The International Practice of the European Communities: Current Survey

A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1991-92

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The following survey covers the period from 1 February 1991 to 31 December 1992.[1]

I. Nakajima

Case C-69/89, Nakajima All Precision Co. Ltd. v. Council, [1991] ECR I-2069

The Court was required to assess the effects of GATT and the Anti-Dumping Code upon the Community legal order. It developed a new approach to the question.

1. Facts

The plaintiff, Nakajima, is a Japanese company selling matrix printers on the Community market. At the request of the Committee of European Printer Manufacturers, the Commission initiated anti-dumping procedures under the rules of Regulations 2176/84/EEC and 2423/88/EEC respectively[2] and the Council imposed a definitive anti-dumping duty of 12%.[3] The plaintiff sought annulment of this Regulation under Articles 173(2) and 184 EEC, raising a plea of inapplicability with respect to Regulation 2423/88 because it allegedly conflicted with Article 2(4) and (6) of the GATT Anti-Dumping Code.[4]

The Council replied that, according to settled case-law, the plaintiff could not rely on GATT provisions, as these were devoid of direct effects.

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1 The opinions expressed in this survey are strictly personal.

2 Council Regulation 2176/84/EEC on Protection Against Dumped or Subsidised Imports from Countries not Members of the European Economic Community OJ 1984 L 201/1 as substituted by Council Regulation 2423/88 OJ 1988 L 209/1.

3 Council Regulation 3651/88/EEC, OJ 1988 L 317/33.

4 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade in GATT, Basic Instruments and Selected Documents, 26th Supplement 1978/79, 171; OJ 1980 L 71/72.

4 EJIL (1993) 430–446

2. The Judgment

The Court first established that the plaintiff, without relying on direct effects of the GATT Anti-Dumping Code, had challenged Regulation 2423/88 incidentally, through Article 184 EEC, and claimed an infringement of the Treaty or of a rule of law relating to its application.[5]

Recalling its earlier jurisprudence in *International Fruit*,[6] the Court held that the Community was bound not only by GATT, but also by the GATT Anti-Dumping Code which had been adopted for the purpose of its implementation.

As it resulted from the second and third recitals in the preamble of Regulation 2423/88, the Community, when adopting this regulation, had acted in order to fulfil its international obligations as they resulted in particular from Article VI GATT. The Court therefore had to verify whether Article 2(3)(b)(ii) of the Anti-Dumping Regulation in fact violated Article 2(4) and (6) of the Anti-Dumping Code.[7]

The Court however found both provisions compatible and therefore rejected the plea of illegality.

3. Analysis

The Court's constant jurisprudence has maintained that the Community – although not a formal member of GATT – is bound by its provisions.[8] Nor is the capacity of international agreements of overriding secondary Community law a novel issue,[9] as the Court has already held, albeit implicitly, that incompatibility of a regulation with such an agreement could invalidate a Community act. For such a claim to succeed before a Member State court, the provisions at stake must however be directly applicable.[10] Since most GATT provisions were considered too vague and ambiguous to have direct effects, GATT related challenges have been thus far unsuccessful.

The Court distinguished its earlier jurisprudence. In *Nakajima*, the claim had been raised in a direct action under Article 173(2) EEC. The Court, creating a different class of GATT cases, may thus have sought to alleviate the direct effects criterion in annulment actions under Article 173(2) EEC.

But the Court put special emphasis on the fact that, by adopting Regulation 2423/88, the Community had acted to fulfil its obligations under the Anti-Dumping Code. This may suggest an alternative explanation. Whereas the Community is not as such a GATT Contracting Party, it is itself a signatory of the Anti-Dumping Code. Having thus deliberately assumed the Code's obligations and adopted Regulation 2423/88 for their implementation, the Community might be subject to a stronger discipline in this respect. This reading might be justified by Article 228(2) EEC, according to which agreements concluded by the Community bind its institutions. The Court, however, does not cite Article 228 EEC.

Nakajima thus initiates a new development whose consequences cannot yet be fully assessed.

5 Case C-69/89 *Nakajima* [1991] ECR I-2069, 2178 at recital 28.

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

7 *Supra* note 5 at recitals 29-32.

8 For earlier developments see Vedder, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law', 1 *EJIL* (1990) 365, 375.

