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

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The survey of the European Court's cases regarding international law issues or contributing to the development of public international law as a whole begins with the coming into effect of the Single European Act on 1 July 1987.

I. Wood Pulp[1]

Cases 89/85, 114/85, 116-117/85, 125-129/85, A. Ahlström Osakeyhtiö v. Commission (Wood Pulp) Decision of 27 September 1988 (not yet reported)

The *Wood Pulp* decision is the Court's most recent statement on the reach of the Community's jurisdiction in competition law.

1. The Facts

A number of Finnish, Swedish, American and Canadian wood pulp producers established outside the EC created a price cartel, eventually charging their customers based within the EC. On 19 December 1984, the Commission issued a Decision[2] establishing several infringements of Article 85 of the Treaty by the said agreements and concerted practices and imposing fines.

The principal arguments of the Commission justifying the Community's jurisdiction to apply their competition rules to an undertaking outside the Community were as follows: the producers involved were exporting and selling directly to customers in the EC or were doing business within the Community through branches, subsidiaries or other

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1 Friend, 'The long Arm of Community Law', *ELR* (1989) 169; Mann, 'The Public International Law of Restrictive Practices in the European Court of Justice', 38 *Int'l. & Comp. L. Quart.* (1989) 375; Breibart, 'The *Wood Pulp* Case: The Application of European Economic Community Competition Law to Foreign Based Undertakings', 19 *Georgia Journal of Int'l & Comp. Law* (1989) 149.

2 Commission Decision 85/202 of 19 December 1984 relating to a procedure under Article 85 of the EEC Treaty, OJ (1985) L 85/1.

agents. Not less than two-thirds of the total shipment and 60% of the consumption of wood pulp in the Community had been affected by the alleged restrictive practices.

Eleven of the forty addressees of the Commission decision brought an action for annulment of the decision. They had two main arguments, one based on Community law, the other on international law. First, the Commission's construction of Article 85 of the Treaty was challenged and, secondly, even if the conditions of Article 85 were fulfilled, it would be contrary to international law to regulate conduct restricting competition adopted outside the territory of the Community merely by reason of the "economic repercussions" produced within the EC. The American and Canadian applicants further claimed that the application of EC competition rules in these circumstances would constitute a breach of the general principle of non-interference and that the Community, by imposing fines, had infringed Canada's sovereignty and had breached international comity. Finally, the Finnish undertakings raised the special argument of the Free Trade Agreement concluded between the Community and Finland which by virtue of its Articles 23 and 27 would preclude the Community from applying EC competition law.

2. The Judgment

Compared to the Commission's decision and the Advocate General's Opinion the judgement of the Court is remarkable for its shortness, which inevitably gives rise to different interpretations and raises additional questions. As for Community law, the Court upheld the territorial scope of Article 85 of the Treaty as construed by the Commission. Article 85 prohibits all agreements or concerted practices between undertakings "which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market..."

The Court starts by stating the fact that as the producers involved in the case are the main source of supply of wood pulp they would constitute the principal actors of competition within the Community. From that it follows clearly

> that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the Common Market within the meaning of Article 85 of the Treaty.
>
> Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article 85.[3]

As to the question of compatibility of the decision with public international law the Court draws up a distinction between the formation of the concerted practice and its "implementation." The application of Article 85 depends not on the place where the agreement at issue is concluded but solely on the place where the agreement is implemented.

> It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the Common

3 Para. 13.

> Market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof...
>
> The producers in this case implemented their pricing agreement within the Common Market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contracts with purchasers within the Community.
>
> Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.[4]

The Court leaves open the question whether or not a rule of non-interference actually exists in public international law. Nor did the Court does not see any contradictory duties deriving from differences between Community law and American law, in particular, from the Webb-Pomerene Act, which exempts export cartels from U.S. antitrust laws but does not require the formation of such cartels.

This question was submitted by the American applicants, who referred to the concurring opinion of Judge Fitzmaurice in the case of *Barcelona Traction Light & Power Company*[5], which describes non-interference as a rule

> according to which where two states have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each state is obliged to exercise its jurisdiction with moderation.[6]

Finally the Court quickly rejected the argument from international comity calling for prior disclosure to the states affected. The Court established that as the Community's jurisdiction does not contravene international law comity cannot be said to have been violated.

