A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1995

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The following survey covers the period from 1 January to 31 December 1995.[2]

I. Bonapharma

Case C-334/93 *Bonapharma Arzneimittel GmbH v. Hauptzollamt Krefeld*, judgment of 23 February 1995, [1995] ECR I-319

Extending its *rationale* in the *Huygen* case,[3] the Court accepted another exception from the strict rules of origin laid down in a free trade agreement.

Bonapharma, a well-known parallel importer of pharmaceuticals, tried to reimport medicinal products from Austria, but was unable to prove the origin of the goods in question in conformity with Protocol No. 3 to the free trade agreement (FTA) between the EEC[4] and the Republic of Austria of 22 July 1972.[5] The German customs authorities imposed a post-clearance customs duty amounting to DM 20,000 and *Bonapharma* sought judicial protection before the *Finanzgericht Düsseldorf*. The plaintiff argued that its inability to give the requisite proof of origin was due to the fact that it had been refused access to the documents, held by the initial supplier, relating to the original export of the goods from Germany into Austria.

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

3 Case C-12/92 *Huygen*, [1993] ECR I-6831; see Vedder and Folz, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1993', 5 *EJIL* (1994) 448, at 462.

4 The Treaty on the European Economic Community is referred to with the abreviation 'EEC'. The Treaty on the European Community, 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 abreviation 'EC'.

5 OJ 1972 L 300/1. The EEC-Austria FTA has been superseded, first by the conclusion of the Agreement on the European Economic Area in accordance with Article 120 EEA, which itself has been superseded by Austria's accession to the Community.

Under Protocol No. 3 to the FTA[6] the agreement is applicable to goods originating from the Community and Austria. The formal evidence of origin is the EUR.1 movement certificate issued by the authorities of the exporting state. Article 9(3) of Protocol No. 3 provides that in the case of reimports the necessary EUR.1 certificate is to be issued upon presentation of the previously granted EUR.1 certificate. The EUR.1 certificate, issued by the German authorities on behalf of the Community for the export of the goods from the Community into Austria, was held by the initial supplier. All attempts made by *Bonapharma,* including judicial proceedings before Austrian courts, to obtain the documents had failed. The *Finanzgericht* Düsseldorf found the origin of the goods to be certified by alternative evidence, including attestations by German and Austrian authorities, beyond any doubt and therefore asked the Court for a preliminary ruling under Article 177 EEC on possible exceptions from the procedures laid down in Protocol No. 3.

The Court first stressed the importance of Protocol No. 3. Any possibility of proving the origin of goods by alternative means, and therefore any exception from the need for a EUR.1 certificate, affects the unity and security of the application of the EEC-Austria FTA and threatens to undermine the agreement.[7]

The Court, however, pointed to its judgment in the *Huygen* case,[8] in which it had permitted exceptions where the trader in question had been confronted with quite exceptional circumstances outside his control, the consequences of which could not have been avoided despite all care taken.[9] The Court found *Bonapharma* to be in a similar situation. The origin of the goods in question was established beyond doubt on the basis of objective evidence, which could not have been manipulated or falsified by those involved. All the steps necessary to obtain the EUR.1 certificates had been taken but had failed for reasons beyond the control of the traders, namely due to anticompetitive behaviour by other interested persons contrary both to the objective and the terms of the EEC-Austria FTA. These circumstances justified a derogation from the arrangements of Protocol No. 3. It was therefore permissible to dispense with the production of the EUR.1 certificate and the national court was free to establish the origin of the goods in the main proceedings.[10]

The *Bonapharma* case shows that the purpose of international agreements can also be frustrated by the behaviour of private parties. The Court is to be commended for finding a pragmatic solution, which safeguards both the interests of the parties to the agreement and the interests of those traders who try to maintain their obligation under the agreement.[11]

6 Protocol No. 3 in relation to the definition of the concept of 'originating products' and methods of administrative cooperation, as amended by Decisions No. 1/88, 2/88 and 5/88 of the EEC-Austria Joint Committee, OJ 1988 L 149/1; L 379/1 and L 381/1.

7 Case C-334/93 *Bonapharma*, [1995] ECR I-319, at 338, Recital 16.

8 *Supra* note 3.

9 Recital 17 of the judgment.

10 Recitals 18–24 of the judgment.

11 As Advocate General Lenz put it in Point 22 of his conclusions, [1995] ECR I-319, at 329: 'The carrying out of such re-imports is also a perfectly legitimate activity. If an economic operator turns

II. Opinion 2/92 OECD

Opinion 2/92 *regarding the competence of the Community to participate in the Third Revised Decision of the OECD on national treatment,* Decision of 24 March 1995, [1995] ECR I-525[12]

The Court confirmed its jurisprudence on the limits of the Common Commercial Policy (CCP) and on the exclusivity of implied competences as previously laid down in Opinion 2/91 *ILO*[13] and Opinion 1/94 *WTO.*[14]

The Community is not a formal member of the Organization for Economic Cooperation and Development (OECD) but it has always cooperated closely in its work in accordance with Article 231 EC and Article 13 of the OECD Convention.[15] The OECD Council had passed a policy statement in the form of a so-called Revised Declaration on national treatment, whereby the member countries expressed their intention to accord the same treatment to undertakings by other members as to domestic undertakings. While the Declaration was not binding itself, it contained a Third Decision which introduced procedures for the notification of national derogations, the monitoring of implementation and the settlement of disputes with which the members had to comply. Article 7 of the Third Decision provided that the Decision was open to accession by the Community. Belgium asked the Court for an opinion under Article 228 para. VI EC on the correct legal basis for accession to the Third Decision and on the nature of the Community's competence.

The Court first noted that, despite the 'soft law' character of the Revised Declaration, the Third Decision would be binding on the Community after accession. It therefore must be treated as an agreement in the sense of Article 228 EC, i.e. as an undertaking, with binding force, entered into by subjects of international law.[16]

However, the Council objected to the admissibility of the opinion, since it considered that Belgium had not questioned the competence of the Community but had raised the issue of the correct legal basis, a question unfit for judicial assessment in

to account the price difference existing between Austria and a Member State of the Community he is availing himself of the possibilities offered to him by the agreement.'

12 For a more detailed discussion on the effects of the Court's latest jurisprudence see the following articles: Dörr, 'Die Entwicklung der ungeschriebenen Außenkompetenzen der EG', *EuZW* (1996) 39; Flory and Martin, 'Remarques à propos des Avis 1/94 et 2/92 de la Cour de Justice des Communautés Européennes au regard de la Notion de Politique Commerciale Commune', *CDE* (1996) 379; Gilsdorf, 'Die Außenkompetenzen der EG im Wandel – Eine kritische Auseinandersetzung mit Praxis und Rechtsprechung –', *EuR* (1996) 145; Neuwahl, 'Shared Powers or Combined Incompetence? More on Mixity', 33 *CMLRev.* (1996) 667.

13 Opinion 2/91 *ILO,* [1993] ECR I-1061; see Vedder and Folz, 5 *EJIL* (1994) 448, at 452.

14 Opinion 1/94 *WTO,* [1994] ECR I-5267, see Vedder and Folz, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1994', 7 *EJIL* (1996) 112, at 131.

