The International Practice of the European Communities: Current Survey

A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1994

Christoph Vedder and Hans-Peter Folz **

The following survey covers the period from 1 January to 31 December 1994.[1]

I. Eurocontrol

Case C-364/92, SAT Fluggesellschaft mbH v. European Organization for the Safety of Air Navigation (Eurocontrol), Judgment of 19 January 1994, [1994] ECR I-43[2]

The Court had to deal with an objection to its jurisdiction under Article 177 EEC[3] based on sovereign immunity in public international law.

1. Facts

Eurocontrol is an international organization established by a convention concluded between 14 European States. It has been entrusted by its contracting parties with the establishment and collection of charges levied on the users of air navigation services. The airline SAT Fluggesellschaft mbH refused to pay the route charges for flights between 1981 and 1985 and Eurocontrol eventually filed suit before the Belgian Courts. The defendant argued that the procedure followed by Eurocontrol in fixing the route charges amounted to an abuse of a dominant position prohibited by Article 86 EEC. The Belgian *Cour de Cassation* asked the Court for a preliminary ruling under Article 177 EEC on the question whether Eurocontrol could be considered as an undertaking in the sense of Articles 86 and 90 EEC.

* University of Bielefeld.

1 All judgments are reported and analyzed only insofar as they directly deal with international law or the foreign relations law of the Community.

2 For a more detailed analysis see the following articles and case notes: Drijber, 32 *CML Rev.* (1995) 1039; Kunz-Hallstein, 'Internationale Organisationen im Rechtsverkehr', *EuZW* (1994) 402; Seidl-Hohenveldern, 'Eurocontrol und EWG-Wettbwerbsrecht', in K. Ginther *et al.* (ed.), *Völkerrecht zwischen normativem Anspruch und politischer Realität, Festschrift für Karl Zemanek* (1994), at 251.

3 The Treaty on the European Economic Community is referred to with the abbreviation 'EEC'. The Treaty on the European Community as is the current designation of the constituent treaty since the entry into force of the Maastricht Treaty on 1 November 1993 is referred to with the abbreviation 'EC'.

2. The Judgment

Eurocontrol had disputed the jurisdiction of the Court arguing that as an international organization dealing with the Community as equals on the basis of rules of public international law the Court was precluded from ruling on the question submitted.[4]

Rejecting the objection the Court pointed to the nature of the Article 177 EEC procedure, which establishes direct cooperation between the Court and the judiciary of the Member States by way of a non-contentious procedure excluding any initiative of the parties. Since the national court had referred a question concerning solely the interpretation of Articles 86 and 90 EEC and not the constituent instruments of Eurocontrol, the Court went on to deal with the substance of the case.[5]

Having established that Eurocontrol's activities were of a non-economic nature connected with the exercise of public authority the Court concluded that an international organization did not constitute an undertaking subject to the provisions of Articles 86 and 90 EEC.[6]

3. Analysis

Eurocontrol's contention that due to sovereign immunity it was exempt from the Court's jurisdiction raises an interesting issue.

First of all, state immunity is traditionally understood as a principle of procedural law, which is subject to generally recognized limitations.[7] The courts of one sovereign state may not claim jurisdiction over another state, i.e. treat it as a defendant.[8] The situation is however different in the framework of an Article 177 EEC procedure, since it is an objective non-contentious procedure solely concerned with the interpretation of Community law. The parties to the main proceedings are heard but they do not act as plaintiff or defendant before the Court. Given the division of tasks between the Court and the Member State judiciary under Article 177 EEC the latter are responsible for dealing with any objections based on sovereign immunity.[9] As Advocate General Tesauro rightly concludes, the objection concerning lack of jurisdiction ought to have been raised in the course of the proceedings before the Belgian judges but not before the Court.[10]

Since the Court was able to refute Eurocontrol's claim for this procedural reason alone, it did not have to deal with another contention that Eurocontrol had raised against the Court's jurisdiction *ratione materiae*. Relying on the general principle of *par in parem non habet imperium*, Eurocontrol had argued that the Court had no right to ascertain whether its acts were compatible with Community law.[11] This plea however was not based on the traditional concept of state immunity but rather on the '*Act of State*'-doctrine according to which the lawfulness of legislation is not questioned in the courts of another state.[12] It is still under

4 Recital 8 of the judgment, [1994] ECR I-43, 59.
5 Recitals 9-11 of the judgment, [1994] ECR I-43, 59.
6 Recitals 30 and 31 of the judgment, [1994] ECR I-43, 63.
7 The most important restriction that has been gradually recognized applies to *acta jure gestionis*, i.e. acts of state not connected with the exercise of public authority. See R. Jennings, A. Watts, *Oppenheim's International Law* (9th ed. 1992) Vol. I, at 357.
8 As Advocate General Tesauro correctly pointed out in point 5 of his opinion, [1994] ECR I-43, 47, the party claiming immunity is usually the defendant, while here Eurocontrol is the plaintiff in the main proceedings. Eurocontrol's claim is all the more surprising since the filing of a suit by one state in the courts of another is considered as a waiver of immunity in respect of any counter-claim that arises out of the same dispute. See Jennings, Watts, *supra* note 7, at 354.
9 For a critique see Seidl-Hohenveldern, *supra* note 2, at 256.
10 See point 5 of Advocate General Tesauro's opinion, [1994] ECR I-43, 46.
11 See point 4 of Advocate General Tesauro's opinion, [1994] ECR I-43, 46.
12 See Jennings, Watts, *supra* note 7, at 368.

dispute if and to what extent the *'Act of State'* doctrine amounts to customary public international law,[13] and therefore whether it actually provides a defence equivalent to state immunity. In any case the question, of why Eurocontrol as an international organization could possibly avail itself of a doctrine derived from the principle of equality of States in order to defend itself against the jurisdiction of another international organization, deserved a more thorough and extensive reasoning than Eurocontrol provided.[14]

II. ONEM/Minne

Case C-13/93, Office National de l'emploi v. Madeleine Minne, Judgment of 3 February 1994, [1994] ECR I-371

The Court confirmed its decision in the *Levy* case[15] stating that by virtue of Article 234(1) EEC, ILO Convention No. 89[16] may take precedence over Directive 76/207/EEC[17] if it can be established by a Member State Court that the convention is still binding on a Member State and that the provisions in question are designed to implement those obligations.

While applying for unemployment benefit Mrs Minne had declared that for family reasons she was not prepared to work at night in the sector of hotel and catering in which she had previously been employed. ONEM, the Belgian authority responsible for unemployment benefit rejected Mrs. Minne's application on the ground that she had refused to accept suitable employment and thus was no longer entitled to such benefit. Mrs Minne filed suit, relying on the Belgian Law on Employment that prohibited women in the hotel and catering industry from working between midnight and 6 a.m. The defendant argued that in principle the prohibition on night work also applied to male workers as well but since the system of derogations provided by the Law of employment in fact allowed fewer derogations for female workers, it amounted to a discrimination contrary to Directive 76/207/EEC. On appeal the *Cour du Travail Liège* requested that the Court give a preliminary ruling under Article 177 EEC on the question of whether Article 5 of Directive 76/207/EEC prohibited such a practice.

The Court held that Article 5(1) of Directive 76/207/EEC precludes a Member State from maintaining in its legislation derogations from a general prohibition of night work which are subject to more restrictive conditions in respect of women than in respect of men and which cannot be justified under the exception clause of Article 2(3) of the directive.[18] However, the Court noted that the Belgian court had referred to ILO Convention No. 89 which might possibly justify a derogation from Community law by virtue of Article 234(1) EEC. The Court declined to consider, whether the case at hand actually did come within the scope of ILO Convention No. 89 for two reasons. First, Belgium had denounced that convention in order to comply with its Community obligations, although the German Government had contended that the denunciation had become effective only after the material time in this

13 See H.-E. Folz, *Die Geltungskraft fremder Hoheitsäusserungen* (1975).

14 Recent state practice tends to a general recognition of similar rights for international organizations. See Vedder, in E. Grabitz, M. Hilf, *Kommentar zum EUV* (1995), Recital 17 at Article 210 EC.

15 Case C-158/91, *Levy*, [1993] ECR I-4287; see Vedder, Folz, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law', 5 *EJIL* (1994) 448, 459.

16 ILO Convention No. 89 of 9 July 1948 concerning Night Work for Women employed in industry, published in International Labour Office (ed.), *International Labour Conventions and Recommendations 1919-1981* (Second impression 1985).

17 Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, OJ 1976 L 39/40.