As far as the Finnish producers are concerned, the Court had to consider, in a more specific field of international law the relationship between Community law and the provisions of the Free Trade Agreement between Finland and the EC.[7] Article 23 para. 1 of that Agreement states that agreements or concerted practices which have as their object or effect the restriction of competition are incompatible with the proper functioning of the Agreement insofar as they may affect trade between the EC and Finland. Article 23 para. 2 and Article 27 paras. 2 and 3 of the Agreement set forth a special bilateral procedure within the Joint Committee to be followed before the parties to the Agreement can take measures against the restricting practices.

The Court argues in two steps. Articles 23 and 27 of the Agreement presuppose that the parties to the agreement have rules enabling them to proceed against practices incompatible with Article 23.

4 Para. 16, 17, 18.
5 ICJ Rep. (1970) 105.
6 Para. 19.
7 Concluded 5 October 1973; OJ (1973) L 328/2.

> As far as the Community is concerned, those rules can only be the provisions of Articles 85 and 86 of the Treaty. The application of these Articles is therefore not precluded by the Free Trade Agreement.[8]

The decisive reason, however, seems to be that the matter at issue is not a bilateral one concerning solely Finnish-EC trade. It is not bilateral trade which is affected – that constitutes the condition of Article 23 of the Agreement. It is intra-Community competition that is distorted by a concerted practice on a much larger scale including not only Finnish but also Swedish, American, and Canadian producers.

> It should be pointed out finally that in this case the Community applied its competition rules to the Finnish applicants not because they had concerted with each other but because they took part in a very much larger concertation ... which restricted competition within the Community. It was thus not just trade with Finland that was affected. In that situation reference of the matter to the Joint Committee could not have led to the adoption of appropriate measures.[9]

After considering these arguments the Court held that the decision at issue is covered by Article 85 of the EEC Treaty and does not infringe public international law or the Free Trade Agreement. On the merits of competition law the Court assigned the case to a Chamber of the Court.[10]

3. Analysis

The *Wood Pulp* decision is one of the rare examples of the "state" practice exercised by the Community and its relevant organs pertaining to general public international law.

a) The EEC under Public International Law

The tacit assumption of the Court's reasoning is that international law in general applies to the Community as an international organization. For the Court as well as for the Commission it seems without doubt that the EC, like a state, is bound by the rules of customary international law, at least, "*mutatis mutandis*."[11] While the effects of customary international law on international organizations have been mostly neglected by the literature, the conduct of the EC can be deemed a clear evidence of a practice confirming that international organizations are subject to customary international law. That result is in line with § 223 (b) of the Third Restatement[12] that indicates that "subject to the international agreement creating it, an international organization has ... rights and duties created by international law or by agreement."

8 Para. 31.

9 Para. 32.

10 Not yet decided.

11 Para. 5 of the Comments of the Commission of the European Communities on the U.S. regulations concerning trade with the U.S.S.R. of 1982, 27 *German Yearbook of International Law* (1984) 554, 555.

12 American Law Institute (ed.), *Third Restatement of the Foreign Relations Law of the United States* (1987).

The application of rules of customary law, in particular the principles of territorial and personal jurisdiction to international organizations, is not self-evident, since both of these principles essentially apply to states. International organizations in general, and even the Community, are not endowed with a proper territory and citizenship.

The justification for such application can be, and has been provided in this case by the Advocate General,[13] in that the Community exercises certain aspects of territorial and personal sovereignty, as it is endowed with powers transferred to it by the Member States. The scope of these "constitutional" powers of the Community limits the range of application of international law. This boundary may coincide with the limits of the restricted legal personality of international organizations under public international law.

b) The Community's Jurisdiction over Foreign Enterprises

Unlike the Advocate General, the Court did not touch this general consideration but turned directly to the question of whether Article 85 applies to concerted practices agreed upon by enterprises having registered offices outside the Community's territory, i.e. the territory to which the EEC Treaty applies. The crucial point is the term "effects", aiming both at the conditions of Article 85 and presumably at the delimitation of the Community's jurisdiction under public international law.