15 UNTS 888, 179.

16 Opinion 2/92 *OECD,* [1995] ECR I-525, 553, Recital 8 of the opinion. For earlier developments see Vedder and Folz, 7 *EJIL* (1996) 112, at 124.

the framework of a procedure under Article 228 para. VI EC. While the Court rejected the Council's plea for an application of Article 91 of the Rules of Procedure by way of analogy, it pointed out that it was incumbent on the Court to examine the admissibility of the request for an opinion *ex officio*.

Since Belgium's request also concerned the division of powers between the Community and its Member States, it was appropriate for the Court to accede to this request for an opinion.[17]

Turning to the substance of the opinion, the Court found it necessary to determine the scope of Article 113 EC. If the entire subject matter of the Third Decision in connection with the Revised Declaration were covered by the notion of Common Commercial Policy (CCP) the competence of the Community would be exclusive.[18] Summing up the content of the agreement, the Court found that the rule of national treatment concerned the situation of undertakings operating on the territory of the Community's Member States which are owned or controlled by nationals of other OECD member countries. The national treatment rule applies to measures concerning government procurement, official aids and subsidies, access to local finance, tax obligations and investments other than direct investments or investments by direct branches. This meant that the rule applied to conditions for the participation of foreign controlled undertakings in trade between the Member States and non-member countries, conditions which are the subject of the Community's CCP. On the other hand, the rule also concerned the participation of foreign controlled undertakings in intra-Community trade and such trade is governed by the Community's internal market rules and not by the rules of its CCP. While the national treatment rule only partially related to international trade, it affected internal trade to the same extent, if not more so. In addition, the field of transport, as had been stated before by the Court in Opinion 1/94 *WTO*, did not fall within the scope of Article 113 EC but within the scope of the common transport policy. Consequently Article 113 EC did not confer exclusive competence on the Community to participate in the Third Decision.[19]

As for implied powers, the Court, citing its judgment in the *AETR*[20] case (*sic*), pointed out that the Community's exclusive external competence does not automatically flow from its power to lay down rules at the internal level. Distinguishing Opinion 1/76,[21] the Court confirmed its jurisprudence in Opinion 2/91 *ILO* and Opinion 1/94 *WTO* and held that the Community had only acquired exclusive competence insofar as matters covered by the Third Decision were the subject of internal legislation. Since the internal measures of the Community do not cover all the fields

17 Recitals 9–15 of the opinion.
18 It is the Court's constant jurisprudence since Opinion 1/75 *Local Costs*, [1975] ECR 1355 that Article 113 EC bestows an exclusive competence on the Community.
19 Recitals 20–28 of the opinion.
20 Case 22/70 *ERTA*, [1971] ECR 263.
21 Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland water vessels*, [1977] ECR 741.

of activity to which the Third Decision relates, the Community and its Member States share joint competence to participate in that decision.[22]

III. Evans

Case C-324/93 *The Queen v. Secretary of State for the Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd,* judgment of 28 March 1995, [1995] ECR I-563

The Court confirmed and clarified several aspects of its recent jurisprudence on Article 234 EC.[23]

1. Facts

The Court found itself faced with a rather unusual constellation: a Member State arguing in favour of the free movement of goods in the Community and private parties insisting on derogations from a fundamental freedom of the Treaty.

The United Kingdom has been a party to the 1961 Single Convention on Narcotic Drugs[24] since 2 September 1964. The Narcotics Convention obligates its member countries to combat illegal drug trafficking and to subject the legal trade in certain specified narcotics for medical purposes to very strict controls, such as licensing. While heroin is also covered by the Narcotics Convention, there is a substantial amount of legal trade for medical purposes in the United Kingdom as it is used as an analgesic for the terminally ill. Until 1992 the United Kingdom had prohibited the import of heroin and had granted to *Evans* and *Macfarlan*, the plaintiffs in the main proceedings, the exclusive right to manufacture and process the product for domestic medical use and marketing. Thereafter, the UK authorities granted a licence to *Generics*, another supplier, to import a consignment from the Netherlands. *Evans* and *Macfarlan* attacked the licence granted to their competitor *Generics* in court, arguing that the obligations of the Narcotics Convention, even if they were at variance with Articles 30 and 36 EC, would have to take precedence over Community law by virtue of Article 234 EC. The High Court of Justice asked the Court for a preliminary ruling under Article 177 EC.

2. The Judgment

Relying on older jurisprudence of the Court, several Member States argued that agreements concluded prior to the entry into force of the Treaty between two Mem-

22 Recitals 29–36 of the opinion.
23 For earlier developments see Vedder and Folz, 7 *EJIL* (1996) 112, at 114.
24 UNTS 520, 204.

ber States could not justify restrictions on trade within the Community.[25] Since the case before the Court concerned an intra-Community import from the Netherlands into the United Kingdom, Article 234 EC could not apply in their view. In order to determine whether a Community rule might be deprived of effect by a pre-accession agreement, the Court, following Advocate General Lenz,[26] found it necessary to ascertain whether that agreement imposes on the Member State concerned obligations required by non-member states parties to it. Following its precedent in the *Levy*[27] case, the Court however made it clear that in the framework of an Article 177 EC procedure it is not the task of the Court, but the duty of the national courts, to determine whether any obligations are actually imposed by an earlier international agreement on the Member State concerned. It is the national court's task to establish the ambit of those obligations so as to ascertain to what extent they thwart the application of Community law.[28] In addition, the Court clarified that where an international agreement allows, but does not require a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure.[29]

3. Analysis

While some of the earlier judgments of the Court on Article 234 EC had failed to impress, either by thorough reasoning or by the clarity of statements, the *Evans* judgment, at least when read in conjunction with Advocate General Lenz's conclusions, elucidates some of the principles of the relationship between Member States' pre-accession agreements and Community law.

Confirming its *Levy* judgment, the Court has made it clear that under Article 234 EC the rights of third states alone can justify a derogation from Community law. Only where a Member State owes fulfilment of a contractual obligation under a pre-accession agreement to a non-member state is the Member State concerned excused for not complying with Community law. These principles also apply in the case of multilateral international agreements which do not provide for the bilateral reciprocal obligations under traditional international law but create obligations *erga omnes*, i.e. obligations for which any party to the agreement owes fulfilment to all other parties. Advocate General Lenz found it beyond doubt that in the present case the fulfilment of the obligations imposed by the Convention on the contracting parties is a duty resting on all contracting parties, since the duty to monitor and control the legal trade in heroin is intended not only to protect the contracting party directly

25 See point 31 and 32 of Advocate General Lenz's conclusions, [1995] ECR I-563, 576. For earlier developments see Vedder, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law', 1 *EJIL* (1990) 365, at 371.
26 See points 29–45 of Advocate General Lenz's conclusions, [1995] ECR I- 563, 575.
27 Case C-158/91 *Levy*, [1993] ECR I-4287. See Vedder and Folz, 5 *EJIL* (1994) 448, at 459.
28 Recitals 27–30 of the judgment.
29 Recital 32 of the judgment.

concerned but all other parties as well.[30] This means that in the case of an *erga omnes* obligation a Member State can rely on Article 234 EC if there is at least one non-member state which is a party to the pre-accession agreement. However, a Member State is only justified in giving precedence to the terms of the agreement if the agreement does not leave it any choice but to derogate from Community law. The Court had previously rejected Member States' defences based on Article 234, if the agreement offered ways to fulfil the requirements of Community law as well as those of the agreement.[31] In *Evans* the Court has now explicitly found that only in the case of an actual conflict between contractual obligations and Community law does the question of a possible application of Article 234 EC arise.[32] It is the task of the national courts to find out whether such a conflict exists before making a reference under Article 177 EC.