18 Recital 13 of the judgment, [1994] ECR I-371, 383.

case.[19] Apart from that the judgment making the reference did not make it possible to determine the extent to which the disputed provisions were designed to implement ILO Convention No. 89. Under these circumstances and in the context of a procedure under Article 177 EEC it fell to the national court and not to the Court of Justice to ascertain the obligations imposed on a member state by an earlier international agreement and to determine whether the national provisions in question in fact served to implement those obligations.[20]

III. Re European Development Fund[21]

Case C-316/91, European Parliament v. Council of the European Union, Judgment of 2 March 1994, [1994] ECR I-625[22]

The Court decided that the financial assistance provided to the ACP States under the Lomé IV Convention did not necessarily have to be part of the Community budget but that the Member States were free to set up a European Development Fund.[23] The judgment may have repercussions for the standing of Member States in mixed agreements.

The Lomé IV Convention,[24] a mixed agreement based on Article 238 EEC concluded between the ACP States on the one hand and the Community and its Member States on the other, provided for financial assistance to the ACP States in order to contribute to their development. Like its predecessors[25] the provisions of Lomé IV on development aid finance cooperation[26] were implemented by an Internal Agreement setting up the European Development Fund (EDF).[27] The EDF was established by the Member States and financed by their contributions.[28] The EDF was managed by the Commission and subject to supervision

19 Advocate General Tesauro in point 6 of his opinion, [1994] ECR I-371, 374, had also taken the position that the convention had only been denounced after the facts material to the case.

20 Recitals 14-18 of the judgment, [1994] ECR I-371, 383.

21 In another case dealing with the fate of a development aid project in Somalia the Court of First Instance in its judgment Case T-451/93, *San Marco v. Commission*, judgment of 16 November 1994, [1994] ECR II-1061, decided in accordance with settled case law that EDF-financed contracts were national contracts concluded between the ACP States and private enterprises not creating any legal relationship between Community institutions and the individual firm. Even if, faced with an emergency such as a civil war, the Commission acted on behalf of an ACP State terminating a contract, the Community was not liable to pay damages or compensation. For earlier developments see Vedder, Folz, *supra* note 15, at 448.

22 See Barents, 32 *CML Rev.* (1995) 249; Henze, 'Aufgaben- und Ausgabenkompetenz der Europäischen Gemeinschaft und ihrer Mitgliedstaaten im Bereich der Entwicklungspolitik', *EuR* (1995) 76.

23 The Court also had to deal with the major important unilateral instrument of the Community's development policy, the System of Generalized Preferences (SGP). In its judgment in the Case C-368/92, *Administration des Douanes v. Solange Chiffre*, judgment of 24 February 1994, [1994] ECR I-605, it ruled on certificates of origin in the exceptional situation of a compensation operation between a developing country and a non-member country.

24 OJ 1991 L 229/3.

25 See point 13 of Advocate General Jacobs' opinion, [1994] ECR I-625, 631.

26 See Article 231 Lomé IV and Article 1(1) of the Financial Protocol to the Convention, OJ 1991 L 229/133.

27 Article 1 of the Internal Agreement 91/401/EEC on the financing and administration of Community aid under the Fourth ACP-EEC Convention, OJ 1991 L 229/288, provided for the setting up of a seventh European Development Fund.

28 According to the Council the Member States preferred to finance the development aid to the ACP States by direct contributions rather than to incorporate it in the Community budget because of the better coordination with the bilateral development assistance policy of each Member State. The individual contributions to the EDF took into account the bilateral development aid advanced by each Member State. See point 16 of Advocate General Jacobs' opinion, [1994] ECR I-625, 632.

by the Court of Auditors and Parliament. The details of implementation were the subject of Financial Regulation 91/491/EEC based on Article 32 of the Internal Agreement.[29]

Parliament had been demanding the inclusion of the EDF into the general Community budget since 1973 and finally sought the annulment of the financial regulation under Article 173 EEC claiming an infringement of its budgetary prerogatives. It argued that expenditure provided for by Lomé IV as development aid had to be considered as Community expenditure and therefore had to be part of the general Community budget. Consequently a financial regulation governing the administration of such funds had to be based on Article 209 EEC, which provides for an obligatory consultation of Parliament.

The Court first had to deal with two objections against the admissibility of the action. The Council had argued that the contested financial regulation was an act outside the scope of Community law and therefore not subject to the jurisdiction of the Court under Article 173 EEC. Recalling its *ERTA* judgment[30] the Court held that an action for annulment must be available against all acts by the institutions intended to have legal effects, irrespective of whether the act had been adopted by the institution pursuant to Treaty provisions.[31] The Council also had disputed a breach of Parliament's prerogatives since Parliament in fact had been consulted, albeit on a voluntary basis. The Court made clear that the adoption of an act pursuant to a legal basis, that did not provide for obligatory consultation, was liable to infringe Parliament's prerogatives in any case.[32] Moreover, in the particular case of Article 209 EEC a consultation could lead to a mandatory conciliation procedure.[33]

Turning to the substance of the case the Court refused to accept that the commitments undertaken in Article 231 Lomé IV and Article 1 of the Financial Protocol could only be met by the grant of Community expenditure. Since the Community's competence in the field of development aid was not exclusive, the Member States remained free to act collectively, individually or jointly with the Community. The Community and its Member States were free to conclude Lomé IV as a mixed agreement and to provide a joint liability for the fulfilment of the obligations relating to financial assistance. Consequently they shared the competence to implement the contractual financial assistance and were able to choose the source and methods of financing. The Member States were entitled to assume directly the financial obligations to the exclusion of any Community expenditure and to set up a Fund by mutual agreement charged with the administration.[34] Neither were the Member States prevented from using Community concepts applicable to Community expenditure and from associating the Community institutions with the procedure thus set up,[35] as the Court had decided before in its judgment *Re Aid to Bangladesh*.[36]

29 Financial Regulation 91/491/EEC, OJ 1991 L 266/1.
30 Case 22/70, *Commission v. Council (ERTA)*, [1971] ECR 263.
31 Recital 8-9 of the judgment, [1994] ECR I-625, 657.
32 As Advocate General Jacobs observed in point 29 of his opinion, [1994] ECR I-625, 636, the possibility could not be excluded that the compulsory or optional nature of the consultation might have an effect on the attitude of the participating institutions which might in turn have an effect on the outcome of the legislative process.
33 Recitals 10-19 of the judgment, [1994] ECR I-625, 657.
34 Recitals 25-38 of the judgment, [1994] ECR I-625, 661.
35 Recital 41 of the judgment, [1994] ECR I-625, 664.
36 Joined Cases C-181/91 and C 248/91, *Parliament v. Council*, [1993] ECR I-3283; Vedder, Folz, *supra* note 15, at 448, 456.

IV. Yousfi

Case C-58/93, Zoubir Yousfi v. Belgian State, Judgment of 20 April 1994, [1994] ECR I-1353

The Court confirmed and extended its jurisprudence[37] on the direct applicability of association agreements pursuant to Article 238 EEC.

Zoubir Yousfi, a Moroccan citizen resident in Belgium, applied for a disability allowance after suffering an accident at work in 1984. The Belgian authorities refused to grant the requested allowance on the ground of Mr. Yousfi's Moroccan nationality. Mr. Yousfi attacked the refusal in court, relying on Article 41(1) EEC-Morocco Cooperation Agreement (CA),[38] which prohibits discrimination based on nationality in the field of social security and on the *Kziber* judgment[39] of the Court which had held this provision to have direct effect. The defendant argued that the principle of non-discrimination was not directly applicable and disability allowances financed by the public treasury not taking into account the status of employment of the beneficiary were not part of the social security system and consequently did not fall within the substantive scope of Article 41(1) CA. The *Tribunal du Travail*, Brussels, asked the Court for a preliminary ruling under Article 177 EEC on the interpretation and direct applicability of the provision in dispute.

The Court curtly refused to entertain Germany's suggestion to reconsider its case-law in the absence of any new arguments submitted in the observations.[40] Quite to the contrary it confirmed that the principle of non-discrimination enshrined in Article 41(1) CA was capable of governing the legal situation of individuals.[41] The direct effect of Article 41(1) CA had the consequence that persons to whom that provision applied were entitled to rely on it before national courts.[42] As to the scope *ratione materiae* of Article 41(1) CA the Court confirmed that it had to be construed in accordance with internal Community concepts of social security, such as Article 51 of the Treaty and its implementing legislation. Since the Court had consistently held disability benefits to be part of 'social security' for Community purposes, disability allowances such as those at issue in the main proceeding came within the purview of Article 41(1) CA.[43]

V. Fiskano

Case C-135/92, Fiskano AB v. Commission of the European Communities, Judgment of 29 June 1994, [1994] ECR I-2885

The Court held that even in the administration of an international fisheries agreement the Commission must observe the right to be heard when imposing sanctions on private parties of a non-member country.