9 Cases 21-24/72, *International Fruit Company*, *supra* note 6.

10 Ibid., at recital 7/9.

The Court's approach was confirmed in subsequent judgments equally concerning alleged infringements of the GATT Anti-Dumping Code by Regulation 2423/88.[11]

II. Barr

Case C-355/89, DHHS (Isle of Man) v. C. S. Barr, Judgment of 3 July 1991, [1991] 3 CMLR 325

The Court was required to decide whether courts from outside the Community are entitled to request preliminary rulings.

The Deputy High Bailiff's Court, Douglas, Isle of Man, requested a preliminary ruling in the course of criminal proceedings against *Barr*, a British Citizen employed on the Isle of Man without the necessary working permit.

The main issue was whether the referring court was, strictly speaking, a 'court or tribunal of a *Member State*' in the sense of Article 177 EEC. The Isle of Man is not part of the United Kingdom. It has a special status, described under international and constitutional law as 'dependancy of the British Crown'.[12]

The question raised by the Deputy High Bailiff's Court related to Protocol 3 of the British Accession Treaty. Accordingly, Article 227(5)(c) EEC, Articles 1(3), 158 and Protocol 3 of the Accession Treaty gave the Court jurisdiction *ratione materiae*. If the courts of the Isle of Man could not refer questions concerning the interpretation of Protocol 3, it would indeed be impossible to ensure its uniform application. For the sake of uniformity, the Deputy High Bailiff's Court was thus a 'court or tribunal' in the sense of Article 177 EEC.

Extending its reasoning exposed in *Kaefer & Procacci*,[13] the Court held that for the purpose of assessing its jurisdiction under Article 177 EEC the special status of certain territories under international law is irrelevant. To the extent that Community law is applicable to these territories and as far as local courts implement Community law, they can request the Court for a preliminary ruling. Preservation of a uniform application of Community law takes precedence over the formal criteria of international law.

III. Re Territorial Sea

Case C-146/89, Commission v. United Kingdom, Judgment of 9 July 1991, [1991] 3 CMLR 649

The Court faced a Member State pleading international law as a defence against failing to fulfil its obligations under Community law.

11 Case C-188/88, *NMB (Deutschland) GmbH v. Commission*, Judgment of 10 March 1992, [1992] 3 CMLR 80, 111, at recital 23; Case C-175/87, *Matsushita v. Council*, Judgment of 10 March 1992, [1992] 3 CMLR 137, 163, at recitals 41-43. In another case, the Court abstained from interpreting Regulation 2176/84 in accordance with GATT or the GATT Anti-Dumping Code because the plaintiff had failed to substantiate its claim. See Case C-179/87, *Sharp v. Council*, Judgment of 10 March 1992, [1992] 2 CMLR 415, 424, at recitals 18 and 19.

12 This rather elusive concept is explained in some detail in Advocate General Jacobs' opinion in Case C-355/89 *Barr* [1991] 3 CMLR 325 at 330 et seq.

13 Cases C-100/89 and C-101/89 *Kaefer & Procacci v. France*, [1990] ECR I-4647, see Areilza, 2 *EJIL* (1991) No. 2, 177.

1. Facts

The access of Community fishermen to fishing grounds in the coastal waters of the United Kingdom (UK) is regulated by Article 6(2) and Annex I of Council Regulation 170/83/EEC[14] establishing a Community system for the conservation and management of fishery resources. These provisions refer to Article 100 of the Accession Treaty of 1973, according to which fishing grounds are defined by reference to the baselines of the coastal Member State.

In accordance with public international law, the UK in 1987 extended its territorial waters from 3 to 12 miles. The UK was thus entitled to redefine its coastal baselines, which led to an extension of those fishing areas in which UK fishermen enjoyed exclusive fishing rights, to the detriment of fishermen from other Member States. As from 1 October 1987, the UK therefore started to exclude such fishermen from areas in which they had traditionally fished.

Following protests by the fishermen concerned and several Member States, the Commission intervened, claiming that coastal Member States, through shifting their baselines, could not unilaterally alter the fishing rights guaranteed by Community law.

The UK replied that the relevant baselines were those unilaterally drawn, and thus subject to change, by the Member States in accordance with international law. After unsuccessful negotiations, the Commission filed suit under Article 169 EEC.