IV. Krid

Case C-103/94 *Zoulika Krid v. Caisse Nationale d' Assurance Vieillesse des Travailleurs Salariés (CNAVTS)*, judgment of 5 April 1995, [1995] ECR I-719

The Court confirmed and extended its jurisprudence on social security non-discrimination clauses in association agreements under Article 238 EC.[33]

Zoulika Krid, an Algerian national resident in France, is the widow of an Algerian worker. Her husband had spent his entire working life in France. While receiving a regular survivor's pension, Ms. Krid applied for a supplementary allowance from the Fond National de Solidarité (FNS). The French authority, the *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés* (CNAVTS), refused her application on the ground of her Algerian nationality. Krid challenged this decision before the *Tribunal des Affaires de Sécurité Sociale*, arguing that Article 39(1) of the EEC-Algeria cooperation agreement[34] prohibited discrimination on the ground of nationality with regard to social security benefits. CNAVTS replied that the supplementary FNS allowance was non-contributory and therefore part of social assistance but not of social security. The *Tribunal des Affaires de Sécurité Sociale* asked the Court for a preliminary ruling under Article 177 EC on the question whether Krid was entitled to the supplementary allowance by virtue of Article 39(1) of the EEC-Algeria cooperation agreement.

30 See point 33 of Advocate General Lenz's conclusions, [1995] ECR I-563, 577.

31 See in particular the judgments Case C-146/89 *Commission v. United Kingdom (Re Territorial Sea)*, [1991] ECR I-3533, see Brandtner and Folz, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1991–92', 4 *EJIL* (1993) 430, at 432 and Case C-221/89 *Factortame II*, [1991] ECR I-3905, see Brandtner and Folz, 4 *EJIL* (1993) 430, at 435.

32 Compare I. MacLeod, I.D. Hendry, S. Hyett, *The External Relations of the European Communities* (1996), at 230.

33 For earlier developments see Vedder and Folz, 7 *EJIL* (1996) 112, and 117.

34 OJ 1978 L 263/1.

The Court first verified the direct effect of Article 39(1) of the agreement. Recalling its settled case law on Article 41(1) of the EEC-Morocco cooperation agreement,[35] which it had found to be directly applicable, the Court held that Article 39(1) of the EEC-Algeria agreement was drafted in the same terms and pursued the same object. Therefore, Article 39(1) had direct effect and persons to whom that provision applied were entitled to rely on it in proceedings before national courts. The Court went on to determine the scope *ratione personae* and *ratione materiae* of that provision. Since Article 39(1) of the agreement also applied to members of workers' families living with them in the Member State in which they were employed, this provision also covered members of the family of an Algerian migrant worker who continued, after the worker's death, to live in the Member State in which he had been employed. Turning to the material scope of the provision, the Court concluded, by way of analogy with its jurisprudence on the EEC-Morocco agreement, that the term social security must be deemed to have the same meaning as internal Community concepts. The Court had previously held in internal Community matters that supplementary FNS allowances, although having the dual function of guaranteeing a minimum means of subsistence to persons in need and of providing additional income for the recipients of inadequate social security benefits, came within the social security system in so far as they were designed to increase the amount of pensions without any assessment of individual needs or circumstances. The supplementary FNS allowances were therefore covered by Article 39(1) of the EEC-Algeria cooperation agreement. On the other hand, since the agreement defined its own scope of application *ratione personae*, exemptions that had been developed by the Court in internal Community matters of social security could not apply in the case at hand.[36]

V. RTE/ITP

Joined Cases C-214/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities*, judgment of 6 April 1995, [1995] ECR I-743

The Court refused to deal with a plea based on the need to interpret Community law in the light of a Member State's agreement by virtue of Article 234 EEC.[37]

Radio Telefis Eireann (RTE), a broadcasting company, had assigned the copyright of its programme listings to Independent Television Publications Limited (ITP), thereby excluding independent publication of these listings by other publishers. The Commission issued a decision censuring the infringement of Article 86 EEC by RTE

35 Case C-58/93 *Yousfi*, [1994] ECR I-1353.
36 Recitals 21–40 of the judgment.
37 For earlier developments see Brandtner and Folz, 4 *EJIL* (1993) 430, at 434.

and ITP and ordering them to grant licences to interested publishers subject to reasonable royalties. RTE and ITP attacked these decisions under Article 173(2) EEC, but lost their case before the Court of First Instance.[38] RTE and ITP appealed to the European Court of Justice.

While the plaintiffs had not managed to present a fully-fledged argument based on Article 234 EEC before the Court of First Instance, they improved their plea slightly on appeal. RTE argued that the 1886 Berne Convention on Copyright as amended by the Paris Act of 1971 should be regarded as part of the rules of Community law relating to the application of the Treaty referred to in Article 173 EEC, even though the Community itself is not a party to the Convention.[39] In support of that supposition, RTE pointed to several Commission proposals in the sense of Article 149(1) EEC which referred to the Convention as material minimum standards by which the Community should be bound. RTE concluded that, although the Community itself is not a party to the Convention, account must be taken of the rules of that Convention within the framework of Community law.[40]

Even Advocate General Gulmann shared the plaintiffs' view to a certain extent. AG Gulmann found it appropriate to interpret Article 86 in accordance with the Berne Convention since these rules were designed to guarantee minimum protection. The Convention enjoyed broad international support and all Member States had acceded. AG Gulmann referred to examples in the Community secondary legislation, mentioning the Berne Convention as an expression of a generally accepted minimum standard. He therefore concluded that Article 86 EC, if interpreted in the light of the Berne Convention, does not necessarily justify the compulsory grant of licences to competitors as foreseen by the contested decision of the Commission.[41]

38 See the judgments in Case T-69/89 *RTE/Commission*, [1991] ECR II-485 and Case T-76/89 *ITP/Commission*, [1991] ECR II-575. The Commission had also issued a decision addressed to the BBC. The BBC lost its suit in Case T-70/89 *BBC/Commission*, [1991] ECR II-535 but did not appeal against that judgment before the European Court of Justice.

39 Article 9(1) of the Berne Convention reserves to the author of a protected work an exclusive right to its reproduction. Article 9(2) of the Convention subjects possible exceptions to the exclusive right of the copyright holder by national legislation to certain restrictions.

40 Recitals 78–79 of the judgment. RTE cites in this respect the judgments in Case 4/73 *Nold*, [1974] ECR 491 and Case 227/88 *Hoechst*, [1989] ECR 2859. This reference however would have required further explanation. In these cases the Court seeks inspiration from the European Convention of Human Rights (ECHR) in order to establish the common constitutional traditions of the Member States and consequently to determine the content of the general principles of Community law which protect the individual. In this respect it remains unclear which general rule of Community law should be interpreted in the light of the Berne Convention. If RTE should seek to interpret Article 86 EEC in the light of the Berne Convention, as Advocate General Gulmann suggests, it would have been necessary to provide a more extensive reasoning in order to answer the question why fundamental rights and copyright law should be treated in an analaguous way. It would have been possible to argue that the general principles of Community law protected the right to property and that this guarantee covered intellectual property as well. While the Court had referred in the *Hauer* case to Article 1 of the first additional protocol to the ECHR, the Berne Convention as a generally accepted standard of minimum protection would have been a more specific expression of the common constitutional traditions of the Member States in the field of intellectual property. Thus it would have been possible to balance Article 86 EC against the Community fundamental right to property as guaranteed in Article 9 of the Berne Convention.