37 Case C-18/90, *Kziber*, [1991] ECR I-199; de Areilza, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1990-91', 2 *EJIL* (1991) 177, 179.
38 Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, OJ 1978 L 264/1.
39 See *supra* note 37.
40 Recital 18 of the judgment, [1994] ECR I-1353, 1369.
41 It appears noteworthy, that Advocate General Tesauro in point 4 of his opinion, [1994] ECR I-1353, 1357, embarked on a short and abstract analysis of the differences between the terms 'direct effect' and 'direct applicability' concluding that they merely reflected a difference of emphasis. The relevance to the case remains unclear. The Court however seemed to react by stating that the direct effect of a provision entailed that persons to whom it applied were entitled to rely on it before national courts.
42 Recitals 16-19 of the judgment, [1994] ECR I-1353, 1368.
43 Recitals 24-28 of the judgment, [1994] ECR I-1353, 1371.

Before accession the Community and Sweden had concluded a fisheries agreement[44] granting each other reciprocal rights for their vessels in their exclusive fishing areas. In accordance with Article 3 of the agreement[45] the parties exchange monthly lists of their vessels and grant fishing licences according to the list. Under Article 5 each contracting party was responsible for the compliance with the agreement by its own vessels. Within its territorial jurisdiction each party was also permitted to ensure compliance by vessels of the other party. In the case of an infringement by a vessel, the Community and Sweden had agreed to communicate its identity with the indication that it was to be denied fishing licences for a specific time as a sanction. Article 3(7) and (8) of the implementing regulation 3929/90/EEC[46] provided that licences could be withheld for a period of up to twelve months.

Lavön, a Swedish fishing vessel owned by the company Fiskano AB, was inspected by Dutch authorities on 10 December 1991 and found to be without a valid fishing licence for the relevant month. The Commission sent a letter to the Swedish Ambassador on 19 February 1992 stating that the vessel *Lavön* had engaged in illegal fishing activity and consequently would not be considered for a new fishing licence for a period of twelve consecutive months. Fiskano AB brought an action under Article 173(2) EEC for the annulment of the Commission's decision embodied in the letter of 19 February 1992.

The Commission disputed the action's admissibility arguing that the contested letter was an intergovernmental communication that could not possibly be of direct and individual concern to the plaintiff. Refuting this argument, the Court held that the Commission had actually exercised its discretion pursuant to Article 3(7) and (8) of Regulation 3929/90/EEC, imposing a penalty. Regardless of any further consequences from the reaction of the Swedish authorities, the letter contained a decision by the Commission being of direct and individual concern to the applicant.[47] Moving to the substance of the case the Court found that no rule of Community law conferred on the Commission the power or the duty to investigate whether the Swedish authorities had excluded the applicant from the monthly list as a result of negligence before imposing sanctions.[48] However the Court stressed the importance of the right to be heard as a general principle of Community law. In all Community proceedings which were liable to adversely affect a person, the observance of the right to be heard was required. Since the international law context did not alter the character of the Commission's decision to impose a penalty the applicant's right to be heard had been infringed.[49] The contested decision was annulled.[50]

44 Agreement on fisheries between the European Economic Community and the Government of Sweden, OJ 1980 L 226/1.

45 Article 3 of the agreement read in its pertinent part: '... The competent authority of each Party shall, as appropriate, communicate in due time to the other Party the name, registration number, and other relevant particulars of the fishing vessels which shall be eligible to fish within the area of fisheries jurisdiction of the other Party. The second Party shall thereupon issue such licences in a manner commensurate with the possibilities for fishing...'

46 Council Regulation 3229/90 laying down for 1991 certain measures for the conservation and management of fishery resources applicable to vessels flying the flag of Sweden, OJ 1990 L 378/48.

47 Recitals 21-27 of the judgment, [1994] ECR I-2885, 2905.

48 Recitals 34-37 of the judgment, [1994] ECR I-2885, 2908.

49 Recitals 38-44 of the judgment, [1994] ECR I-2885, 2909.

50 Here the Court did not follow the opinion of Advocate General Darmon who had held the violation of the right to be heard to be immaterial. In point 67 of his opinion, [1994] ECR I-2885, 2896, Advocate General Darmon argued that the plaintiff had failed to produce any evidence likely to prove that Fiskano was in fact entitled to a fishing licence. Therefore, even if the applicant had been heard by the Commission, the outcome of the procedure would have been the same.

VI. Re FYROM Embargo

Case C-120/94, R Commission of the European Communities v. Hellenic Republic, Decision of 29 June 1994, [1994] ECR I-3040

The Court had to strike a difficult balance between the prerogatives of the Member States reserved under the security exemption of Article 224 EC and the integrity of the Community legal order. For the first time it was concerned with an application for interim measures in the context of a main action under Article 225(2) EC.[51]

The Former Yugoslav Republic of Macedonia (FYROM) declared its independence on 17 September 1991. The choice of its statal symbols such as its proper name and flag and the text of certain constitutional provisions were interpreted by Greece as an ambition towards the unification with the Greek province of Macedonia. Greece therefore held its territorial integrity to be threatened and reacted by imposing an embargo blocking the movement of goods transiting through the port of Thessaloniki.[52] Facing inquiries from the Commission concerning the compatibility of the embargo with Article 113 EC in particular, Greece relied on Article 224 EC which allowed a Member State to derogate from Community law in the case of a serious international tension constituting a threat of war. The Commission brought proceedings under Article 225(2) arguing that Greece had made improper use of the powers granted by Article 224 EC and petitioned the Court for an order under Article 186 EC to suspend the embargo pending judgment in the main action.

The Court first set aside Greece's objection against the admissibility of the application by stating that Article 186 EC, not expressly providing for any exceptions, was also applicable to actions under Article 225(2) EC. However, the particular nature of the Article 225(2) procedure as an expedited action requiring difficult assessments in facts and law could be taken into consideration when examining whether the applicant could establish a *prima facie* case and urgency pursuant to Article 83(2) of the Rules of Procedure justifying interim measures.[53] While admitting a *prima facie* case for the applicant[54] the Court felt unable to confirm the urgency of the matter. The fact alone that Greece had committed a manifest breach of Community law could not in itself constitute a threat of serious and irreparable harm justifying the adoption of provisional measures, since Article 224 EC raised complex legal questions requiring thorough consideration of arguments from both sides.[55] The Court equally felt precluded from assessing the political harm to the Community resulting from the embargo, since such assessments were likely to prejudice the decision on the substance of the case contrary to Article 86(4) of its Rules of Procedure.[56] Since Article 225(2) only sought to ensure the protection of Community interests and since no harm suffered by Community traders had been established, the Court could not take into account the possible harm caused by the embargo to a non-member country when examining the urgency of the matter.[57] Therefore the Court had to dismiss the application for interim measures, reserving its decision in the main proceedings.

51 The FYROM and Greece have settled their dispute in the meantime and since Greece has subsequently lifted the embargo it is unclear at the time of writing whether there will be a final judgment by the Court in the main proceedings.

52 For a detailed account of the origins and development of the dispute see Recitals 6-35, [1994] ECR 3037, 3042, of the Court's order.

53 Recitals 38-43 of the decision, [1994] ECR I-3037, 3053.

54 Recitals 67-70 of the decision, [1994] ECR I-3037, 3060.

55 Recital 92 of the decision, [1994] ECR I-3037, 3066.

56 Recital 94 of the decision, [1994] ECR I-3037, 3066.

57 Recitals 95-101 of the decision, [1994] ECR I-3037, 3067.

VII. Anastasiou: Re Cypriot Import Certificates

Case C-432/92, The Queen v. Minister of Agriculture, Fisheries and Food ex parte S. P. Anastasiou (Pissouri) Ltd and Others, Judgment of 5 July 1994, [1994] ECR I-3087[58]

By expressly declaring provisions concerning movement certificates contained in an association agreement under Article 238 EEC to be directly applicable the Court added further clarifications to the concept of direct effect of international agreements. At the same time the Court, by applying the customary law of treaties as codified in the 1969 Vienna Convention, added a valuable contribution to the international practice of the Community.

1. Facts

The Community had concluded an association agreement based on Article 238 EEC with the Republic of Cyprus (ROC) in 1972[59] that provides for a system of tariff preferences benefiting citrus fruits and potatoes originating from Cyprus. The concept of origin is defined in Article 6(1) of the 1977 Origin Protocol[60] which provides that evidence of the originating status of products is given by movement certificate EUR.1 to be issued by the responsible customs authorities of the exporting state. In 1974 the ROC was *de facto* partitioned after a Turkish invasion into the southern part of the island that remained under the full jurisdiction of the ROC and the part north of the UN Buffer Zone which subsequently was proclaimed by the resident Turkish community as the 'Turkish Republic of Northern Cyprus' (TRNC). With the exception of Turkey no member of the United Nations so far has recognized the TRNC as a sovereign state. The United Kingdom and other Member States continued to accept EUR.1 movement certificates and phytosanitary certificates required by Directive 77/93[61] issued by the TRNC authorities although not under the designation of TRNC. This practice had been condoned by the Commission, which had sent specimen stamps and authorized signatures as used by the TRNC authorities to the Member States. The applicants in the main proceedings, Greek Cypriot producers,[62] sought to prevent the importation of citrus-fruit products and potatoes from Cyprus without the appropriate movement or phytosanitary certificates issued by the legitimate ROC customs authorities. The *High Court of Justice* referred the question to the Court under Article 177 EEC whether the EEC-ROC association agreement and its protocols precluded the Member States from accepting certificates not issued by the ROC authorities.