2. The Judgment

The Court held that the Community rules at stake represented a careful balance between the interests of the coastal Member State and the protection of certain activities of fishermen from other Member States.[15]

The activities covered by Regulation 170/83 were not to be understood as abstract opportunities, but pertained to a factual situation, the nature and depth of the fishing grounds and the general features of the maritime area. An interpretation permitting variable baselines could compromise the Regulation's objectives by upsetting its inherent balance.[16]

Expressly rejecting the defendant's claim[17] that redefinition of the baselines could not be regarded as unilateral action (since it complied with international law) the Court pointed out that, under international law, States were merely authorized to extend their territorial waters and, in certain circumstances, their baselines.

In such cases, the decision to prevail itself of these options and to use the altered provisions for reassessing the areas defined by Annex I of Regulation 170/83 was solely attributable to the UK. The UK had thus failed to fulfil its obligations under the EEC Treaty.

3. Analysis

Although the Court did not directly refer to Article 234 EEC, it dealt with its underlying principle.

Article 234 EEC declares that Community law leaves unaffected the rights of third states and obligations of Member States resulting from international agreements, if their conclusion predates Community competence.

14 OJ 1983 L 24/1.
15 Case C-146/89, *Commission v. United Kingdom* [1991] 3 CMLR 649, 674 at recital 22.
16 Ibid., at recital 23.
17 Ibid., at recital 25.

In areas where Member States still have exclusive jurisdiction to act under public international law, obligations deriving from customary international law may however collide with the requirements of Community law. The question then is whether Member States can invoke international obligations against Community law. Their argument can be summarized as follows: since the Community is bound by international law, Community law cannot compel Member States to violate this law if they act within their own sphere of competences. Where the Member States alone bear international responsibility, obligations imposed by public international law should take precedence over Community law.

In the case at hand, the Court however denied the very existence of the conflict. The *international rules at stake did not force the UK to act as it did. They merely contained an option.* It was thus possible to comply with Community law without violating international law. The UK's argument was simply unfounded.

IV. RTE/BBC/ITP

Case T-69/89, RTE v. Commission, [1991] ECR II- 485;

Case T-70/89, BBC v. Commission, [1991] ECR II-535;

Case T-76/89, ITP v. Commission, [1991] ECR II-575

These cases permitted the Court of First Instance, for the first time, to deal with some aspects of Article 234 EEC.

The facts of these cases are very similar. Television and broadcasting stations in Ireland and the UK had reserved for themselves access to their broadcasting schedules and published their own monopolistic TV guides. For the Commission, these practices amounted to abuse of a dominant position, contrary to Article 86 EEC. It thus issued decisions ordering *RTE*, *BBC* and *ITP* to grant publishers non-discriminatory access to their data and to permit publication subject to reasonable royalties. The stations challenged these decisions under Article 173(2) EEC, arguing, *inter alia*, that the order to grant compulsory licences violated Article 9(1) of the 1886 Berne Convention on Copyright, which reserves the author of a protected work an exclusive right to its reproduction. Since all EC Member States were Contracting Parties to the Berne Convention, this convention should, according to the plaintiffs, be read into Community law through Article 234 EEC.

The Community had not yet acquired comprehensive and exclusive competence regarding copyright law. Nor was it Party to the Berne Convention. The Court therefore simply reiterated the European Court of Justice's constant jurisprudence according to which the Member States cannot rely on treaties predating the EEC Treaty for derogating from their obligations under Community law[18] and rejected the plaintiffs' argument.[19]

The argument raised does not reflect the traditional understanding of Article 234 EEC.[20] In fact, the plaintiffs were arguing Community succession into the position of its Member States

18 The European Court of Justice (ECJ) rejected a similar argument based on Article 5A para. 2 of the 1883 Paris Convention for the protection of industrial property in Case C-235/89, *Commission v. Italy (Re Compulsory Patent Licenses)*, Judgment of 18 February 1992 [1992] 2 CMLR 709, 760, at recital 31. It held that the provision at stake could not justify measures which by virtue of their discriminatory nature were contrary to the Treaty.

19 Case T-69/89, *RTE v. Commission* [1991] ECR II-485, 531 at recitals 102-104; Case T-70/89, *BBC v. Commission* [1991] ECR II-535, 573 at recitals 76-78; Case T-76/89, *ITP v. Commission* [1991] ECR II-575, 609 at recitals 75-77.