41 See points 144–168 of Advocate General Gulmann's conclusions, [1995] ECR II-743, 787.

The Court, however, refused to take issue with both the parties' contentions and the Advocate General's conclusions and simply reiterated its jurisprudence on Article 234. The Court found it appropriate to observe that the Community is not a party to the Berne Convention. While this Convention was a pre-accession agreement for Ireland and the United Kingdom in the sense of Article 234 EEC, the Court pointed to its settled case law according to which the provisions of an agreement concluded prior to a Member State's accession cannot be relied on in intra-Community relations if, as in the present case, the rights of non-member countries are not involved. In addition, the Court held that the specific provisions on which the plaintiffs had relied were only amended and ratified after accession to the Community. The Court therefore refused to take the Berne Convention into consideration.[42]

Apart from sidestepping a very interesting question, i.e. whether multilateral conventions to which the Community is not a party may nevertheless be taken into consideration when interpreting Community law, the Court had in fact answered a plea that had not been made and had failed to answer an argument actually raised by the plaintiffs.

VI. Bozkurt

Case C-434/93 *Ahmet Bozkurt v. Staatsecretaris van Justitie*, judgment of 6 June 1995, [1995] ECR I-1475

While confirming its jurisprudence on the direct effect of EEC-Turkey Association Council decisions under Article 238 EEC,[43] the Court had to conclude that these do not protect a Turkish worker who, having suffered an accident at work, is rendered permanently incapacitated for work.[44]

Ahmet Bozkurt, a Turkish national, had been employed as an international lorry driver by a Dutch company. Between his assignments he lived in the Netherlands. In the case of Bozkurt, the national legislation of the Netherlands did not require a working or residence permit. In 1988 Bozkurt was the victim of an accident at work that rendered him permanently incapacitated for any further employment. His application for a permanent residence permit was rejected in 1991. Relying on Article 6(1) of Decision 1/80 of the EEC-Turkey Association Council,[45] Bozkurt attacked the refusal in court, claiming a right to stay in the Netherlands. The *Raad van State der Nederlanden* asked the Court under Article 177 EC whether Decision 1/80 conferred a right of residence to a person in the situation of Bozkurt.

42 Recitals 83–86 of the judgment.
43 For earlier developments see Vedder and Folz, 7 *EJIL* (1996) 112, at 130.
44 For a more detailed analysis see the case note by Peers, 33 *CMLRev.* (1996) 103.
45 Article 6(1) of Decision 1/80 reads in its pertinent part as follows: 'Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State ... shall enjoy free access in that Member State to any paid employment of his choice, after four years of legal employment.'

Since Article 6 of Decision 1/80 required that a Turkish worker belong to the legitimate labour force of a Member State, the Court first had to ascertain whether an international lorry driver who did not work permanently within the territory of a Member State actually belonged to the labour force of that Member State. The Court had previously decided in its *Lopes da Veiga* judgment[46] that, in order to determine whether a national of a Member State who worked on board a ship flying the flag of another Member State was covered by Article 48 of the Treaty, the national court had to take into account several factors, namely whether the worker was employed by a company established in a Member State, whether the employment relationship was governed by the law of a Member State, and whether the worker was insured under the social security system of a Member State and paid taxes there. The Court held that in adopting Decision 1/80 the Association Council was determined to go one stage further, guided by Articles 48, 49 and 50 of the Treaty, towards securing freedom of movement for Turkish workers. In order to further that objective, the Court is prepared to transpose as far as possible Community principles to Turkish workers under Decision 1/80. That means that the national court must ascertain whether the legal relationship of employment can be located within the territory of a Member State or retains a sufficiently close link with that territory. To this end, consideration must be given to the place where the worker was hired, the place where he actually worked and the applicable national legislation in the field of employment and social security law.

The Court went on to determine whether a worker who did not need a residence or work permit under national law could be considered as being duly registered and therefore part of the legitimate labour force of a Member State within the meaning of Article 6 Decision 1/80. Since the question of legality of employment was a matter for the national legislation of the Member State, any legal employment automatically conferred a right of residence so as to safeguard access to the labour force. Furthermore, Article 6(1) of Decision 1/80 did not explicitly submit the right to work and its inherent right of residence to the formal requirement of a work and residence permit. Administrative documents issued by the Member States could only be of declaratory value.

However, it was the Court's view that Article 6 of Decision 1/80 did not entitle the plaintiff to remain in the Netherlands. This provision only covers Turkish workers who are currently employed in a Member State or are temporarily incapacitated for work. It does not regulate the situation of a worker who, either due to retirement or permanent incapacitation, is no longer part of the legitimate labour force of a Member State. A Turkish worker's right of residence, following from Article 6 of Decision 1/80, as a corollary of legal employment is bound to the purpose of employment. It therefore ceases to exist when the person concerned definitively stops working.[47] The Court finds confirmation of this result in a comparison with the legal

46 Case 9/88 *Lopes da Veiga/Staatsecretaris van Justitie*, [1989] ECR 2989.

47 As Peers, *supra* note 44, at 110, puts it: '... In contrast, rights to remain after disability are not a *necessary implication* of the right to work.'

situation under Article 48 EC. Even within the Community, the right of workers to remain in another Member State after the end of their employment there is subject to specific regulations according to Article 48(3)(d) EC. The rules applicable under Article 48 EC therefore could not be transposed to Turkish workers.[48]

The logic of the Court's reasoning regarding the limits of the rights under Article 6 of Decision 1/80 is irrefutable. The *Bozkurt* case shows that even the Court's teleological interpretation of the EEC-Turkey association agreement is limited by the objectives of the agreement and leaves room for considerable personal hardship.

VII. Odigitria

Case T-572/93 *Odigitria AAE v. Council of the European Union and Commission of the European Communities*, judgment of 6 July, [1995] ECR II- 2025

The Court of First Instance accepted in principle that the Commission had a duty to protect the interests of Community fishing vessels in the framework of a fisheries agreement with third states, even though the Court denied a liability in this specific case.[49]

1. Facts

The Community had concluded fisheries agreements both with the Republic of Senegal and with the Republic of Guinea-Bissau guaranteeing Community fishing vessels access to their fishing zones against financial compensation. Access to the fishing zones was subject to the condition that the Community vessels were in possession of a valid licence. However the exact demarcation of the maritime borderline between Senegal and Guinea-Bissau was under dispute between the two states. In 1990 the fishing vessel 'Theodoros M' flying the Greek flag was boarded by the Guinea-Bissau Coast Guard within the disputed waters. Since the Greek vessel only held a licence granted by the Senegalese authorities and issued through the Commission's delegation *in loco*, the Coast Guard seized ship and cargo. The master of the vessel was indicted before a court of Bissau for illicit fishing. The Court found the master to be aware of a dispute between the two states and fined him accordingly. Relying on Article 215(2) EC, the owner of the ship filed a suit before the Court of First Instance requesting compensation.