2. The Judgment

Both the Commission and the United Kingdom had argued that the rules of the 1977 Origin Protocol did not have direct effect since they established a system of effective administrative cooperation between the authorities of the exporting State and those of the importing State. Recalling its jurisprudence regarding the direct applicability of international agreements, the

58 See Emiliou, 'Cypriot Import Certificates: Some Hot Potatoes', 20 *EL Rev.* (1995) 202.

59 Agreement of 19 December 1972 establishing an Association between the European Economic Community and the Republic of Cyprus, OJ 1973 L 133/1; for a detailed account of the agreement and the origins of the dispute before the Court see Lycourgos, *L'association avec union douanière: un mode de relations entre la C.E.E. et des Etats tiers* (1994) at 35 and 146.

60 Protocol concerning the definition of the concept of 'originating products' and methods of administrative cooperation, annexed to the Additional Protocol to the EEC-ROC Association Agreement, OJ 1977 L 339/1 and 16.

61 Council Directive 77/93/EEC on protective measures against the introduction into the Member States of organisms harmful to plants or plant products, OJ 1977 L 26/20.

62 See Emiliou, *supra* note 58, at 204.

Court found that the rules of origin laid down clear, precise and unconditional obligations. The Court further referred to its judgments *Les Rapides Savoyards*[63] and *Huygen*[64] where it had decided by implication that provisions on movement certificates may be applied by the national courts. It followed that the relevant provisions had direct effect and may be relied upon in proceedings before a national court.[65]

Problems in connection with the application of the EEC-ROC Association agreement resulting from the *de facto* partition of Cyprus did not warrant a departure from the clear, precise and unconditional provisions of the 1977 Origin Protocol. A system of cooperation between customs authorities involving the recognition of movement certificates issued by the exporting state as evidence of origin relied on total and mutual confidence. A system of that kind could only function if the procedures were strictly complied with and excluded any acceptance of certificates not issued by the ROC.[66] The same reasoning applied to phytosanitary certificates.[67]

However, the United Kingdom had argued that Article 5 of the Association Agreement which prohibited any discrimination between nationals or companies of Cyprus overrode any other interpretation and allowed the acceptance of TRNC certificates since otherwise products from the northern part of Cyprus could not benefit from the preferential treatment under the Agreement. The Commission, in defence of its view that a policy of non-recognition should not result in depriving the population of Cyprus of any advantages conferred by the agreement, referred to the *International Court of Justice*'s advisory opinion on Namibia.[68] Citing Article 31 of the 1969 Vienna Convention on the Law of Treaties[69] the Court examined whether the general rules of public international law could possibly justify the result propounded by the United Kingdom and the Commission. While the interpretation of an international agreement must pay regard to its object and purpose and to any subsequent practice in its application, the principle of non-discrimination as codified in Article 5 of the Agreement was just one of several objectives that had to be reconciled with the other general aims of the Agreement excluding a departure from one of its fundamental rules. The precedence of Article 5 over all other provisions of the Agreement would also result in a right to interfere in the internal affairs of Cyprus, a right not likely to be conferred on the Community. Regarding the subsequent practice in the application of the Agreement the Court found that, given the bilateral nature of the agreement, it was impossible to take into consideration a unilateral practice manifestly inconsistent with the aims of the agreement. The fact that the Commission and several Member States actually had accepted TRNC certificates could not be regarded as relevant practice for the purpose of interpretation. Neither was there any indication of an informal consensus between the partners regarding the interpretation of the Agreement. Far from acquiescing the practice followed by the Commission, the ROC had formally insisted on its exclusive right to issue valid movement certificates. Finally the Court, referring to the opinion of the Advocate General, held that, given the differences in law and fact between Cyprus and Namibia, no interpretation could be

63 Case 218/83, *Les Rapides Savoyards*, [1984] ECR 3105. The Court had decided that the customs authorities of the Member States were bound to accept the movement certificate EUR.1 issued by the exporting state as evidence of origin of imported goods.

64 Case 12/92, *Huygen*, [1993] ECR I-6381; see Vedder, Folz, *supra* note 15, at 448, 462. The Court held that under very exceptional circumstances the customs authorities of the Member States were not precluded from independently establishing the origin of certain goods.

65 Recitals 21-27 of the judgment, [1994] ECR I-3087, 3127.

66 Recitals 37-41 of the judgment, [1994] ECR I-3087, 3131.

67 Recitals 56-66 of the judgment, [1994] ECR I-3087, 3135.

68 International Court of Justice, *Opinion on the legal consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 16.

69 1155 UNTS 331.

based on an analogy.[70] The Court concluded that the member states were precluded from accepting movement certificates not issued by the ROC.[71]

3. Analysis

The judgment of the Court is first of all a valuable contribution to the Community's international practice. The Court applies public international law in an exemplary way, even though sometimes it might seem hard to follow the Court's line of reasoning through the abundance of arguments. Although a different outcome of the case could hardly have been imaginable, the Court's reasoning is thorough and extensive. The United Kingdom and the Commission were in a weak position from the start and their combined efforts to build up a conclusive defence were never likely to be successful.

The judgment is also important because it allows one to state more precisely the concept of direct effect of international agreements.[72] According to the *Demirel*-formula[73] a provision in an international agreement must contain a clear and precise obligation not subject to any subsequent measure in order to have direct effect. Since the Court occasionally had asked whether a provision was capable of creating rights of which interested parties might avail themselves in a court of law when examining its direct effect,[74] it remained debatable whether the direct effect of an obligation was restricted to cases in which it purported to create the entitlement of an individual.[75] If so, the obligation incumbent on the Community and its Member States would correspond to a right of those benefiting from the agreement to demand performance. The violation of such an individual right would give standing before a court.

In the *Anastasiou* case a direct effect of rules of origin could have been excluded, since these rules most certainly did not intend to create a right for ROC producers to prevent imports by their TRNC competitors. Therefore the United Kingdom and the Commission had argued that the rules of origin established a system of administrative cooperation in the public interest and should not be considered as having direct effect. While the Court in its judgments *Les Rapides Savoyens* and *Huygen* had simply ruled on the interpretation of rules of origin without expressly addressing the matter of direct effect, the Court found in *Anastasiou* that the provisions had direct effect and could be invoked before a national court.

It follows from the *Anastasiou* judgment of the Court that regardless of any subjective entitlement of an individual, the direct effect of a provision solely depends on its justiciability. Anybody affected directly or indirectly by the application of an international agreement can rely on its direct effect, if the requirements set out by the Court are met. If the rule is operational, it is capable of being applied by a court of law in a specific case due to its objective legal nature. Even if a norm does not regulate a situation directly, a person may benefit from its legal consequences. A provision can be invoked by anybody to whom it

70 Advocate General Gulmann in point 58 of his opinion, [1994] ECR I-3087, 3108, considered the ICJ Opinion adduced by the Commission to be of 'little, if any, relevance to the present case.' The ICJ Opinion held that acts such as the registration of births, deaths and marriages, the effects of which could only be ignored to the detriment of the resident population, should not be held invalid as a result of a policy of non-recognition against an illegal administration. The situation of Cyprus was therefore clearly not in any way comparable.

71 Recitals 42-55 of the judgment, [1994] ECR I-3087, 3132.

72 See also the judgment IV. *Yousfi* above.

73 Case 12/86, *Demirel*, [1987] ECR 3719; Vedder, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law', 1 *EJIL* (1990) 365, 375.

74 See Cases 21-24/72, *International Fruit*, [1972] ECR 1219, 1227, Recital 19/20.

75 See for example the judgment Case C-69/89, *Nakajima*, [1991] ECR I-2069, Recital 28, where the Court distinguishes the direct effect of a provision from its incidental effect under Article 184 EEC in the framework of an action for annulment.

applies if the application has an incidence and therefore an effect on the outcome of the legal proceedings.[76] The right to invoke a provision follows from its direct effect.

VIII. OTO

Case C-130/92, OTO SpA v. Ministero delle Finanze, Judgment of 13 July 1994, [1994] ECR I-3281

The Court had to conclude that internal taxation which *de facto* had the effect of favouring direct imports from non-member countries was not prohibited under the Treaty.[77]

Italy levied a consumption tax both on domestic and imported audio-visual and photo-optical products. For goods originating in non-member countries that had been imported into another Member State before being sold to Italy the value on the basis of which the tax was determined included charges due for entry into free circulation within the Community, such as CCT tariffs. For direct imports into Italy such charges were not taken into consideration which entailed a lower consumption tax for directly imported products from third states. The Italian legislation therefore *de facto* tended to favour direct imports over imports of the same products already in free circulation within other Member States. In the course of legal proceedings brought by the enterprise OTO SpA the Italian *Corte Suprema di Cassazione* asked the Court for a preliminary ruling on the question whether the contested consumption tax did constitute a charge equivalent to a customs duty in the sense of Article 12 EEC.