20 The ECJ decided in its judgment in Case 812/79, *Burgoa*, [1980] ECR 2787 that Article 234 EEC did not mean that the Community was in any way bound by its Member States' previous contractual commitments.

and thus incorporation of the Berne Convention into the Community legal order, following the European Court of Justice's GATT rationale.[21]

The Court of First Instance's rapid disposal of this argument is justified. Indeed, the primary prerequisite for succession established in the GATT cases, the comprehensive and complete transfer of competence from the Member States to the Community, was missing. The appeal of the argument therefore lies in its ingenuity rather than its strength.

V. Factortame/II

Case C-221/89, Factortame II, Judgment of 25 July 1991, [1991] 3 CMLR 589

As in *Re Territorial Sea*, the Court rejected a Member State's defence based on public international law.

1. Facts

Under the Common Fisheries Policy, national quotas had been established for the conservation and management of fishing resources. The UK found itself exposed to a phenomenon known as 'quota hopping' – fishing vessels from other Member States enlisting in the British register, thus flying the British flag and sharing in the British quotas. Moreover, vessels traditionally registered in the UK had been purchased by companies incorporated under British Law, but whose directors and shareholders were predominantly nationals from other Member States. The UK, feeling 'plundered' by vessels lacking any genuine link with its jurisdiction and considering 'quota hopping' an abuse of the Common Fisheries Policy, altered the conditions for British registration of vessels in 1988. Fishing vessels thus were only eligible for the new register, if they were British-owned or effectively controlled by British citizens established in the UK. The new provisions would have excluded 95 fishing vessels from the British register and fishing quota. The companies concerned challenged their compatibility with Community law before the High Court of Justice of England and Wales, Queens Bench Division, which asked the European Court of Justice for a preliminary ruling under Article 177 EEC.

2. The Judgment

The United Kingdom had argued that public international law required a genuine link between a State and vessels flying its flag. This resulted from the Geneva Convention of 29 April 1958 on the High Seas,[22] which codified customary international law.[23]

The Court dismissed this argument, as its pertinence was restricted to the existence of an actual conflict between Community law and international law. Without exposing its reasons for not finding any such conflict, the Court declared that, while in the current state of Community law, competence to determine the conditions for the registration of vessels (in accordance with

21 For a detailed discussion of the problems of 'succession' under Article 234 EEC and its connection with the ECJ's GATT-jurisprudence see J. Groux, P. Manin, *The European Communities in the International Order* (1985), Part 3, Chapter 1, para 1. B 1.

22 UNTS, Vol. 450, 82.

23 Art. 5(1) of the Convention reads, in its pertinent part: '... There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'

the general rules of international law) was still vested in the Member States, this competence must be exercised in a manner consistent with Community law.[24]

3. Analysis

There seems to be a new pattern of defence for Member States derogating unilaterally from their obligations under Community law.[25] Member States claim conflicts between customary or conventional international law and Community law. In order to justify their failure to comply with the latter, they invoke Article 234 EEC or a principle underlying it.

The Court did not take up the challenge and elected to avoid the conflict. It was held that the notion of 'genuine link' in international law was vague, and state practice varied.[26] The nationality requirement stipulated by the UK could not therefore be the sole and mandatory assessment criterion. There can be a 'genuine link' between vessel and registering State respecting the Community principles of non-discrimination and freedom of establishment. It was concluded therefore that there was no need for the Court to decide which legal order takes precedence.[27]

VI. Opinions 1/91[28] and 1/92[29] - The EEA Treaty Cases

Opinion 1/91, regarding the Draft Agreement between the European Community and the European Free Trade Association relating to the creation of the European Economic Area, Decision of 14 December 1991 [1992] 1 CMLR 245

Opinion 1/92 regarding the EEA, Decision of 10 April 1992 [1992] 2 CMLR 217

In Opinion 1/91, rejecting the creation of the judicial system contained in the first version of the Agreement creating the European Economic Area (EEA), the Court completed its previous jurisprudence concerning the position of international agreements in the Community legal order. In Opinion 1/92, the Court finally accepted the new dispute-settlement mechanism renegotiated between the Parties.