48 Recitals 15–42 of the judgment.

49 For an introduction to the Community's external fisheries policy, see MacLeod, Hendry and Hyett, *supra* note 32, at 241. In another case, Case T-493/93 *Hansa-Fisch GmbH v. Commission*, judgment of 8 March 1995, [1995] ECR II-575, the Court of First Instance had to decide on the distribution of fishing licences resulting from the EEC-Morocco Fisheries Agreement among the nationals of various Member States.

2. The Judgment

The applicant argued initially that, given the uncertainty caused by the territorial dispute, the very conclusion of agreements with Senegal and Guinea-Bissau by the Commission and Council was in itself a wrongful act that entailed the Community's liability. The applicant therefore submitted that both institutions had failed to observe their duty to show due care and to ensure good administration in the conclusion of an international agreement. The Council replied that it had acted within the limits of its discretion in deciding to remain neutral with regard to a sovereignty dispute between non-member states. The Commission supported the Council's stance by stating that any attempt to clarify the status of the disputed waters would have been interpreted by the other parties as interference in their internal affairs.[50]

Restating the settled case law on the principles governing the Community's liability for legislative measures, the Court of First Instance found that the conclusion of an international agreement, being a legislative measure, could only give rise to liability if the Community institutions had manifestly and gravely disregarded the limits on the exercise of their powers. This was only the case where the authority in question had manifestly exceeded the limits of its discretion, i.e. if the contested measure was manifestly inappropriate for obtaining the objective pursued. The Court found that in the exercise of the powers conferred by Articles 228 and 43 EC upon the Community legislature the institutions enjoyed a wide discretion in the field of the Community's external economic relations, as in the corresponding internal field of the common agricultural policy. In concluding the fisheries agreements with Senegal and Guinea-Bissau, the Community institutions would have run the risk of jeopardizing the outcome of the negotiations if they had requested that the disputed waters be excluded from the agreements. In the view of the Court, the choice made by Council and Commission – namely, that it was better to have fishing rights, even if partially disputed, than to have no fishing rights at all – could not be considered as an evident transgression of the limits of their discretion or as a manifestly inappropriate measure. The Court concluded that the principle of exercising care and ensuring good administration had not been infringed by the Community institutions when concluding the fisheries agreements. The resulting lack of legal certainty could not be attributed to the Community. On the other hand, Community fishing vessels could easily avoid the risk of being boarded by applying for licences from both states in advance.[51]

The applicant secondly argued that the Commission had failed to inform the Community fishing vessels about the dispute between Senegal and Guinea-Bissau and the resulting risk. In omitting to inform the Community vessels concerned, the Commission had infringed the principle of good administration. The Commission on the other hand pointed out that it had neither the means nor the duty to inform each

50 Recitals 25–32 of the judgment.
51 Recitals 34–38 of the judgment.

individual shipowner. In the view of the Commission, it was up to the national administrations of the Member States to inform their nationals.[52]

The Court held that the Commission in fact had committed a fault regarding the administrative implementation of the agreement, which thus failed to protect Community vessels in the disputed fishing zone. Since all licences were issued through the intermediary of the Commission's Delegation in Senegal, the Commission was in a position to attach a warning to each licence notifying the licence-holder of the risk. The Court held that the Commission could have easily worded such a warning in sufficiently neutral and diplomatic terms so as to avoid taking a position in the dispute between Senegal and Guinea-Bissau. Further, the Commission could have asked Member States to notify their nationals. The Court concluded that the Commission had infringed a duty to provide information, but found that there was no causal link between the Commission's failure and the damage suffered by the applicant. The master of the vessel must be considered to have known the risks of fishing in the disputed zone. It was therefore his deliberate decision to fish there at his own risk. The Court found the applicant's plea unfounded.[53]

The applicant further argued that the Commission had failed to avail itself of the opportunities offered by the dispute-settlement mechanism of the EEC-Guinea-Bissau fisheries agreement in order to afford diplomatic protection. In the view of the applicant, the Commission could have sought urgent consultations with the Guinea-Bissau authorities in order to request the immediate release of the vessel and its master. The Court refuted these allegations and held it to be established beyond doubt that the Commission Delegation in Guinea-Bissau had fulfilled its obligations under the agreement as well as its duty to provide diplomatic protection to the vessel's master and the owner. The Court also held that, given that the owner himself had been in a position to lodge a request with the Bissau Court for the fixing of a bank security, the Commission had not acted in breach of its duty to provide diplomatic protection when its delegation did not do so. The Court refused to accept the plea and dismissed the action as unfounded.[54]

3. Analysis

As the Community becomes an ever more important actor on the international scene more and more individuals are directly affected by decisions taken by the Community within the framework of its external relations. This phenomenon raises important issues, particularly the question of whether and to what extent Community institutions must take into consideration the interests of Community citizens, whether Community institutions are entitled to and under a duty to protect contractual rights of Community citizens in relation to third states, i.e. whether and to what extent the Community can afford diplomatic protection to nationals of Member States.

52 Recitals 48–58 of the judgment.
53 Recitals 63–73 of the judgment.
54 Recitals 74–85 of the judgment.

The Court of First Instance chooses a pragmatic approach. It safeguards the Community's freedom to act and react on the international plane by stressing the wide discretion that Community institutions enjoy in the exercise of their external powers. Commission and Council are therefore free to decide whether the general interest of the Community is better served by the conclusion of an international agreement and what compromises may seem necessary to attain such an objective.

On the other hand, the Court assumes a duty on the part of Community institutions to safeguard the interests of those Community nationals benefiting from the agreement in the proper administration of such an agreement. Where a course of action within the Community seems feasible without compromising the Community's external relations to third states, the Community has a duty to assist its citizens by providing information.

The most controversial issue appears to be the uncritical assumption of the Court of First Instance that the Community must afford diplomatic protection. This raises first of all the question whether the Community is entitled to grant diplomatic protection under general public international law. While the right to grant diplomatic protection has been a prerogative of states, the international practice is changing. The Court of Justice has repeatedly held that, while the Community is bound by the rules of general international law, it also claims within the tasks and powers conferred on it by the Treaty the same prerogatives as states under international law.[55] The dispute between the Community and Canada over the seizure of the Spanish fishing vessel 'Estai' in March 1995 provides a spectacular example of diplomatic protection provided by the Community in the framework of a fisheries agreement.[56] The Community has concluded agreements with almost all states worldwide. If one of these agreements should be infringed, who if not the Community should be entitled to ask for compensation or, if necessary, to retaliate. The right to grant diplomatic protection in the case of the violation of an agreement concluded between the Community and a third state is therefore a right inherent in the Community's general legal capacity under international law pursuant to Article 210 EC.[57]

Another question is whether the Community has a duty to afford diplomatic protection under Community law and whether a failure to act on behalf of the Community can entail liability under Article 215(2). To date the Court of Justice has been reluctant to recognize such a duty. In the *Adams*[58] case, where an individual had become the target of retaliation by a third state in reaction to a Community policy, the Court of Justice had held that the Community's decision to avail itself of the dispute-settlement mechanism provided in an international agreement was a political

55 Cases 89/85, 114/85, 116–117/85, 125/85 *Wood Pulp I*, [1988] ECR I-5193, see Vedder 1 *EJIL* (1990) 365; Case C-286/90 *Poulsen Diva*, [1992] ECR I-6019, see Brandtner and Folz, 4 *EJIL* (1993) 431, at 442; Case C-405/92 *Mondiet*, [1993] ECR I-6133, see Vedder and Folz, 5 *EJIL* (1994) 448, at 461.