Recalling its judgment *Simba*[78] the Court confirmed that a consumption tax must be regarded as being an integral part of a general system of internal taxation whose compatibility with the Treaty had to be assessed exclusively on the basis of Article 95 EEC. Since there was no direct discrimination between domestic products and third-country products in free circulation within the Community the aim of Article 95 to eliminate all forms of protection was not endangered. Article 95 EEC did not apply to goods directly imported from non-member countries.[79] Neither could a rule similar to Article 95 EEC regarding domestic taxation in respect of trade with non-member countries be deduced from Article 113 EEC. The Treaty did not contain any such rule with the possible exception of any agreement provisions that might be in force between the Community and the country of origin of a given product. Although Article 113 EEC conferred upon the Community all the necessary powers to take any appropriate measure within the scope of common commercial policy, it was not in itself a sufficiently precise legal criterion to enable an assessment of the contested national rules of taxation.[80]

76 See Vedder, in E. Grabitz, M. Hilf, *Kommentar zum EUV* (1986), Recital 52 at Article 228 EEC.
77 For earlier developments see Brandtner, Folz, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1991-92', 4 *EJIL* (1993) 430, 439.
78 Joined Cases C-228/90 to C-234/90, C-339/90 and C-353/90, *Simba and others*, [1992] ECR I-3713.
79 Recitals 11-19 of the judgment, [1994] ECR I-3281, 3297.
80 Recital 20 of the judgment, [1994] ECR I-3281, 3299.

IX. Peralta

Case C-379/92, Criminal proceedings against Matteo Peralta, Judgment of 14 July 1994, [1994] ECR I-3453

The Court refused to accept the incorporation of an international convention not concluded by the Community itself but by its Member States into the Community legal order.[81]

Peralta, the master of an Italian vessel, was prosecuted by the Italian authorities for having discharged harmful substances into the sea contrary to Italian legislation. The defendant argued that he had acted in compliance with the International Convention for the Prevention of Pollution from Ships[82] (MARPOL convention). The MARPOL convention should be regarded as part of the Community legal order and therefore take precedence over the conflicting Italian law, thus justifying his behaviour. The Italian *Pretora Circondariale di Ravenna* asked the Court, among other questions, for a preliminary ruling under Article 177 EEC on whether the Italian legislation failed to observe 'international agreements ratified in Community law'.

Although the referring court had not explicitly formulated a question on the compatibility of the Italian legislation on pollution of the maritime environment with the MARPOL convention, it appeared from the files in the case that MARPOL was deemed to produce effects in the Community legal order. The Court therefore held it necessary but also sufficient to note that the Community was not a party to MARPOL. Neither had the Community assumed under the Treaty the powers previously exercised by the Member States in the subject matter of MARPOL. The 'succession' of the Community into an agreement concluded by its Member States was excluded since the conditions of the GATT formula as set out in *International Fruit*[83] were not fulfilled. The Court concluded that the question whether a national provision adopted by a Member State was compatible with a convention such as MARPOL was not a matter on which the Court had jurisdiction to rule.[84]

X. Re EC-US Competition Agreement

Case C-327/91, French Republic v. Commission of the European Communities, Judgment of 9 August 1994, [1994] ECR I-3641[85]

Rejecting the concept of 'administrative agreements', the Court upheld the principle of institutional balance as laid down in Article 4(1) subparagraph 2 EEC by interpreting Article 228 EEC as definitively determining the allocation of powers between the Community institutions with regard to the conclusion of international agreements.

1. Facts

The Commission concluded an agreement with the US Government on a cooperation procedure designed to prevent jurisdictional conflicts arising from the extraterritorial application of their respective law of competition. The Commission had not asked the Council

81 For earlier developments see Brandtner, Folz, *supra* note 77, at 430, 434.
82 1341 UNTS No. 22484.
83 Joined Cases 21/72 to 24/72, *International Fruit Company*, [1972] ECR 1219.
84 Recitals 15-17 of the judgment, [1994] ECR I-3453, 3494.
85 See Burrows, 'No General External Relations Competence for the Commission', 20 *EL Rev.* (1995) 210; Hummer, 'Enge und Weite der "Treaty Making Power" der Kommission nach dem EWG-Vertrag', in A. Randelzhofer *et al.* (ed.), *Gedächtnisschrift Grabitz* (1995), at 195; Kingston, 'External Relations of the European Community – External Capacity versus Internal Competence', 44 *ICLQ* (1995) 659.

for a negotiating brief under Article 228(1) EEC and insisted that it had the power to conclude this agreement without the involvement of the Council. Entering into force the same day the agreement was signed on 23 September 1991 but not subsequently published in the *Official Journal of the European Communities*. France asked for an annulment of the agreement under Article 173(1) EEC alleging that the Commission was not competent to conclude the contested agreement.

2. The Judgment

The Commission had raised an objection against the admissibility of the action, arguing that an international agreement not being an act attributable to a Community institution alone was not an act susceptible to judicial review under Article 173 EEC. The Court held that, since the exercise of the powers delegated to the Community institutions could not escape judicial review, the act whereby the Commission sought to conclude the agreement was susceptible to an action for annulment.[86] Therefore the action had to be understood as being directed against the Commission's internal decision and was therefore admissible.[87]

Addressing the substance of the case France had argued that Article 228(1) EEC expressly reserved to the Council the power to conclude international agreements. The Commission replied that it was competent to conclude administrative agreements not binding on the Community since any failure in performance would not incur international liability on the part of the Community but merely lead to the termination of the agreement. The Court found that quite to the contrary the Competition Agreement produced legal effects.[88] Since only the Community enjoying legal personality under public international law by virtue of Article 210 EEC had the capacity to bind itself by concluding international agreements with non-member countries or international organizations, a category of agreements engaging only institutions such as the Commission could not exist. The agreement was clearly covered by Article 2(1)(a)(i) of the second Vienna Treaty Law Convention of 1986[89] and therefore binding on the Community which would have to bear the responsibility for a violation.[90]

Since the Competition Agreement was also an agreement within the sense of Article 228 EEC as defined in *Opinion 1/75*[91] the Commission's competence had to be assessed in relation to this Treaty provision. Following Advocate General Tesauro's opinion the Court found that regarding the conclusion of treaties Article 228 EEC constituted an autonomous general rule that established an institutional balance by conferring specific powers to individual Community institutions. Since the Council's power to conclude agreements was subject to the powers vested in the Commission in this field[92] the Commission relying on the

86 As Advocate General Tesauro pointed out at Recitals 8-16 of his opinion, [1994] ECR I-3641, 3647, the internal Commission's decision of 10 September 1991 to conclude the agreement had not been published. It was only recorded in the minutes of the Commission meeting, which were not communicated to the Member States.

87 Recitals 13-17 of the judgment, [1994] ECR I-3641, 3672.

88 For an example of an international consensus not generating any legal effect, see the judgment of the Court of First Instance in the Case T-37/92, *BEUC v. Commission*, judgment of 18 May 1994, [1994] ECR II-285. The Court considered that an unwritten commercial consensus between the Community and Japan not made within the context of the common commercial policy was purely political in import.

89 Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organizations or between International Organizations, 25 ILM (1986) 543.

90 Recitals 23-25 of the judgment, [1994] ECR I-3641, 3674.

91 Opinion 1/75, *Local Costs*, [1975] ECR 1355. The Court had held that Article 228 EEC used the expression 'agreement' in a general sense to indicate any undertaking entered into by entities subject to international law which had binding force, whatever its formal designation.