24 Case C-221/89, *Factortame II* [1991] CMLR 589, 625 at recitals 13-14 and 17.

25 A very similar defence had been employed by the Spanish government in Case C-369/90, *Micheletti*, Judgment of 7 July 1992 (not yet reported): In cases of dual citizenship, international law allegedly required a state to recognize only effective citizenship. This would in some cases force a Member State to disregard citizenship of another Member State, thus depriving its national of rights granted by Community law. AG Tesauro dismissed the argument as irrelevant and the Court did not refer to it. For a critique see: Ruzié, 'Nationalité, Effectivité et Droit Communautaire', 97 *RGDIP* (1993) 107.

26 See the detailed discussion in the opinion of AG Mischo, Factortame II *supra* note 24 at 603.

27 This jurisprudence was confirmed in Case C-246, *Commission/United Kingdom*, [1991] ECR I-4585, which was based on the same factual situation.

28 On Opinion 1/91, see Burrows, 'The Risks of Widening Without Deepening', 17 *ELR* (1992) 352; Hummer, 'Vorder- und Hintergründe des Gutachtens des EuGH zum EWRV', *WBl.* (1992) 33; Reinisch, 'Kritische Bemerkungen zum EWR-Gutachten des EuGH', *ÖJZ* (1992) 321.

29 On both Opinions, see Brandtner, 'The Drama of the EEA', 3 *EJIL* (1992) 300; Boulouis, 'Les avis de la Cour de Justice des Communautés sur la compatibilité avec le Traité CEE du projet d'accord créant l'Espace économique européen', 28 *RTDE* (1992) 457; Dutheil de la Rochère, 'L'Espace économique européen sous le regard des juges de la Cour de Justice des Communautés européennes', *RMC* (1992) 603; Epiney, 'La Cour de Justice des Communautés européennes et l'Espace économique européen', *Schweizerische Zeitschrift für internationales und europäisches Recht* (1992) 275; Schermers, 'Opinion 1/91 of the Court of Justice, 14 December 1991; Opinion 1/92 of the Court of Justice, 10 April 1992', *CML Rev.* (1992) 991.

1. Facts

The Community, its Member States and the European Free Trade Association (EFTA) had first negotiated the EEA with a view to largely duplicating the internal market. For this purpose, apart from incorporating most of the relevant primary and secondary *acquis communautaire*, the EEA, for the sake of 'legal homogeneity', foresaw an EEA court (and an EEA Court of first instance), functionally integrated with the European Court of Justice and competent to interpret the Agreement. Moreover, through an additional protocol, EFTA courts could ask the European Court of Justice to 'express itself' on questions pertaining to the EEA's interpretation. For the sake of coherence between these various rulings, the jurisprudence of the European Court of Justice predating the Agreement's signature was incorporated into the Agreement and the Courts were to pay 'due account' to each others' rulings. The Commission asked the Court for a first opinion regarding this system's compatibility with Community law. Following the European Court of Justice's negative answer, the EEA's renegotiated version found its approval in the second opinion.

2. The Opinion[30]

In the Court's view, analysis of the objective of 'legal homogeneity' was only possible after a comparison between the aims and context of EEA and EEC.[31] Identical wording could not be decisive. According to the Vienna Convention on the Law of Treaties, the EEA, being an international treaty, must be interpreted not only in the light of its wording, but also its object and purpose.

Both treaties' aims and objectives were fundamentally different. The EEA was an international agreement foreseeing no transfer of sovereign rights and mainly concerned with free trade and competition in the Parties' economic relations. The Community, however, was a Community of law, for the sake of which the Member States had transferred sovereign rights, and whose finality lay, beyond the internal market and economic and monetary union, in the making of concrete progress towards European unity.

In such a setting, attainment of 'legal homogeneity', if not impossible in principle, necessitated other mechanisms, but those foreseen in the EEA were at least insufficient, at worst illegal. Article 6 EEA, which sought to incorporate prior European Court of Justice jurisprudence into the EEA, was restricted *ratione materiae* as well as *ratione temporis*. As the Court's case-law was bound to evolve, homogeneity could not be thereby achieved.[32]

Moreover, the EEA's judicial system threatened the Community's legal autonomy.[33] The EEA court's capacity of determining the respective 'Contracting Party', in a mixed agreement, violated the prerogatives of the European Court of Justice under Arts. 164 and 219 EEC, since it would interfere with the Community's internal division of powers.[34]

Finally, conclusion of an Agreement was an act of the Community institutions. From its entry into force, such an agreement was part of Community law, binding on its Member States and institutions alike. The Court, when interpreting the EEA, could thus at the same time be called upon to rule on the Agreement, and, as a Community institution subject to the Agreement,

30 As the Court, in Opinion 1/92 [1992] 1 CMLR 245 at recitals 17-18, restates the 'international part' of Opinion 1/91, analysis will be restricted to the latter (the competence-expanding use of international agreements in Opinion 1/92 cannot be commented upon here; see Brandtner, *supra* note 29, at 325 et seq.).