56 See Simma and Vedder, in E. Grabitz and M. Hilf, *Kommentar zum EUV*, (1995), Recital 23 at Article 210 EC.

57 See Simma and Vedder, *supra* note 56, Recital 22 at Article 210 EC.

58 Case 53/84 *Adams v. Commission*, [1985] ECR 3595.

decision made solely in the general interest. The statements by the Court of First Instance in the *Odigitria* judgment therefore seem motivated above all by the fact that in this case the Commission had actually contacted the authorities of Guinea-Bissau and had taken steps in support of the owner's interests.

VIII. Aprile

Case C-125/94 *Aprile Srl, in liquidation v. Amministrazione delle Finanze dello Stato*, judgment of 5 October 1995, [1995] ECR I-2939

The Court held that disproportionate charges levied by a Member State for the cost of customs services 'outside normal business hours' were charges having an equivalent effect to customs duties illicit under Article 113 EC and prohibited by free trade agreements with non-member states.

Italy levied a charge on private traders for services rendered by customs authorities 'outside normal business hours'. This charge was not based on the cost per hour for personnel actually dealing with the request for the customs transaction. The Court had declared this charge to be partially incompatible with Community law with respect to intra-Community transactions.[59] Relying on this precedent, the plaintiff in the main proceedings asked the Italian authorities for a reimbursement of those charges levied for customs transactions in extra-Community trade. The *Giudice Conciliatore*, Milan asked the Court for a preliminary ruling under Article 177 EC.

The Court found it necessary to distinguish two different issues in the case. The Court first considered whether Member States were generally entitled to impose charges having equivalent effect as customs duties in trade with non-member states unilaterally. Consequently, the Court recalled the characteristics of the Customs Union under Article 9 EC. Covering all trade in goods, the Customs Union incorporated a Common Customs Tariff, with the aim of bringing about equalization of the charges borne at the external frontiers of the Community by products imported from non-member countries, preventing trade diversions between Member States and making sure that the free movement of products between Member States and the economic conditions of competition were not distorted. The concept of a Common Commercial Policy pursuant to Article 113 EC achieving a degree of uniformity in measures of liberalization implied that national disparities of a fiscal and commercial nature affecting trade with non-member countries had to be abolished. Both the unity of the Community customs territory and the uniformity of the Common Commercial Policy would be seriously undermined if the Member States were authorized to impose charges unilaterally having equivalent effect on imports from non-

59 Case 340/87 *Commission v. Italy*, [1989] ECR 1483 and Case C-209/89 *Commission v. Italy*, [1991] ECR I-1575.

member countries. Referring to its settled case law the Court pointed out that it had held consistently that Member States had no right to add national charges unilaterally to the duties payable under the Community rules. It was for the Community alone to determine and, if necessary, change the level of duties and taxes. It followed that Member States may not impose charges having equivalent effect on trade with non-member countries.

The Court went on to consider whether this concept of a charge having equivalent effect could be transposed to the many bilateral and multilateral agreements concluded between the Community and numerous non-member countries containing similarly phrased prohibitions. The Court found no reason to interpret these provisions differently, given the purpose of such agreements to consolidate and extend the economic relations existing between the parties and to eliminate obstacles to trade, notably charges having equivalent effect. These agreements would otherwise be deprived of much of their effectiveness. Consequently, Italy was not entitled to levy the contested charges for transactions in extra-Community trade either.[60]

IX. Werner/Leifer

Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v. Germany*, judgment of 17 October 1995, [1995] ECR I-3189 and Case C-83/94 *Criminal proceedings against Peter Leifer and Others*, judgment of 17 October, [1995] ECR I-3231[61]

The Court had to decide on the legality of Member State export restrictions for dual-use goods.[62]

1. Facts

Germany had a system of surveillance of exports designed to control, in particular, goods that can be converted for military use or for the production of military weapons – so-called dual-use goods. All dual-use goods requiring a specific export li-

60 Recitals 31–42 of the judgment. The Court did not address its judgment in the Case C-130/92 *OTO*, [1994) ECR I-3281, in which it had held that Article 113 did not contain a rule similar to Article 95 prohibiting discriminatory taxation of direct imports from non-member countries. Advocate General Ruiz-Jarabo Colomer distinguishes the *OTO* judgment from the case at hand in point 54 of his conclusions, [1995] ECR I-2919, 2935, by pointing out that the contested charge applied specifically to the customs treatment of goods and therefore could not be likened to a general system of internal taxation in the sense of Article 95 EC.

61 For a critical discussion see Emiliou, 'Strategic Export Controls, National Security and the Common Commercial Policy', *European Foreign Affairs Review* 1 (1996) 55.

62 In the meantime the Community has introduced a Community regime for the control of exports of dual-use goods based on Article 113 EC, which allows for additional export control measures by the Member States. See Council Regulation 3381/94/EC of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods, OJ 1994 L 367/1 in conjunction with Council Decision of 19 December 1994 on the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods.

cence by German authorities were listed in detail by a regulation. Pursuant to paragraph 7 of the German *Außenwirtschaftsgesetz*, export licences could be denied in order to guarantee the security of the Federal Republic of Germany, to prevent disturbance to the peaceful coexistence of nations and to prevent national external relations from being seriously disrupted. Violations of the export control procedure, such as the illicit export of commodities without the necessary licence, could be punished as an offence.

In the *Werner* case German authorities had denied an export licence requested by the Werner firm for a vacuum-induction smelting and cast oven destined for Libya in order to prevent a possible use for military purposes in the framework of Libya's missile development programme. Werner attacked the decision in court, arguing that, given the exclusive jurisdiction of the Community, Germany had lost its power to control exports by virtue of Article 113. The Verwaltungsgericht Frankfurt asked the Court for a preliminary ruling under Article 177 EC on the legality of national export controls for dual-use goods under Community law.

In the *Leifer* case Leifer and other managers were accused of having delivered a plant, plant parts and chemical products to Iraq without having been issued the necessary export licences. The *Landgericht Darmstadt* felt that if the national provisions were incompatible with Community law, they could not be applied, thereby removing the very basis of the criminal offence. It therefore asked the Court for a preliminary ruling under Article 177 EC on the power of Member States to maintain national export controls despite Article 113 EC.