92 The Court repeated in Recital 29 of the judgment, [1994] ECR I-3641, 3675, the French acknowledgement that the exception clause referred to the Commission's powers under Article 7

French language version[93] of Article 228 EEC, its own continuous institutional practice and an analogy with Article 101(3) Euratom pleaded for an extensive interpretation that would allow it to conclude 'administrative agreements'. The Court refused to accept such reasoning since the Commission's powers mentioned in Article 228(1) 2nd sentence EEC derogated from the prerogative of the Council to conclude agreements for the Community. Constituting an exception the clause could not be construed in an extensive way without upsetting the principle of institutional balance as guaranteed by Article 4(1) 2nd sentence EEC. Neither did the other language versions lead to a different conclusion, nor could the Commission rely on its institutional practice, as a mere practice could not override the provisions of the Treaty. An analogy with Article 101(3) Euratom was excluded since, given the simultaneous conclusion of the EEC and Euratom Treaties, any difference in the allocation of powers to the institutions could not possibly reflect an inner contradiction.[94]

The Commission's final argument stated that its treaty power followed from the fact that the Treaty had conferred on it specific powers in the field of competition. This reasoning sought to make use of the *ERTA*-doctrine[95] of parallelism between the internal and external powers of the Community by transposing its principle to the inter-institutional relationship. It nevertheless failed to convince the Court. This internal power could not as such alter the institutional allocation of powers which was solely determined by Article 228 EEC.[96]

3. Analysis

The biggest surprise of this case is not its outcome but the Commission's behaviour that gave rise to it.[97] The principle that the power to conclude international agreements was in general reserved to the Council had not been tested before in court,[98] perhaps because Article 228 EEC left little room for ambiguity. Although the Commission had managed to adduce quite different arguments in defence of its legal stance none of them really carried weight against the fact that the institutional balance and stability of the Community were at stake. The principle of institutional balance as guaranteed in Article 4(1) 2nd sentence is one of the most important constitutional principles of the Treaty. The French action therefore gave the Court an opportunity to preserve the Community system of checks and balances and to pronounce on the principles governing the inter-institutional allocation of powers in the Community's foreign relations law. It emphasized the character of Article 228 EEC as the autonomous and definitive expression of the distribution of competences amongst the institutions in a Community of law.[99] Given the importance to preserve this system any derogations had to be expressly provided for by the Treaty or some other rule of primary Community law. Since no exception applied, the Court's decision was conclusive.

One can only speculate about the Commission's ultimate motivation to claim against all odds the independent power to conclude a competition agreement. The Commission's notion

of the Protocol on the Privileges and Immunities of the European Communities and under Article 229 EEC so as to confirm that there actually were cases in which the Commission had the power to conclude an international agreement on its own.

93 The Commission had argued that the French version in contrast to the general Treaty usage did not speak of 'compétences *attribuées*' but of 'compétences *reconnues* à la Commission.' See Recital 30 of the judgment, [1994] ECR I-3641, 3675.

94 Recitals 30-39 of the judgment, [1994] ECR I-3641, 3675.

95 Case 22/70, *Commission v. Council (ERTA)*, [1971] ECR 263.

96 Recitals 40-41 of the judgment, [1994] ECR I-3641, 3677.

97 See Burrows, *supra* note 85, at 210, 213.

98 See Kingston, *supra* note 85, at 659.

99 As Advocate General Tesauro put it in point 34 of his opinion, [1994] ECR I-3641, 3660: 'I am constantly aware that the Community is governed by the rule of law, based on the principle of legality and conferred powers.'

of 'administrative agreements' at least seems inspired by the Member States constitutional law. The concept of agreements, that create only limited obligations, capable of being discharged without the involvement of other institutions and which are implemented in particular within existing budget limits,[100] reflects a category of agreements recognized in the internal law of most states. Such agreements can be concluded by the executive alone and their existence is based on a specific view of the executive's inherent prerogatives in the conduct of foreign affairs.[101] If the Commission, adopting the role of Community executive, should draw on such examples by way of an analogy, such conduct is questionable.[102] The Community cannot be compared to a State nor can Commission and Council be identified with the functions of executive and legislative.[103] The institutional balance following from the unique legal nature of the Community has to be defined autonomously without reference to other legal systems.

XI. Lancry

Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93, René Lancry SA and Others v. Direction Générale des Douanes and Others, Judgment of 9 August 1994, [1994] ECR I-3957

The Court decided that according to Article 227(2) EEC the Council was not entitled to derogate from the application of the provisions relating to the free movement of goods in the French overseas departments.

In *Legros*[104] the Court treated a dock due called *octroi de mer* as a charge having effect equivalent to a customs duty and found it incompatible with Article 12 EEC and with the EEC-Sweden Free Trade Agreement. However, after the facts material to the case in *Legros* the Council had adopted Decision 89/688/EEC[105] on the basis of Article 227(2) and Article 235 EEC, authorizing a further temporary imposition of the dock dues. Various French courts asked the Court under Article 177 EEC for a preliminary ruling on the validity of Council Decision 89/678/EEC.

The Court amended its reasoning in *Legros* by stating that the unity of the Community customs territory was endangered as much by a regional customs frontier as by a national one. Since the very principle of a customs union as laid down in Article 9 EEC covered all trade in goods, it required the free movement of all goods in general within the union as opposed to free inter-State trade alone. The text of Articles 9 *et seq.* only referred to trade between the Member States because the authors of the Treaty had assumed that no such charges were in existence in the Member States. It followed that they were prohibited also in so far as they were levied on goods from the same Member State.[106] Neither was the Council authorized to adopt a decision exempting the dock dues from the application of the rules on the free movement of goods in the framework of Article 227(2) EEC. In the Court's view an interpretation of Article 235 EEC as allowing the Council to suspend even temporarily the application of norms of primary Community law such as Articles 9, 12 and 13 of the Treaty would fundamentally disregard the internal structure of Article 227(2) EEC as apparent from the explicit distinction in its different subparagraphs. As a result of such interpretation,

100 See Recital 31 of the judgment, [1994] ECR I-3641, 3676.
101 See point 32 of Advocate General Tesauro's opinion, [1994] ECR I-3641, 3659.
102 See point 33 of Advocate General Tesauro's opinion, [1994] ECR I-3641, 3660.
103 See Hummer, *supra* note 85, at 224.
104 Case C-163/90, *Legros*, [1992] ECR I-4625; Brandtner, Folz, *supra* note 77, at 430, 440.
105 Decision concerning the dock dues in the French overseas departments, OJ 1989 L 399/46.
106 Recitals 24-32 of the judgment, [1994] ECR I-3957, 3990.

Article 227(2) first subparagraph would be deprived of its effectiveness.[107] The Court held Council Decision 89/688/EEC invalid.

XII. Re Banana Import Regime

Case C-280/93, Federal Republic of Germany v. Council of the European Union, Judgment of 5 October 1994, [1994] ECR I-4973[108]

The Court added another facet to its increasingly complex jurisprudence on the effects of GATT within the Community legal order.

1. Facts

The Community had adopted Council Regulation 404/93/EEC on the common organization of the market in bananas[109] on 13 February 1993 which subjected imported bananas from Latin America to a levy of ECU 100 per ton or ECU 850 per ton for bananas exceeding a tariff quota of two million tonnes. Before the regulation was adopted imports of bananas into certain Member States were only subject to a customs duty of 20% *ad valorem* consolidated within the framework of GATT while Germany benefited from an annual quota of bananas free of customs duty. Germany filed suit under Article 173(1) EEC seeking the voidance of the banana market organization. Among other arguments[110] Germany claimed an infringement of GATT[111] constituting a reason for annulment.[112]

2. The Judgment

Without addressing the substance of the argument the Court held that GATT could not be relied on to challenge the lawfulness of a Community act. Although the Community was bound by GATT, its spirit, general scheme and terms had to be considered when assessing its scope within the Community legal system. The GATT was characterized by the great flexibility of its provisions, such as its safeguard clauses that permitted an exceptional suspension of concessions and the substitution of concessions by compensation in other sectors. This flexibility found its expression also in the dispute-settlement mechanism which allowed the Contracting Parties different options to react to unilateral suspension of GATT

107 Recital 37 of the judgment, [1994] ECR I-3957, 3994.

108 See Castillo de la Torre, 'The Status of GATT in EC Law, Revisited – The Consequences of the Judgment on the Banana Import Regime for the Enforcement of the Uruguay Round Agreements', 29 *JWT* (1995) 53; Dony, 'L'Affaire des Bananas', *CDE* (1995) 461.

109 OJ 1993 L 47/1.

110 The applicant also claimed an infringement of Article 168 of Lomé IV.

111 For a detailed analysis of GATT law pertaining to the case, see Hahn, Schuster, 'Zum Verstoß von gemeinschaftlichem Sekundärrecht gegen das GATT', *EuR* (1993) 261. The judgment also sets an example for the disadvantages following from the Court's decision not to publish the Report of Hearing in the official court reports any longer. Neither Advocate General Gulmann nor the judgment itself give an account of the plaintiffs' plea alleging a breach of GATT. One manifest violation lies in the introduction of a higher customs duty contrary to Article II(1)(b) GATT. In addition to that a GATT panel had already found the import regime to be incompatible with GATT law. Although the panel report had not been adopted by the Contracting Parties and therefore was not formally binding on the Community, it was not devoid of authority either. See Castillo de la Torre, 29 *JWT* (1995) 53, 56 with further references.