31 Opinion 1/91 ibid., at recitals 13-22.

32 Ibid., at recitals 24-29.

33 Ibid., at recital 30.

34 Ibid., at recitals 32-36.

be ruled upon by the EEA court. While not in principle incompatible with Community law, this setting was invalidated by the EEA's additional feature of duplicating fundamental provisions of Community law. 'Homogeneity' and 'due account' would therefore lead to an interpretation of EEC rules according to EEA principles, in clear violation of Article 164 EEC and the Community's very foundations.[35]

This fundamental incompatibility could only be enhanced by the organic links created between the European Court of Justice and EEA courts. Nor could the Court be called upon to deliver non-binding opinions at the EFTA courts' request, although nothing in the Treaty prevented the Community from expanding to third countries the Court's jurisdiction to give binding preliminary rulings. Consequently, Article 238 EEC clearly provided no legal basis for the contested part of the EEA.

3. Analysis

It is the Court's task, under Article 228(1) EEC, to ensure that the contractual commitments undertaken by the Community towards third states do not collide with its internal order. Opinions are thus most important for the Community's constitutional structure, even if they also determine its capacity to act under international law.

In the opinions at stake, the EEA's unique features seem to have been decisive of the Court's approach, which may limit the overall impact of the ruling.

The Court's insistence on the existence of allegedly fundamental differences between the EEA and the EEC is surprising, although it follows well-established jurisprudence.[36] After all, 'duplication' is mirroring, as closely as possible, the Community system. However there is a fundamental difference. It lies between the EEA and the Community's other international agreements. The reason for this is to be found in the Court's now total incorporation of international agreements, be they mixed or not, into the Community legal order.

The structure of 'classical' international agreements markedly differs from the Community structure. They cannot therefore call into question the hierarchy of Community norms. Divergences between these agreements' interpretation by various courts can thus be accepted, because they never challenge the Community structure.

The EEA however duplicates Community law. The traditional understanding of the rank of international agreements in the Community legal order is that they stand between primary and secondary Community law. The whole EEA *acquis* is made up of secondary Community law, duplicated into the EEA, subsequently reincorporated into Community law, arguably at a higher rank than originally held. The EEA's total incorporation into this order must thus upset the hierarchy of Community norms. Moreover, in such a setting, the installation of an autonomous judicial system must result in a loss of autonomy for the Community institutions, the Court in particular. The parallel applicability of identically worded provisions holding different ranks would have threatened an erosion of the Court's judicial prerogatives in the Community legal order.

Contrary to what the Court seems to assert, the 'fundamental difference' is the EEA's closeness to the Community. In its original version, it was not a 'normal' international agreement. Its conclusion thus exceeded the Community's international capacity.

35 Ibid., at recitals 37-46.

36 See the line of jurisprudence regarding free trade agreements initiated by the Court in Case 270/80, *Polydor*, [1982] ECR 329.

VII. Simba

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

These cases concerned the protectionist effects of a national tax on direct imports from third countries, and the limits of the Court's jurisdiction under Article 177 EEC.

1. Facts

Italy had imposed a tax on the consumption of bananas. The Court had previously held that this tax violated Article 95(2) EEC.[37] Consequently, the tax no longer applied to imports from other Member States, but only to direct third country imports. Several Italian tribunals referred preliminary questions to the Court, inquiring whether the remaining tax amounted to a customs duty incompatible with the Common Customs Tariff or whether it violated Articles 95 or 113 EEC.