2. The Judgments

The Court interpreted both references as seeking clarification of the scope of Article 113 EC, asking more particularly whether the CCP solely concerned measures pursuing commercial objectives or whether it also covered commercial measures having foreign policy and security objectives. In the traditional view of the Court, the implementation of a CCP based on the principles named in Article 113 required a non-restrictive interpretation of that concept in order to avoid disturbances in intra-Community trade deriving from disparities which could emerge in certain sectors of economic relations with non-member countries. Therefore, export control measures, the effect of which was to prevent or restrict the export of certain products, could not be treated as falling outside the scope of the CCP on the ground that it pursued foreign policy and security objectives.[63] The fact that the restriction concerned dual-use goods did not affect that conclusion as the nature of these products could not remove them from the scope of the CCP.[64] The very idea and notion of a common policy according to Article 113 EC required that a Member State should not be able

63 Recitals 7–10 of the *Werner* judgment
64 Recital 11 of the *Leifer* judgment.

to restrict its scope by freely deciding, in the light of its own foreign policy or security requirements, whether a measure was covered by Article 113 EC.[65]

Since full responsibility for the CCP had been transferred to the Community by Article 113(1) EC, national measures of commercial policy were therefore permissible only if they were specifically authorized by Community law. The export of goods from the Community was governed by Council Regulation 2603/69/EEC establishing common rules for exports.[66] Article 1 of the Export Regulation provided freedom of exportation, while Article 11 contained an exception empowering the Member States to restrict exports on grounds of public security and other similar grounds. Article 1 of the Export Regulation was directly applicable pursuant to Article 189(2) EC and was therefore a direct source of rights and obligations for all those concerned, whether Member States or individuals who were parties to legal relationships governed by Community law.[67] The Court went on to ascertain whether the contested export controls were covered by Article 1 and possibly justified under Article 11 of the Export Regulation. Article 1 did not explicitly mention measures having equivalent effect as quantitative measures. However, the Court assessing the context of the provision found that measures having equivalent effect were implied in Article 1, since a regulation whose objective was to implement the principle of free exportation in accordance with Article 113 EC could not exclude from its scope Member State measures amounting to an export prohibition. Since the export controls were not compatible *prima facie* with Article 1 of the Export Regulation, the Court had to examine whether the national measures were necessary for the protection of the security of a Member State in the sense of Article 11. Referring to its judgment in the *Richardt*[68] case, the Court declined to interpret the concept of security as used in Article 11 more restrictively so as not to authorize Member States to restrict the movement of goods within the internal market more than the movement between themselves and non-member countries. Since it was becoming increasingly difficult to draw a hard and fast distinction between foreign policy and security policy considerations, the Court, relying on the conclusions of Advocate General Jacobs, assumed a close link between national security and the security of the international community at large. The risk of a serious disturbance to foreign relations or to the peaceful coexistence of nations could therefore affect the security of a Member State. The Court observed that it was common ground that the exportation of goods capable of being used for military purposes to a country at war with another country might affect the public security of a Member State, while leaving the appraisal of the facts to the national courts.[69]

65 Recital 11 of the *Werner* judgment.
66 OJ 1969 324/25 as amended by Council Regulation 3918/91/EEC, OJ 1991 L 372/31.
67 Recital 44 of the *Leifer* judgment.
68 Case C-367/89 *Richardt*, [1991] ECR I-4621. The Court had held that the concept of public security within the meaning of Article 36 EEC covered both a Member State's internal security and its external security.
69 Recitals 12–28 of the *Werner* judgment.

When adopting measures by virtue of Article 11 of the Export Regulation, the Member States had to observe the principle of proportionality, as this provision, being an exception, must not be interpreted extensively. Its effects must not extend beyond that which is necessary to protect the interests it was intended to guarantee. However, the national authorities enjoyed a certain degree of discretion. The Member States were free to require an applicant to show that the goods were intended for civil use or, failing that, to deny a licence if those goods were objectively suitable for military use. The Member States had the competence to impose criminal sanctions for any breach of the export control procedure provided the penalties were not disproportionate. When assessing the proportionality of the sanctions the national courts had to take into consideration the nature of the goods and their inherent risks, the circumstances in which the violation had been committed and whether or not the trader had acted in good or bad faith.[70]

3. Analysis

These judgments do not contain an entirely new approach of the Court of Justice. Rather they draw the consequences of the Court's constant jurisprudence on Article 113 and the CCP. The clarity and precision of the Court's reasoning is exceptional. Choosing a very pragmatic line of reasoning, the Court insists on the one hand on its judicial autonomy in the definition of the scope of Article 113 EC. Since the transfer of powers under Article 113 EC is complete and confers exclusive jurisdiction on the Community, no unilateral interpretative derogation by the Member States can be accepted. On the other hand the Court leaves the Member States a considerable amount of leeway to protect their legitimate interests under the exception clause of Article 11 Export Regulation. The Member States are thus still able to pursue their legitimate foreign policy and security policy interests, and have the corollary powers to supplement their prerogatives of sovereignty. While treating the Member States with caution the Court also makes it clear that the Member States are acting under the judicial supervision of the Community judiciary, which is not likely to tolerate any abuse on the part of the Member States.

X. Geotronics

Case T-185/94 *Geotronics SA v. Commission of the European Communities*, judgment of 26 October 1995, [1995] ECR II-2797

The Court of First Instance had to decide on the temporal effect of the entry into force of the Agreement on the European Economic Area (EEA).

70 Recitals 39–40 of the *Leifer* judgment.

In the framework of the Community's PHARE[71] programme the government of Romania and the Commission jointly issued an invitation to tender for the supply of electronic tachometers. The general conditions specified that the equipment had to originate in a Member State or in one of the beneficiary countries under the PHARE programme. The French company, Geotronics SA, a wholly-owned subsidiary of a Swedish company, submitted a tender, which was initially successful. However, as the products turned out to be of Swedish origin, the Commission and the Romanian authorities rejected Geotronic's tender. Geotronic brought action before the Court of First Instance against the Commission, requesting annulment of the Commission's decision under Article 173 EC and seeking compensation under Article 215(2) EC.

Following the settled case law of the Court of Justice,[72] the Court rejected the claim for annulment as inadmissible. Since aid granted under PHARE was funded by the general budget, the provisions of the general Financial Regulation relating to external aid set down that the power to award a contract remained with the beneficiary country. The Commission had to administer the aid and to make sure that the general conditions for Community financing were met. Contracts financed by the PHARE programme were to be regarded as national contracts binding only the beneficiary country and the economic operator. Given this division of roles, the Commission restricted itself to taking funding decisions that could not be of direct concern to a tenderer. The Commission's rejection was not capable of forming the subject matter of an action under Article 173(4) EC.[73]

With respect to its plea for compensation, the plaintiff argued that the Commission had infringed the general non-discrimination clause of Article 4 EEA.[74] The Court of First Instance confirmed the admissibility of the plea for compensation, arguing that, given the Commission's responsibility for funding projects, it would be wrong to dismiss the possibility that acts or conduct by the Commission or its officials in connection with the allocation or implementation of PHARE projects might cause damage to third parties. Addressing the merits of the case, the Court held that in the absence of transitional provisions the EEA took effect in full as from its entry into force, namely 1 January 1994. The EEA could therefore apply only to legal situations which came into being after its entry into force. In the view of the Court, it was the restricted invitation to tender of 9 July 1993 which created the relevant legal situation since both the applicant and the Commission had anticipated the conclusion of the tendering procedure before 1 January 1994. As the applicant alone was responsible for the delay the Commission was entitled to proceed on the basis of its general conditions defined in July 1993. The Court concluded that in any event the EEA could not apply to contracts governed by legal relations with a third state not

71 The PHARE programme supports the process of economic aid and social reform by providing economic aid to the countries of Central and Eastern Europe. See MacLeod, Hendry and Hyett, *supra* note 32, at 348.