The Court surprisingly used the term effects exclusively to construe Article 85 on the Community law level and strictly avoided the "effects doctrine" as a basis for the Community's jurisdiction under public international law. The fact, however, that the territorial scope of Article 85 in Community law was correctly assessed[14] does not lead to the proposition that the Community's competition law is applied *per se* to enterprises established outside the Community. The term "effects" in the wording of Article 85 only shows the existence of an infringement of that article but does not, in itself, establish the Community's jurisdiction over foreign enterprises under international law.

On the international law level the Court has partly overruled its former decision regarding the Community's jurisdiction in competition matters[15] by its *Wood Pulp* ruling. In the prior *Dyestuff* decision the Court had relied upon the fact that the enterprises involved with registered offices outside the Community were "able to exercise decisive influence over the policy of the subsidiaries as regard selling prices in the Common Market and in fact used this power..."[16]

In *Wood Pulp* the Court does not take into account the fact that several of the applicants are acting through subsidiaries or agents based within the Community. That line of reasoning would not, in any event, be sufficient, as some of the undertakings were selling directly to their customers based in the Community without the intermediary of subsidiaries.

Thus the Court does not rely on any kind of relationship between foreign enterprises and their possible intra-Community representatives and bases its reasoning upon the distinction between the formation of agreements or concerted practices taking place outside

13 Opinion of the Advocate General of 25 May 1988, para. 27.

14 As the Court, according to Community law, in particular, Articles 164 and 173 para. 2 of the Treaty, has the monopoly in deciding questions of Community law, its findings in construing rules of Community law cannot be questioned under general international law.

15 Case 22/71, *Béguelin*, ECR (1971) 949, 959; case 48/69, *Dyestuff*, ECR (1972) 619, 662; case 6/72, *Europemballage*, ECR (1973) 215, 242.

16 *Dyestuff*, *supra* note 15, para. 137.

the Community and the implementation thereof without going into further details. It has to be observed, however, that the term implementation is not a new finding of the Court. Already in *Dyestuff* the power to control intra-Community subsidiaries was considered by the Court an essential means of implementing the restrictive agreements[17] even though the Court had directly imputed the measures taken by their agents to the foreign applicants.

This change in reasoning marks thus the significance of the present case. According to *Wood Pulp* the mere selling of products at coordinated prices to customers situated in the Community is deemed a sufficient link to found the Community's jurisdiction without any reference to subsidiaries or other agents actually under the territorial jurisdiction of the Community. That appears to be the effects doctrine, as was pointed out by the Advocate General M. Darmon.[18] But the Court insisted that the application of Article 85 in this case was covered by the territoriality principle. Relying on the territorial jurisdiction the Court attempted to avoid discussion of the effects doctrine, as it has also done in *Dyestuff*.[19]

This reasoning is not satisfactory under public international law. The Court does not differentiate between the fulfillment of the conditions of Article 85 and the applicability of that rule under international law,[20] the former being only the prerequisite of the latter. It does not clearly separate between the elements of an infringement of Article 85 under Community law and the question whether or not Article 85 applies to undertakings based outside the Community's territory. The Court is obviously of the understanding that the "effects" fall under the territorial jurisdiction because they are already part of Article 85 of the Treaty, which it then simply applies. Thus, the question of whether or not the Community has jurisdiction under international law is reduced to the mere application of Article 85 of the Treaty.

Advocate General Darmon clearly established the effects doctrine as being the basis of the Community's jurisdiction. In an extraordinary and comprehensive study[21] on the territorial and personal principle, as well as on the effects doctrine, the Advocate General, denying that there is a territorial link with the Community, emphasizes the existence and definition of that doctrine and the fulfillment of its conditions in the case. According to the Advocate General the only criterion for the jurisdiction is the "direct, substantial and foreseeable effect."[22] Thus, he does not apply the "balancing test" which American courts are particularly fond of.

Despite such clear and well-founded arguments the Court surprises by refusing the effects doctrine. This approach might be explained by the opposition the Community has always demonstrated to the attempts of American administrations and even courts to make use of the effects doctrine in relation to trade matters outside the U.S. to the disad-

17 *Dyestuff, supra* note 15, para. 130: "By making use of its power to control its subsidiaries established in the Community, the applicant was able to ensure that its decision was implemented on the market."

18 Opinion of 25 May 1988, para. 47 *et seq.*

19 Case 48/69, *Dyestuff*, ECR (1972) 619, 661; Advocate General Mayras had pointed out the effects doctrine justifying the Communities jurisdiction, *Opinion of the AG*, ECR (1972) 700.

