nonetheless, upon the examination of *'the spirit, general scheme and the terms of the general agreement,'* came to the conclusion that the GATT Agreement is an

agreement characterized by great flexibility of the provisions and several derogations. This has for consequence, that this Agreement in the view of the Court does not belong to such types of agreements to which direct effect can be granted.

The judgment was doctrinally rather criticized, since the Court did not pay sufficient attention to the relation between the GATT law and international law and led to paradoxical situation, that the ECJ adopted restrictive approach to the international obligations, unlike the judgments *Enel* and *Van Gend en Loos* where ruled clearly on the supremacy principles of the EU law over the national legislation.

The Court came to similar conclusion also in following cases *Schlüter* rejecting the challenging of the invalidity of the regulation as incompatible with the provisions of GATT, in next one *Nederlandse Spoorwegen* rejected the challenging of the CCT in regard to the GATT obligations. Negative stance was also presented in the '*banana case*', when rejected the granting of the direct effect in the case of the regulation referring to the GATT law which were opposed by the MS.

However, under the GATT legal system, there are some small references to the direct effects of the GATT law within the EEC/EC/EU legal order. In the case *Bresciani* the Court admitted that the Yaoundé convention governing the relations to the third states may have direct effect, even in the case of imbalanced rights and obligations.

Nonetheless, as the real exceptions are considered only two cases - *Fediol* and *Nakajima*. Within the *Fediol* case was given right to the individuals to file a complaint against the European Commission when the EU legislation grants the individuals the right challenge the practices of the third states contradictory to the GATT law. In the *Nakajima* one, the direct effect of the GATT law was linked to the implementation of the GATT-law-specific obligations.

The entry into power of the WTO Agreement meant many expectations in terms of the expected turnover of the stance of the ECJ to the WTO law. The expectations were also connected to the fact that the ECJ gave rather positive opinion on the conclusion of the WTO Agreement, however, with specific approach to the TRIPs and GATS agreement.

The very first case in regard to WTO law – Portugal v. Council, however, did not fulfil the expectations. The ECJ referred back to the '*GATT approach*' and did not find much difference between the GATT agreement and WTO in terms of the legal quality and especially the lack of reciprocity.

In the following cases, the ECJ on the basis of the similar grounds rejected the direct effect. However, at least the Court granted the preference given to the WTO-friendly interpretation (as e.g. in case International Dairy Agreement), and adopted the same stance in terms of the TRIPs Agreement, as e.g. in the Hermès case. The Court nonetheless, admitted the possibility of the recognition of the direct effect of the MS in terms of TRIPs (judgment Dior).

Moreover, the Court went even beyond the substantive rules and did not recognize the direct effect neither for the implementation of the DSB decision, nor for the DSB decision even after the elapse of the time for implementation of such a decision.

As the doctrine pessimistically states, the ECJ shut the door for any possibility of granting of the direct effect to the WTO law in the legal order of the EU including the rejection of any kind of legislative liability (and presumably any other kind of liability apart from administrative one under very restricted conditions) for the non-compliance with the WTO rules (judgment FIAMM).

Lastly, it may be questioned whether the direct effect is recognized within the MERCOSUR legal order. MERCOSUR, as international organization is built-up on the intergovernmental principles, in economic terms reaching the customs union stage. Principally, MERCOSUR was subsumed under the scope of

applicability of the WTO law, having constitutional quality over the MERCOSUR one. The MERCOSUR legal system as a matter of principle rejects its direct applicability also within the MS of MERCOSUR and adopts rather flexible approach to the implementation of the MERCOSUR secondary law. However, it is still considered as RTA in regard to WTO.

Therefore, not surprisingly, the MEROCUR Tribunal in the case of the chicken parts subsidies case rejected to examine the MERCOSUR law in the light of WTO one, despite parallel wording and meaning of the provisions and rejected thus the direct effect. Nonetheless, the case law of the MERCOSUR Tribunal is not very rich on this point, therefore one shall wait for the further judgments in order to confirm or rebut this stance in the future.

## ***8 Conclusion of the dissertation***

The dissertation formulated at its very beginning two fundamental hypotheses. First of them related to the formulation of the real scope of the CCP and the formation of the relation EU-MS and the definition of the CCP taking into account these elements. In order to understand fully the scope of the competences, they are intrinsically linked to the very nature of the EU, its aims, objectives and the entitlement to act in own name – legal personality. Second one concerned the relation between the EEC/EC/EU law and legal system of GATT/WTO with comparative reflection of the MERCOSUR law.

The EU as economic, political and legal entity reflected the most significant contributions of the economic theory while converting them to the legal reality. Among them appear as the most significant contributions the theory of comparative advantages, protectionism theories and theories of international dependency of the economic entities. The economic ratio behind the integration was also one of the reasons why the European integration uplifted from the simple free trade area up to the supranational entity represented by the EU.