2. The Judgment

In the Court's view, the fact that the consumption tax on bananas now only applied to direct third country imports did not alter its legal nature.[38] It formed part of a general system of internal taxation. It could not at the same time constitute an internal tax under Article 95 EEC and a charge having equivalent effect to a customs duty (CEE) under Article 9 EEC. Article 95 EEC only applied to Member State imports[39] and Article 113 EEC was not pertinent either. The Treaty thus lacked a parallel to Article 95 EEC in the Community's external relations.[40] There were, however, international agreements which might be decisive in the main proceedings, such as the third Lomé Convention.[41] The banana tax was a protectionist measure. The national courts thus had to ensure respect for the Community's contractual obligations, eventually after referring preliminary interpretative questions to the European Court of Justice.[42]

3. Analysis

The limits of the Court's jurisdiction under Article 177 EEC are defined by the preliminary questions submitted by the national courts. Although the Commission,[43] the plaintiffs in the main proceedings[44] and the Advocate General[45] had at least considered the possibility of a violation of the third Lomé Convention, the Italian courts had not raised questions pertaining thereto. The Court felt precluded from giving a detailed and definitive interpretation of a provision which seemed relevant, if not decisive, for the main proceedings. It thus 'restrained

37 Case 193/85, *Co-Frutta*, [1987] ECR 2085.
38 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, 3750 at recital 12.
39 Ibid., at recital 14.
40 Ibid., at recital 18.
41 OJ 1986 L 86/3. See in particular Article 139(2), which imposes upon the Community and its Member States the obligation not to use protectionist measures.
42 *Simba supra* note 38 at recital 22.
43 See the submissions of the Commission ibid., at I-3723.
44 See the submissions of the parties ibid., at I-3725.
45 See the opinion of AG Lenz ibid., at I-3735.

itself' to stressing the potential relevance of Article 139(2) of Lomé III and reiterating the national courts' responsibility to refer to it, under Article 177 EEC, questions concerning the interpretation of Community agreements. The Court thereby practically invited further preliminary questions in these proceedings.

VIII. Legros

Case C-163/90, Legros, Judgment of 16 July 1992 (not yet reported)

In this case the Court confirmed the line of jurisprudence initiated in *Polydor*[46] with respect to free trade agreements.[47]

La Réunion, a French overseas department, imposed a levy called *octroi de mer* which was based on customs valuation on all goods imported from outside the region. The *Cour d'Appel* of Saint-Denis asked the European Court of Justice whether this charge was compatible with the EEC-Sweden Free Trade Agreement (FTA) of 1972,[48] in particular Articles 3, 6 and 18 prohibiting CEEs and discriminatory internal taxation.

The French government intervened, arguing that if the *octroi de mer* could be a CEE under the Treaty, this did not necessarily imply that it was also prohibited by Article 6 of the FTA.[49]

The French argument was rejected following analysis of the FTA. Confirming *Polydor*, according to which identity of words in the EEC Treaty and an FTA did not necessarily imply identity of interpretation, the Court had to assess whether the objective of Article 6, of the agreement as a whole and the FTA's overall context warranted such identity.[50]

In this case, the FTA's *effet utile* would be severely impaired if Article 6 were to be interpreted more restricively than its EEC counterparts.[51] The Court thus concluded that Article 6 of the FTA stood in the way of the *octroi de mer*.

IX. Re: Allocation of Fishing Quotas

Joined Cases C-63/90 and 67/90, Spain and Portugal v. Council; Cases C-70/90, C-71/90 and C-73/90, Spain v. Council; all judgments of 13 October 1992 (not yet reported)

This case concerned the incidence of the Spanish and Portuguese accessions on the repartition of fishing quotas under a pre-existing Community scheme.

1. Facts

The Community's basic scheme for the allocation of fishing quotas under the Common Fisheries Policy, founded in the 'basic regulation' 170/83/EEC[52] and performed through annual

46 *Polydor, supra* note 36.

47 One marginal aspect of Case C-65/91, *Commission v. Greece*, Judgment of 14 October 1992 (not yet reported), dealt with the EEC-Sweden FTA. In an Article 169 EEC procedure, the Court held that Greece's systematic denial of import licences for matches of Swedish origin constituted a violation of Article 13 FTA.