20 Para. 16 of the judgement shows that the Court has established the "implementation" as an element of Article 85 and not of international law. See *supra* note 4 and accompanying text.

21 Referring largely to literature and case law of the Court and of international and in particular American courts.

22 Para. 57 of the opinion.

vantage of the EC.[23] On the other hand, it has to be observed that in the fervent debates on the American pipeline embargo of 1982 the Commission, as it has also done in the *Wood Pulp* case,[24] has reluctantly accepted the effects doctrine as a possible basis of jurisdiction under international law. However, the Commission could not find any "direct, foreseeable and substantial effect" on the U.S. in the exports of pipeline material from the EC to the U.S.S.R.[25]

c) The Applicability of the Free Trade Agreement

The additional Finnish argument, that Articles 23 and 27 of the Free Trade Agreement would preclude the Community from applying Article 85 without prior reference to the Joint Committee, is based on the priority of specific international treaty provisions prevailing over rules of general international law, such as the effects doctrine. It goes without saying that the agreement, by virtue of Articles 113, 114, 228 paras. 1 and 2 of the Treaty and according to the international law of treaties,[26] has binding effect on the EC as well as on Finland.

Without challenging this argument the Court comes to the conclusion that the scope of application of Article 23 of the Agreement is not touched. The aim of Article 23 is a different one. Even if the wording of Article 23 is almost identical[27] to that of Article 85 of the Treaty the relevant rules of the Agreement deal exclusively with distortions of bilateral trade as the first subparagraph of Article 23 of the Agreement shows. When the competition in the Community is distorted on a larger scale, including undertakings from other countries, Article 23 of the Agreement cannot produce precluding effect because, in this context, it is not to be regarded as a *lex specialis*.

II. Deserbais

Case 286/86, Ministère Public v. Deserbais, Judgment of 22 September 1988 (not yet reported)

In a preliminary ruling under Article 177 of the Treaty the Court had to decide upon the possible intra-Community effects of an international convention as well as of the Codex Alimentarius jointly drawn up by the FAO and the WHO to which the Community is not party.

23 Above all by virtue of the Export Administration Act of 30 October 1984, Public Law 98-573, ILM (1985) 826.

24 Para. 79 of Commission Decision 85/202, OJ (1985) L 85/1, and according to the *Report for the Hearing* 27.

25 Comments of the EC Commission of 1982 on the U.S. regulations concerning trade with the U.S.S.R., paras. 12 and 13, 27 *German Yearbook of International Law* (1984) 554, 557.

26 Now being restated by the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations of 20 March 1986, A/CONF.129/15.

27 According to the established practice of the Court, even an identical wording of rules set forth in the Treaty and in an international agreement concluded by the Community does not require an identical construction of the very rules: case 225/78, *Bouhelier*, ECR (1979) 3151, 3160; case 104/81, *Kupferberg*, ECR (1982) 3641, 3666; case 270/80, *Polydor*, ECR (1982) 329.

1. Facts

Mr. Deserbais, director of a dairy products enterprise, had marketed in France under the name of "Edam" a cheese imported from the FRG having a fat content of 34%, whereas under French legislation the name "Edam" is reserved for a type of cheese with a fat content of at least 40%. This national requirement implements the so-called Stresa Convention[28], to which France is a party. In the FRG, however, the cheese in question is legally manufactured and distributed. Nonethe'ess, Mr. Deserbais was convicted of violating the relevant French law. The Court of Appeal called upon the Court to determine whether this national legislation constitutes a quantitative restriction or a measure having equivalent effect thereto in the sense of Article 30 of the Treaty.

2. The Judgment

According to the established practice of the Court, well known as the *Cassis de Dijon* formula,[29] the Court states that the French regulations pertaining to minimum fat content create an obstacle to trade in the sense of Article 30, which cannot be justified as being "necessary in order to satisfy mandatory requirements relating, *inter alia*, to the defence of the consumer and the fairness of commercial transactions."[30] What distinguishes this case from the large number of rulings on Articles 30 and 36 of the Treaty is that the national legislation at issue implements international obligations, both the Stresa Convention and the Codex Alimentarius calling for a minimum fat content of at least 40%.