In order to turn the ambitious economic plans to the legal ones, it was necessary to grant the legal personality to the EEC/EC/EU to act on own behalf, although in the strictly specified domains. The Lisbon Treaty ended up the discussion on the existence and nature of the legal personality since this unified the personality of the Union into one single entity – singular legal personality of the EU (including the EC legal personality and partial one arising originally from the EU).

Besides the enactment of the legal personality play essential role also the competences. The lack of the clear delimitation between the EU and the MS called into practice the ECJ/CJ EU that needed to rule on the nature of the competences and their extent. Generally, the ECJ/CJ EU adopted a dynamic approach and

rather extended the competences of the EU and confirmed their exclusivity. It was also the case of the CCP within which the Court ruled that the CCP is not limited to the traditional tools and has similar content than on the commercial policy within the MS.

Alongside the case-law was significantly changed the nature of the CCP also legislative enactment of the CCP within the primary law of the EU, covering under the Lisbon Treaty the goods, services, trade-related aspects of intellectual property law and investments treaties. However, not all aspects of the subject-matters are still completely clear.

Important breaking point in the EU-WTO relations was the Opinion 1/94 in which the ECJ ruled that the EU may concluded the new WTO Agreements, however, with certain reservation as to the share nature of the competences in the matters of between GATS and TRIPs. Nonetheless, the EC entered to the WTO as one block via the special Council Decision.

In order to be able to understand the WTO legal system, it was necessary to understand the development of the WTO since its very beginning in the form of the GATT. The GATT Agreement came into existence as '*historical accident*' since the original idea of the formation of ITO collapsed.

The GATT Agreement, originally only a part of the ITO Charter came to existence as '*general world trade law.*' Only gradually the GATT was transformed from a partial international agreement with limited subject-matter to the international organization with own institutional system of dispute settlement, nonetheless having rather diplomatic conciliatory nature.

Only upon entry into power of the WTO Agreement, it can be spoken about the real international agreement establishing a fully-fledged international organization endowed with the legal personality, institutional system and legal system of dispute settlement, based on legal principles with two stage procedure and enforcement mechanism.

EU was on various occasions confronted with the GATT law. Since its beginning, the ECJ/CJ EU presented strong opposition to any form of recognition of the GATT/WTO law.

The key reasoning of the Court, as appeared in the judgment *International Fruit company*, characterized the GATT/WTO as the law based on '*reciprocal and mutually advantageous arrangements*' and further characterized it by '*great flexibility of its provisions, in particular those conferring the possibility of derogation.*' As problematic was also perceived the diplomatic way of the settlement of disputes between the Contracting Parties became fundamental for basically all judgments of the ECJ'/CJ EU in regard to the GATT/WTO.

The Court rejected to grant the direct effect to any substantive GATT/WTO rules, even to the final decisions of the DSB and rejected to take any responsibility for the violation of the WTO law as a result of the legislative action of the EC/EU.

There were admitted only partial exemption to this rule, namely, the *Nakajima* and *Fediol* exceptions, granting the direct effect when the EU legislation grants to the individuals the right to challenge the practices of the third states in contradiction to the GATT/WTO law (*Nakajima* principle) and as the Court admitted in the case *Fediol*, if the WTO law imposed a specific obligation for the implementation of the GATT/WTO law.

As partial sign of the direct effect may be also considered the cases *International Dairy Agreement* within which the Court recognized the WTO law friendly interpretation in regard to the secondary legislation, the case *Hermès* and the case *Dior* within which the Court recognized the possibility of the indirect application of the TRIPs Agreement, and especially in the case *Dior* recognized the possibility of the direct effect of the TRIPs Agreement within the national legal order of the MS.

However, the general conclusion is that the CJ EU/ECJ does not recognize the direct effect as it arises from the GATT/WTO Agreement. This stance is rather



an exception to the international friendly approach of the CJ EU/ECJ to the international agreements which form the integral part of the EU legal system and as a matter of principle can have direct effect.

As to the ruling of the CJ EU/ECJ, the reluctance to the granting of the direct effect is the significant feature also of the legal orders of the main trade partners of the EU. This argument was used by the Court to support its negative stance to GATT/WTO.

MERCOSUR as international organization, reaching the integrational level of customs union was also confronted with the question of the possible direct effect of the GATT/WTO agreement within its legal order. The case-law of the MERCOSUR tribunal is in comparison to the case-law of the CJ EU modest, however, in one case concerning the subsidies for the export of the whole chickens the MERCOSUR Tribunal admitted that the MERCOSUR law is subsumed under the scope of the WTO law (as the AB decided the RTA as MERCOSUR cannot be used as a justifiable reason for the violation of the WTO rules).

However similarly to the EU CJ, the MERCOSUR Tribunal in the chicken parts subsidies cases decided on denial of the direct effect to the WTO law, although this may be in its wording similar to the provision of the MERCOSUR. The Court based its judgment also on more profound analysis of the MERCOSUR '*modus operandi*' and its very nature as intergovernmental type of international organization.

Nonetheless, for the objective evaluation of the direct effect of the MERCOSUR law are needed more judgments confirming the existing MERCOSUR '*case-law*'.

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Tutore: Prof. (Cognome e Nome)

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