112 Although the Community formally became a Contracting Party of GATT 1994 only with the conclusion of the Uruguay Round agreements (see Article XI(1) WTO Charter, OJ 1994 L 336/3), the Court had constantly held since its judgment in Cases C-21-24/72, *International Fruit Company*, [1972] ECR 1219, that the Community was bound by GATT 1947.

obligations. The Court recalled that these features of GATT precluded an individual from invoking its provisions in a court of law to challenge the validity of a Community act. GATT rules were not unconditional and did not impose an obligation on the Contracting Parties to be recognized as directly applicable rules of international law. For the same reasons the Court could not take GATT provisions into consideration when assessing the lawfulness of a regulation in the framework of an action for annulment brought by a Member State under Article 173(1) EEC. Distinguishing its jurisprudence in *Fediol*[113] and *Nakajima*[114] the Court found itself competent only to review the legality of a Community act with regard to GATT rules if the Community act served to implement a particular contractual obligation or if the Community act itself expressly referred to specific provisions of GATT.[115]

3. Analysis

The Court for the first time had to confront a direct action under Article 173(1) EEC brought by a Member State pleading an infringement of GATT as a ground for illegality. Since Member States were privileged applicants under Article 173(2) EEC entitled to censure any violation of an international agreement binding the Community, no question of direct concern and standing clouded the substance of the case. While the Court had decided in *International Fruit*[116] that due to the particular legal nature of GATT no individual could rely on it to challenge the legality of a Community act, it could not avoid ruling on the effects of GATT within the Community legal order in the *Banana Import Regime* case. Although the case did not raise the issue of direct effect, the Court used the same criteria for assessing the impact of GATT on Community law and reached the same result.

Relying on the particular flexibility of GATT the Court reduced the GATT provisions to a sort of 'soft law', unfit for the assessment of a Community act. Continuing its jurisprudence on the direct effect of international agreements,[117] the Court found that GATT's objective legal nature excluded justiciability and prevented direct applicability. However, the Court, unwilling to overrule its *Fediol* and *Nakajima* judgments, admitted a direct effect of GATT if the Community by referring to GATT law in a Community act had committed itself expressly to implement a particular obligation or if the GATT rule was incorporated into a Community act.

At first sight such a differentiation might appear contradictory.[118] If the applicability of a provision is a function of its justiciability, there is no conclusive reason why the legal nature of a contractual obligation should change, simply because another rule of law refers to its implementation. A rule of GATT does not become any more clear and precise if a Community act happens to mention it. One possible explanation could be offered. When the Court concludes that GATT rules are not unconditional it could intend to say that a Community commitment contained in a Community act could change a GATT rule into an unconditional obligation under Community law. If a GATT rule is no longer subject to any subsequent measure since the Community has made it clear its intention to treat it as an unconditional obligation, a major obstacle preventing direct applicability is removed.

113 Case 70/87, *Fediol*, [1989] ECR 1781; Vedder, 1 *EJIL* (1990) 365, 374. The Court held that if a provision of Community law conferred on individuals the right to invoke GATT, the applicants could rely on it.

114 Case C-69/89, *Nakajima*, [1991] ECR I-2069; Brandtner, Folz, *supra* note 77, at 430. The Court had ruled that since a Community regulation according to its preamble sought to fulfil Community obligations assumed under GATT, applicants could rely on GATT law.

115 Recitals 103-12 of the judgment, [1994] ECR I-4973, 5071.

116 Cases 21-24/72, *International Fruit Company*, [1972] ECR 1219.

117 See above, judgment No. VII *Re Cypriot Import Certificates*.

118 See Castillo de la Torre, 29 *JWT* (1995) 53, 62.

However it is the task of the Court to develop a more coherent and convincing reasoning for the different strands of its GATT jurisprudence than can be inferred from the *Banana Import Regime* judgment. This will not be the last word of the Court on this matter for other reasons as well.[119] The Uruguay Round agreements have transformed GATT into a legal order of world trade, that has lost much of its former flexibility.[120] Many deficiencies in the GATT structure have been amended, as the dispute-settlement system in particular demonstrates.[121] It seems doubtful whether the Court will persist in finding the new GATT not directly applicable.[122]

XIII. Eroglu

Case C-355/93, Hayriye Eroglu v. Land Baden-Württemberg, Judgment of 5 October 1994, [1994] ECR I-5113

The Court confirmed and extended its jurisprudence on the direct applicability of Decision 1/80 of the EEC-Turkey Association Council.[123]

Hayriye Eroglu, the daughter of a Turkish worker lawfully resident in Germany, spent more than a year as a trainee with a German company after having completed her university studies. After her internship she was employed for some ten months with another firm before being offered a position by her first employer in 1992. She applied for a working and residence permit, which was refused by the German authorities, although she had been living in Germany since 1980. Mrs Eroglu filed suit before the *Verwaltungsgericht Karlsruhe* claiming a right of residence by virtue of Article 6(1) first indent[124] and Article 7(2)[125] of Decision 1/80. The administrative tribunal asked the Court for a preliminary ruling under Article 177 EEC on the interpretation of Decision 1/80.

The Court found that the applicant in the main proceedings could not rely on Article 6(1) first indent since it only sought to ensure continuity of employment with the same employer. To allow a change of employer before the expiry of a period of three years as provided by Article 6(1) second indent would mean to deprive Community workers of their priority. However, the Court held Article 7(2) of Decision 1/80 to be directly applicable since it laid down in a clear, precise and unconditional way the right of those children of Turkish workers who had completed a course of vocational training in the host country to respond to any offer

119 See, for example, the decision of the *Finanzgericht Hamburg*, *EuZW* (1995) 413, asking the Court for a preliminary ruling under Article 177 EC on the question of whether the Member States are entitled to derogate from the banana import regime by virtue of Article 234 EC in order to fulfil their obligations under GATT law following from their continuing GATT membership.

120 See Kuijper, 'The Conclusion and Implementation of the Uruguay Round Results by the European Community', 6 *EJIL* (1995) 222, 237.

121 See the Understanding on Rules and Procedures Governing the Settlement of Disputes, OJ 1994 L 336/234.

122 Castillo de la Torre, 29 *JWT* (1995) 53, 66. However it is interesting to note that Council Decision 94/800/EC on the conclusion of the Uruguay Round Agreements, OJ 1994 L336/1, considers in its preamble GATT 94 as 'not susceptible to being directly invoked in Community and Member State courts'.

123 For earlier developments see Brandtner, Folz, *supra* note 77, at 430, 446.

124 Article 6(1) first indent of Decision 1/80 provides that, subject to Article 7 on free access for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer.

125 Article 7(2) of Decision 1/80 reads in its pertinent part: 'Children of Turkish workers, who have completed a course of vocational training in the host country, may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years.'

of employment, if their parents had been legally employed in the Member State for at least three years. The right to respond to any offer of employment necessarily implied a right of residence for the beneficiary. Since the rights guaranteed by Article 7(2) of Decision 1/80 were not subject to any condition concerning the ground on which a right to enter and to stay had been originally granted by the Member State, Mrs Eroglu could rely on Article 7(2) of Decision 1/80.[126]

XIV. Opinion 1/94

Opinion 1/94, Re The Uruguay Round Agreements, Decision of 15 November 1994, [1994] ECR I-5267[127]

Dealing with all aspects of external powers, the Court in its most comprehensive opinion under Article 228(6) EC to date had to decide on the Community's competence to conclude the Uruguay Round Agreements.

1. Facts

After more than seven years of multilateral negotiations the GATT Uruguay Round[128] finally produced a legal order for world trade,[129] creating the World Trade Organization (WTO)[130] as an institutional framework, laying down detailed rules in a single 'package'[131] of multilateral agreements[132] and complementing these arrangements by the introduction of an elaborate dispute-settlement system.[133] Within the Community however there was dispute amongst the Community institutions and between the Commission and most of the Member States about the competence to conclude the Uruguay Round Agreements.[134] While the Commission essentially took the view that the Community had the exclusive competence to conclude all of the agreements, most of the Member States disputed this assertion in particular with respect to the General Agreement of Trade in Services (GATS)[135] and to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs),[136] but also regarding ECSC and Euratom products. The Commission therefore petitioned the Court for an opinion pursuant to Article 228(6) EC on the competence question.

126 Recitals 13-23 of the judgment, [1994] ECR I-5113, 5138.
127 See Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: An Echternach Procession', 32 *CML Rev.* (1995) 763; Hilf, 'The ECJ's Opinion 1/94 on the WTO – No Surprise, but Wise? -', 6 *EJIL* (1995) 245.
128 For an overview, see T. Cottier (ed.), *GATT-Uruguay Round* (1995).
129 See Petersmann, 'The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization', 6 *EJIL* (1995) 161.
130 Agreement establishing the World Trade Organization, OJ 1994 L 336/3.
131 The single 'package' does not enclose the so-called 'Plurilateral Trade Agreements' contained in Annex 4 of the WTO Charter, that serve as a 'testing ground' for future possible developments of GATT.
132 See in particular Annex 1 A of the WTO Charter containing the Multilateral Agreement on Trade in Goods.
133 Understanding on Rules and Procedures Governing the Settlement of Disputes, OJ 1994 L 336/234.
134 For a detailed account of the background of the Opinion 1/94, see Kuijper, *supra* note 120, at 222.
135 General Agreement on Trade in Services, OJ 1994 L 336/191; see Weiss, 'The General Agreement on Trade in Services 1994', 32 *CML Rev.* (1995) 1177.
136 Agreement on Trade Related Aspects of Intellectual Property Rights, OJ 1994 L 336/213.