The Court did not consider the Codex Alimentarius to be binding[31] and thus focuses on the Stresa Convention which was concluded prior to the entry into force of the EEC Treaty and thus comes within the scope of Article 234 EEC. Parties to the Convention, among others, are only four of the present Member States including France. The Court following its earlier pronouncement in *Burgoa*[32] reiterated that

> the purpose of Article 234 (1) of the Treaty is to make it clear, in accordance with the principles of international law, that application of the Treaty does not affect the duty of the Member States concerned to observe the rights of non-member countries under a prior treaty and to fulfil its corresponding obligations...[33]

As no rights of non-member countries are concerned in the case,

> a Member State cannot rely on the provisions of a treaty in order to justify restrictions on the marketing of products from another Member State when such marketing is lawful by virtue of the free movement of goods provided for by the Treaty.[34]

28 *International Convention on the Use of Designations of Origin and Names for Cheeses of 1 June 1951*, Journal Officiel de la République Française (1952) 5821.
29 Case 120/78, *Cassis de Dijon*, ECR (1979) 649.
30 Para. 8.
31 Para. 15.
32 Case 812/79, ECR (1980) 2787.
33 Para. 17.
34 Para. 18.

3. Analysis

The relation of Community law to international law, including international agreements of the Member States, have not been dealt with exhaustively as in the case of municipal law. Article 234 of the Treaty is a first step in this direction according to which international treaties concluded by one or more Member States prior to the entry into force of the EEC Treaty are not affected by the Treaty and Community law deriving from it. This rule not only reflects but points out ostensibly[35] the self-evident principle under the international law of treaties[36] that the EEC Treaty cannot prevail *per se* over other international agreements to which third states are parties. Thus, Article 234 para. 1 constitutes the only Treaty provision dealing expressly with the interrelation between Community and public international law.

According to prior decisions of the Court, in particular the *Burgoa*[37] case, Article 234 of the Treaty is construed in a restrictive manner considerably limiting its effect to that which is absolutely necessary from the point of view of international law. Article 234 para. 1 does not safeguard every prior international treaty of the Member States as such, but only the rights of third parties and thus reaffirms the respective obligations of Member States *vis-à-vis* non-member countries.

This construction of Article 234, as it stands now, limits the scope of safeguarding international agreements by means of Article 234 in two directions. First, in case of incompatibility with Community law only the rights of the respective third parties remain unaffected, whereas the rights of the respective Member States cannot be opposed as against Community law. Secondly and consequently, when there is no third party involved the commitments of Community law prevail over the agreement concluded by a Member State. The latter can result in two situations. If only two or more Member States are parties to the prior treaty, Community law prevails over the treaty as a whole. Should there be third parties to the treaty, as in the case of the Stresa Convention, the Member States Parties to the treaty cannot rely on provisions of that treaty in their mutual relationship.

In more general terms, Community law prevails not only over contradictory national legislation but likewise over international commitments of the Member States with the sole exception of rights of third countries. Thus the fact that the FRG is not member of the Stresa Convention is irrelevant in the case.

In essence, within intra-Community relations Member States cannot insist on treaties previously concluded. The predominance which Community law enjoys over the Member States' national law[38] therefore covers their international obligations to one another. As the primacy of Community law does not *invalidate* a conflicting national rule but only requires its non-application in the particular case, this basic principle of Community law can leave the existence of the prior agreements under international law as such undecided, as the international agreement cannot be applied under all circumstances.

35 In order to appease apprehensions regarding possible negative effects created by the close co-operation to be established by the Treaty.

36 Article 39 *et seq.* of the Vienna Convention on the Law of Treaties Concluded by International Organizations, see *supra* note 26.

37 Case 812/79, ECR (1980) 2787, 2803.

38 Case 6/64, *Costa v. ENEL*, ECR (1964) 125 and standing case law.

III. Fediol

Case 70/87, Fediol v. Commission, Judgment of 22 June 1989 (not yet reported)

Another *Fediol* case dealing with the "new Community instrument" against illicit commercial practices seems, at first glance, to modify the settled case law which established the non-direct effect of the GATT.