72 For earlier developments see Vedder and Folz, 5 *EJIL* (1994) 448.

73 Recitals 27–33 of the judgment.

74 Agreement on the European Economic Area, OJ 1994 L 1/4.

being party to the EEA. Since the contracts for PHARE-funded projects remained national contracts concluded between the private tenderer and the beneficiary state they were of no concern to the parties of the EEA.[75]

XI. Chiquita Italia

Case C-469/93 *Amministrazione delle Finanze dello Stato v. Chiquita Italia SpA*, judgment of 12 December 1995, [1995] ECR I-4533

While categorically confirming that GATT had no direct effect in the Community legal order,[76] the Court found a national consumption tax on bananas incompatible with the standstill clause in Article 1 of Protocol No. 5 on bananas annexed to the fourth EEC-ACP Lomé Convention.[77]

Chiquita Italia, a banana trader importing bananas from ACP countries, attacked a national Italian consumption tax on bananas before the *Tribunale di Trieste*. The Court had already ruled on the issue in its *Simba* judgment,[78] holding that the banana consumption tax constituted an internal tax under Article 95 EEC. Since neither Article 95 EEC nor Article 113 EEC prohibited the discriminatory taxation of direct imports from third states the Court had pointed to the obligations of the Member States under international agreements of the Community that might conflict with the contested consumption tax. Chiquita therefore claimed an infringement of GATT and the Lomé IV[79] Convention. The *Tribunale di Trieste* asked the Court for a preliminary ruling under Article 177 EC on the question whether both agreements were capable of having direct effect and, if so, whether they contained a prohibition of measures such as the banana consumption tax.

The Court first reiterated its jurisprudence on the direct effect of international agreements according to which the spirit, general scheme and the terms of the agreement had to be examined. Relying on its settled case law, the Court concluded that the legal nature of GATT precluded an individual from invoking provisions of the GATT before the national courts in order to challenge national provisions. This concerned any provision of GATT regardless of the exact formulation of a specific rule.[80] Lomé IV on the other hand was a different case. Although there was a considerable imbalance in the level of obligations undertaken by the contracting parties reflecting the special nature of the Convention, some of its provisions were never-

75 Recitals 38–55 of the judgment.
76 For earlier developments see Vedder and Folz, 7 *EJIL* (1996) 112, at 128.
77 For earlier developments see Brandtner and Folz, 4 *EJIL* (1993) 430, at 439.
78 Joined Cases C-228/90, C-229/90, C-230/90, C-231/90, C-232/90, C-233/90, C-234/90, C-339/90, C-353/90 *Simba*, [1992] ECR I-3713.
79 Fourth ACP-EEC Convention, OJ 1991 L 229/3.
80 As Advocate General Lenz puts it succinctly in point 22 of his conclusions, [1995] ECR I-4533, 4544: 'The lack of direct effect of the provisions of GATT is not attributable to the absence of one of several factors, but has its basis in the very nature of those provisions.'

theless capable of having direct effect. The Court concluded that GATT did not contain any provisions of such a nature as to confer rights on individuals in the Community legal order and that Lomé IV might contain such provisions.[81]

Chiquita argued that the Italian consumption tax had infringed Article 177(2) of Lomé IV, a provision which the plaintiff claimed to have the same content as Article 95 EC.[82] The Court refuted this argument. Although Lomé IV contained explicit rules on the prohibition of customs duties and charges having equivalent effect in Article 168 and the free movement of goods in Article 169, it did not contain provisions expressly relating to internal taxation. The Court considered this to be a deliberate omission by the contracting parties as could also be seen from the legislative history. The Court pointed out that the Second Yaoundé Convention, a predecessor agreement, had actually contained provisions expressly relating to internal taxation. Furthermore, the context of Article 177(2) Lomé IV spoke against an extensive interpretation. Article 177(2) referred to safeguard measures in response to a crisis in the Community's economy and therefore constituted an exception clause unfit for extensive interpretation.[83]

Chiquita argued on an alternative line that, even if Article 177(2) could not be considered to have direct effect, the general clause of Article 169 Lomé IV guaranteeing free movement of goods would apply. The Court however made it clear that this argument was based on the assumption that the EC Treaty and Lomé IV would both seek to ensure the free movement of goods, exempt from any obstacle whatsoever, including those resulting from discriminatory internal taxation. Given the differences between the objectives and the context of the agreement and those of the Treaty, this was not the case.[84] The Court however found Article 1 of Protocol No. 5[85] to contain a standstill clause protecting bananas from ACP countries from deterioration of access to their traditional markets. Article 1 was worded in clear, precise and unconditional terms and therefore had direct effect. It precluded a consumption tax such as the one at issue as it affected the marketing conditions negatively. Since the first three ACP-EEC conventions had contained identical provisions, any increase of a national consumption tax on bananas was precluded after the entry into force of the first Lomé Convention i.e. after 1 April 1976.[86]

81 Recitals 25–37 of the judgment.

82 Article 177(2) Lomé IV reads as follows: 'The Community and its Member States undertake not to use other means for protectionist purposes or to hamper structural development. The Community will refrain from using safeguard measures having the same effect.'

83 Recitals 41–47 of the judgment.

84 Recitals 48–52 of the judgment.

85 Article 1 of Protocol No. 5 reads as follows: 'In respect of its banana exports to the Community markets, no ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable situation than in the past or at present.'

86 Recitals 54–63 of the judgment.

XII. Opinion 3/94 Bananas Framework Agreement

Opinion 3/94 *on the Framework Agreement on Bananas*, decision of 13 December 1995, [1995] ECR I-4577

The Court decided that a request for an opinion under Article 228(6) EC becomes inadmissible if the agreement has actually become binding on the Community.

On 25 July 1994 Germany had asked the Court for an opinion according to Article 228(6) EC on the legality, under the Treaty, of a framework agreement concluded between the Community and several banana exporting states. The framework agreement pursued the objective of settling disputes which had arisen after the entry into force of the Banana Market Organization. The framework agreement was a formal part of the agreements of the Uruguay Round. On 22 December 1994 the Council adopted Decision 94/800/EC on the conclusion of the Uruguay Round agreements on behalf of the Community. On 1 January 1995, the Uruguay Round agreements, including the framework agreement on bananas, entered into force.

The Court found that the framework agreement was an integral part of the Uruguay Round agreements and that it had been concluded together with those agreements after the Court had been requested to deliver its opinion. The Court declined to give an opinion as the objective of Article 228(6) EC could no longer be attained. The purpose of Article 228(6) was to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community.[87] Consequently, the second sentence of Article 228(6) provided that in the case of a negative opinion of the Court the Community could only conclude the agreement after having formally amended the Treaty in accordance with Article N TEU. It would be contrary to the internal logic of Article 228(6) EC if the Court were still to give an opinion once the agreement had been concluded, since a negative opinion would no longer have the legal effect prescribed by that article.[88] Neither could the preventive intent of the opinion procedure be achieved any longer if the agreement had already been concluded.[89] The Court did not consider the judicial protection of the Member States or the Community institutions to be endangered by this result as the primary objective of Article 228(6) EC was not to protect the rights of the Member State or the Community institution having requested the opinion, but to protect the interests of the Community as a whole in its external relations. A Member State or Community institution whose interests might be affected by a Community agreement was free to bring an action for annulment of the Council's decision to conclude the agreement and in that context to apply for interim relief.[90]

87 Recital 16 of the opinion.
88 Recital 13 of the opinion.
89 Recital 19 of the opinion.
90 Recitals 20–22 of the opinion.

Whether or not the necessary standard of judicial protection can be safeguarded will largely depend on the Court's readiness to annul an internal Community decision on the conclusion of an agreement, thus risking the incurrence of liability under international law. It would probably have been a better motivation for the Council to await the opinion of the Court before concluding the agreement, if the Court had reserved its right to give the opinion.