2. The Opinion

The Court held the Commission's application to be admissible since it could be called upon to state its opinion under Article 228(6) EC at any time before the Community's consent to be bound by the agreement was finally expressed.[137]

A concurring competence of the Member States could not follow from the fact that several Member States did represent certain dependent territories which were exempt from Community law according to Article 227(3) and (5) EC. As set out in *Opinion 1/78*[138] their special position could not affect the demarcation of spheres of competence within the Community.[139] Distinguishing *Opinion 1/78*[140] the Court found that, since the WTO would not have a financial-policy instrument, the fact that the Member States contributed to the operating WTO budget did not in itself justify treating the WTO Charter as a mixed agreement.[141]

The Community had the exclusive competence pursuant to Article 113 EC to conclude the Multilateral Agreements on Goods. Since the Euratom Treaty contained no provisions on external trade, Article 113 EC applied. Article 71 ECSC, reserving competence in commercial policy matters to the Member States, had to be construed restrictively as the ECSC had been drawn up before the creation of the EEC. It could only refer to agreements of the Member States specifically regulating coal and steel products, whereas Article 113 EC encompassed all agreements of a general nature even if they included ECSC goods. Article 113 EC was also the appropriate legal basis for the conclusion of both the Agreement on Agriculture[142] and the Agreement on the Application of Sanitary and Phytosanitary Measures.[143] Since both agreements sought to establish a framework facilitating an international agricultural trading system, they did not intend to achieve the objectives of Article 39 EC and Article 43(2) EC could not take precedence over Article 113 EC. Given the objective to minimize the negative effects on international trade, the Agreement on Technical Barriers to Trade[144] was covered by Article 113 EC as well.[145]

While the cross-border direct supply of services was analogous to the trade in goods and therefore was part of the Common Commercial Policy, the rest of the modes of the supply of services regulated by GATS, i.e. consumption abroad, commercial presence and the presence of natural persons, exceeded the limits of Article 113 EC. As the system of the different Community policies articulated in Article 3 EC and the existence in the Treaty of specific chapters on the free movement of natural and legal persons and transport showed, not all of these matters could fall within the Common Commercial Policy. An institutional practice with respect to embargoes based on Article 113 EC pointing to the contrary was held to be immaterial, since the measures in question were only a necessary adjunct to the principal measure. In any case a mere practice could not in any way create a legal precedent with regard to the correct legal basis.[146]

The exclusive competence under Article 113 EC only covered the provisions of TRIPs dealing with the fight against the release of counterfeit goods into free circulation, since these related to measures taken by customs authorities at the external frontiers of the Community. For the rest of the agreement, however, no such competence could be inferred, since

137 Recital 12 of the opinion, [1994] ECR I-5267, 5392.
138 Opinion 1/78, *International Agreement on Natural Rubber*, [1979] ECR 2871.
139 Recital 17-18 of the opinion, [1994] ECR I-5267, 5394.
140 Opinion 1/78, *supra* note 138.
141 Recital 21 of the opinion, [1994] ECR I-5267, 5395.
142 Agreement on Agriculture, OJ 1994 L 336/22.
143 Agreement on the Application of Sanitary and Phytosanitary Measures, OJ 1994 L 336/40.
144 Agreement on Technical Barriers to Trade, OJ 1994 L 336/86.
145 Recitals 24-33 of the opinion, [1994] ECR I-5267, 5396.
146 Recitals 42-53 of the opinion, [1994] ECR I-5267, 5401.

intellectual property rights did not relate specifically to international trade. Otherwise the Community institutions would be able to escape the internal constraints to which they were subject by the legal bases in respect of legislative procedures and voting rules in particular. The fact that intellectual property infringements could give rise to commercial defence measures by the Community could have no influence on the interpretation of Article 113 EC since these measures already by their very nature fell within the ambit of commercial policy. Even if international agreements concluded by the Community occasionally contained ancillary provisions dealing with aspects of intellectual property rights, the central subject matter of TRIPs did not fall within the ambit of Article 113 EC.[147]

As to the external powers of the Community flowing from its internal powers to legislate pursuant to the *ERTA*-doctrine[148] the Court once again made clear that in general the Community competence to conclude an agreement was only exclusive if the parallel internal field had been subject to total harmonization. Neither were the internal and external aspects of the sectors covered by GATS so inextricably linked in the sense of *Opinion 1/76*[149] as to justify the conclusion of an agreement without prior internal harmonization. The same reasoning applied to Article 100 a EC and Article 235 EC as these legal bases could only confer exclusive external competence in the exceptional case, where internal powers could only be effectively exercised at the same time as external powers. On the other hand the fact that the chapters on the right of establishment and the freedom to provide services did not expressly refer to the treatment of non-member country nationals, did not mean that the Community was deprived of any external powers in these fields. Whenever the Community had included in its internal legislative acts provisions dealing with the status of non-member country nationals or expressly conferred on its institutions powers to negotiate with third States, such as in the banking and insurance sector, it acquired exclusive external competence in this respect. The same principle applied if the Community had achieved complete internal harmonization of the rules governing access to a self-employed activity. Since these requirements were not fulfilled in all areas covered by GATS, the competence to conclude GATS was shared between the Community and its Member States. Refuting an argument brought forward by the Member States the Court held that the Community was certainly competent to harmonize national rules on intellectual property within the ambit of Article 100 EEC. Since the Community had not yet made use of these powers the Community and its Member States were jointly competent to conclude TRIPs.[150] Since the Uruguay Round agreements were inextricably interlinked *inter alia* by the possibility of cross retaliation, the Community and the Member States were under a duty of close cooperation within their respective spheres of competence following from the requirement of unity in the international representation of the Community.[151]

3. Analysis

The merit of *Opinion 1/94* lies in the fact that the Court finally set limits to the concept of Common Commercial Policy under Article 113. The Commission's stance has been rightly criticized by a Member State as 'extravagant'.[152] The concept that any agreement liable to have a direct or indirect effect on the volume or structure of international trade encompassing not only goods could be concluded on the basis of Article 113 EC would have led to the

147 Recitals 55-71 of the opinion, [1994] ECR I-5267, 5404.
148 Case 22/70, *Commission v. Council (ERTA)*, [1971] ECR 263.
149 Opinion 1/76, *Draft Agreement establishing a European laying-up for inland water wessels*, [1977] ECR 741.
150 Recitals 77-105 of the opinion, [1994] ECR 5267, 5411.
151 Recitals 108-9 of the opinion, [1994] ECR I-5267, 5420.
152 [1994] ECR I-5267, 5316.

transformation of the Common Commercial Policy into a general and exclusive Community competence on external economic relations. The Council therefore had argued that the Commission was seeking by means of judicial interpretation the establishment of rules which had been rejected as proposals in the course of the Intergovernmental Conference on Political Union in 1991.[153] The Court uses arguments derived from the system of the Treaty curtailing the exclusive external competence of the Community under Article 113 EC. It might seem debatable, as has been suggested, whether the Court actually limits the implied extension of Community powers to the detriment of the Member States.[154] By finding that internal competences apparently restricted to intra-Community matters nevertheless can form the basis of external competence the Court asserts a Community power not expressly claimed before. Since these powers develop only gradually into exclusive competences once complete internal harmonization has been achieved, the loss for the Member States is less apparent and acute but the potential reach of such an external competence encompasses the entire jurisdiction *ratione materiae* covered by the Treaty. This result is confirmed by the express rejection of arguments relating to domains reserved to the Member States.[155]

Turning to the flaws of the opinion one cannot fail to notice that the grounds given by the Court fall short of the ideal of a comprehensive and consistent argument stating a logical and conclusive line of reasoning justifying the decision. The reasons given for the identification of the applicable legal basis appear to be incoherent and deviate from earlier jurisprudence.[156] One has to consider that the Court was under pressure to give the opinion as early as possible in order to allow a timely ratification by the Community and the Member States. Apart from that, the subject matter of the opinion, that covered most of the crucial questions of the Community's foreign-relations law, and the mass of the submissions propagated by institutions and Member States[157] excluded any possibility for the Court to treat all arguments raised with equal diligence. The opinion therefore has to be seen as the solution to a practical problem, i.e. the procedure applicable for the conclusion of the Uruguay Round Agreement. Apart from that, *Opinion 1/94* has raised more questions than it has answered.

153 [1994] ECR I-5267, 5306.
154 See Hilf, 6 *EJIL* (1995) 245, 258.
155 Recital 104 of the opinion, [1994] ECR I-5267, 5419.
156 See Bourgeois, *supra* note 127, at 763, 776.
157 Of 155 pages *in toto* the operative part of the opinion comprises only 33 pages.