1. Facts

The EEC Seed Crushers' and Oil Processors' Federation (Fediol) brought an action for annulment of the Commission Decision No. 86/2506 rejecting Fediol's complaint requesting the Commission to take measures against certain export practices of Argentina. Fediol regarded Argentina's measures to impede export of soya beans by imposing higher rates of duty and quantitative restrictions on exports of soya beans to be illicit commercial practices.

The Commission refrained from taking measures against Argentina's conduct by virtue of Council Regulation No. 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices.[39] According to Article 2 para. 1 of the Regulation "illicit commercial practices" are all practices of third countries which, regarding international trade, are contrary to the rules of international law or to general accepted rules. The provisions of the GATT, in particular, have to be considered as rules of international law in that sense. The Commission denied the infringement of certain Articles of the GATT alleged by Fediol.

2. The Judgment

The Commission denied the admissibility of the action by arguing that GATT rules do not have direct effect conferring these rights on individuals. The Court, however, held

> that since Regulation No. 2641/84 conferred on the operators concerned the right to invoke GATT provisions in their complaint to the Commission in order to establish the illicit nature of the commercial practices as a result of which they claimed to have suffered injury, those operators were entitled to apply to the Court to review the legality of the Commission decision applying those decisions.[40]

On the merits the Court was unable to confirm the alleged infringements of Articles III, XI, XX (i) and XXIII of the GATT by Argentina's practices. Following the Court Article III of the GATT does not apply to exports, Articles XI and XX (i) do not extend to measures having an effect equivalent to quantitative restrictions and, finally, Article XXIII does not, in itself, embody any specific substantive rule the infringement of which would constitute an illicit commercial practice.

39 17 September 1984, OJ (1984) L 252/1.

40 Para. 22.

3. Analysis

Following the Court's decision that the EC itself is a *de facto* contracting party to the GATT and is bound by its provisions[41] it has often focussed on alleged violations of GATT provisions. However, the Court always answered the question of direct effect of GATT provisions in the negative, so that individuals or enterprises cannot rely on GATT rules to challenge Community law contravening GATT.[42]

Bearing this established jurisdiction in mind the new *Fediol* decision seems to turn a new page, entitling individuals to rely on GATT rules. This, however, is not true. The Fediol decision is not based on a direct effect of GATT. The applicant's right of action is exclusively founded on the express provisions of the Regulation No. 2641/84, i.e. it comes not from GATT but from internal Community law.

As the Community's antidumping and antisubsidies law[43] entitles individuals, individual enterprises and associations thereof to a complaint, the so-called new commercial policy instrument established under Regulation No. 2641/84 in its Article 1 para. 3 gives associations like Fediol likewise the right to complain by requesting the Commission to initiate an examination procedure to investigate illicit commercial practices. It is solely by virtue of Community law itself that individuals and associations are endowed with the right to apply for judicial review. Thus the *Fediol* decision has not modified the Court's general attitude towards GATT rules.

IV. Demirel

Case 12/86, Meryem Demirel v. Stadt Schwäbisch Gmünd, ECR (1987) 3719

The *Demirel* decision of 30 September 1987,[44] contributes to the major case law of the Court because, primarily, it defines the power to conclude association agreements by virtue of Article 238 of the Treaty and, secondly, it reaffirms the Court's conception of potential direct applicability of the Community's international treaties, and finally, it clarifies the effects of a mixed agreement to some extent.

1. Facts

The Turkish citizen Mrs. Demirel, married to a Turkish worker living lawfully in the FRG, entered the FRG with a tourist visa valid for three months. Mrs. Demirel then remained in the FRG and gave birth to her second child. About 13 months after Mrs. Demirel's entry, the competent German authority ordered Mrs. Demirel to leave the country. In the course of an action for annulment of that order the question arose whether certain provisions of the Association Agreement concluded with Turkey would prohibit the German authorities from applying national regulations justifying Mrs. Demirel's expulsion under national

41 Case 21-24/72, *International Fruit Company*, ECR (1972) 1219.

42 Case 21-24/72, *International Fruit Company*, ECR (1972) 1219; case 9/73, *Schlüter*, ECR (1973) 1135; case 266/81, *SIOT*, ECR (1983) 731; case 267-269/81, *SPI and SAMI*, ECR (1983) 801.

43 Regulation No. 2176/84 of 23 July 1984, on protection against dumped or subsidized imports from countries not member of the EEC, OJ (1984) L 201/1.

44 Nolte, 'Freedom of movement for workers and EEC Turkish association agreement', 25 *CMLR* (1988) 403; Vedder, 'Ausländerrecht für türkische Arbeitnehmer', *Europarecht* (1988) 50.

law.[45] Thus the Court was asked for a preliminary ruling under Article 177 of the Treaty as to whether the relevant rules of the Association Agreement produced direct effect within the legal order of the Member States.

2. The Judgement

At first, the Court had to confirm its jurisdiction questioned by the written observations submitted by the governments of the United Kingdom and Germany. To this end the Court recalls its former decisions stating

> that an agreement concluded by the Council under Articles 228 and 238 of the Treaty is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of Article 177 (1)(b), and, as from its entry into force, the provisions of such an agreement form an integral part of the Community legal system...[46]

Concerning the Turkish Association Agreement,[47] concluded in a "mixed procedure" both by the Community itself and by its Member States and Turkey the jurisdiction of the Court is incontestable only if the provisions at issue are covered by the Community's own powers. Thus, for the first time, the Court had to declare itself on the scope of the powers conferred to the Community by virtue of Article 238 which was severely disputed between the Commission and the Council, and in the literature.

The Court follows the broad interpretation of Article 238 advocated by the Commission and the vast majority of scholars:

> Since the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system, Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty.[48]

As freedom of movement is covered by Article 48 *et seq.* of the Treaty, commitments relating to freedom of movement fall within the scope of Article 238. The Court was thus not forced to decide whether it had jurisdiction to interpret provisions of a mixed agreement which the Member States could enter into by virtue of their own powers.

This result is not challenged by the fact that, as Community law now stands, it is for the Member States to implement the provisions of the Agreement relating to the movement of Turkish workers. As the Court stated earlier,[49] according to Article 228 para. 2 of the Treaty, i.e., by virtue of Community law, and not according to international law, the

45 The compatibility of the national legislation and administrative orders with German constitutional law as well as with the European Convention on Human Rights and Fundamental Freedoms and even with Community law was challenged unsuccessfully before the German Federal Constitutional Court, Order of 12 May 1987, Rep. vol. 76, 1.

46 Para. 7 referring to the decision in case 181/73, *Haegeman*, ECR (1974) 449.

47 9 July 1961, OJ (1963) 294.

48 Para. 9.

49 Case 104/81, *Kupferberg*, ECR (1982) 3641.

Member States are obliged to implement the obligations derived from international agreements of the Community:

> in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement.[50]

Having settled, as a preliminary question, its jurisdiction by this reasoning, the Court turns to the substance of the case and to the question of whether Mrs. Demirel is entitled to refer to rules of the Association Agreement relating to the movement of workers before German authorities against the expulsion order. The Court had to decide whether Article 12 of the Agreement[51] and Article 36 of the Protocol to the Agreement,[52] read in conjunction with Article 7 of the Agreement,[53] constitute rules of Community law which produce direct effect in the municipal legal order of the Member States.

As the Court's well-established jurisprudence[54] shows that

> (a) provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.[55]

Applying this formula to the rules at issue, the Court denies a direct effect within the national legal order by several arguments, the most important being the following. The Association Agreement only provides the aims of the association and sets forth guidelines without establishing detailed rules. Article 12 of the Agreement according to which the contracting parties "agree to be guided by Articles 48, 49 and 50 of the Treaty", and Article 36 of the Protocol according to which "freedom of movement for workers ... shall be established in accordance to the principles of Article 12 of the Treaty of Association" by progressive stages, and which confers the exclusive powers to the Council of Association to determine detailed provisions for the implementation of freedom of movement reveal "that they essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers."[56]

50 Para. 11.

51 See *supra* note 47.

52 Additional Protocol of 23 November 1970, OJ (1972) L 233/1.

53 Which rather identical to Article 5 of the Treaty calls upon the contracting parties to take all appropriate measures to ensure the fulfillment of the obligations deriving from the agreement.

54 Case 87/75, *Bresciani*, ECR (1976) 129; case 17/81, *Pabst*, ECR (1982) 1331; case 270/80, *Polydor*, ECR (1982) 329; case 104/81, *Kupferberg*, ECR (1982) 3641.

55 Para. 14.

56 Para. 23.