48 OJ 1972 L 300/96 (English Special Edition).

49 Case C-163/90 *Legros*, Judgment of 16 July 1992 (not yet reported) at recital 21.

50 Ibid., at recitals 23-25.

51 Ibid., at recital 26.

52 Council Regulation 170/83/EEC, OJ 1983 L 24/1.

implementing regulations, had attributed fishing quotas only to certain Member States[53] and subjected the quotas' annual repartition to the principle of 'relative stability' contained in Article 4(1) of the 'basic regulation'.[54] This system was not modified upon the Spanish and Portuguese accessions, thereby excluding Spain and Portugal from any attribution of quotas.

When the Council adopted regulations establishing, for 1990, the annual fishing quotas related to various fishing agreements,[55] it again took no account of Spanish and Portuguese interests, although in some cases,[56] prior to accession, these countries possessed fishing rights which they subsequently lost to the Community. Spain and Portugal therefore sought annulment of these regulations under Article 173 EEC, claiming, *inter alia*, the Council's infringement of the principle of 'relative stability' and of general principles of Community law such as non-discrimination, equity and solidarity.

2. The Judgments[57]

In all cases the Court, following Advocate General Lenz, upheld the regulations.

Spain had claimed violation of the 'principle of relative stability' because of a fundamental change of circumstances brought about by its accession and leading to the inapplicability of a system initially conceived for only ten Member States. The Court responded that the fact of an accession could not *per se* produce legal effects, its modalities being laid down in the Accession Treaties. Apart from these, the pertinent *acquis communautaire*, *in casu* the 'principle of relative stability', remained unchanged. As the Accession Treaty had not modified this principle, although it could have, this left the new Member States in a position identical to those Member States which had not benefitted from initial quotas. Along with these Member States,[58] Spain and Portugal could therefore raise their claims in the event of future openings of fishing opportunities, or at the scheme's modification under Article 4(2) of the 'basic regulation'.

It was held that the new Member States had lost competence to conclude international fishing agreements, but so had all Member States. If they had not been compensated for the fishing resources lost upon accession, this was no discrimination.[59]

An Accession Treaty was an act of primary Community law, capable in principle of modifying any aspect of the Community legal order. If, as in this case, the parties had opted for the existing scheme's preservation,[60] there was no scope for equity considerations.

53 Belgium, Denmark, Germany, France, the Netherlands and the United Kingdom (see opinion of AG Lenz).

54 The 'principle of relative stability' has been interpreted by the *ECJ* as granting an immutable percentage of captures to those Member States initially benefitting from such quotas, unless the Council modified the scheme, under Art. 4(2) of the 'basic regulation', through the procedure contained in Art. 43 EEC, see Case 46/86, *Romkes v. Officier van Justitie*, [1987] ECR 2671.

55 These agreements concerned Groenland, the Faroe Islands, Norway and Sweden.

56 Namely, traditional Portuguese fishing rights regarding Groenland and contractual Spanish fishing rights regarding Norway.

57 The following description and analysis will be based only on the judgment in Joined Cases 63/90 and 67/90 *Spain and Portugal v. Council*, Judgment of 13 October 1992 (not yet reported). This judgment contained the most ample statement of the parties' arguments and the reasoning of the Court.

58 Ibid., at recitals 31-37.

59 Ibid., at recital 44.

60 Ibid., at recital 49.

Finally, the Court concluded that adoption of a Council regulation violated neither the obligation of loyal cooperation imposed by Article 5 EEC upon the Member States, nor the Council's reciprocal obligation of loyalty.[61] In particular, Article 5 EEC did not govern the competition, in Council, between various Member State interests.

3. Analysis

The approach to Accession Treaties adopted by both the Court and the Advocate General seems quite remarkable. However, the way in which Spain and Portugal presented their case arguably could not have encouraged the Court to decide otherwise.

On the one hand, the Court recognized that these agreements had international and contractual nature which enabled the Community to deviate to a very large extent[62] from existing Community legislation. On the other hand, neither the Advocate General, nor the Court, paid any account to the plaintiffs' arguments resulting in this regard. Spain and Portugal had claimed, if not outright *rebus sic stantibus*, at least material error regarding the circumstances prevailing at the time of accession. These arguments seem inspired by customary international treaty law. Debatable as they may have been, they could at least cast doubt on the validity of Accession Treaties, in so far as these treaties constitute the very border of Community law and public international law. The Court thus was called on to define the regime for this border. Disregarding the specific position of accession candidates, the Court preferred a 'clean slate' to an equitable solution.

The Community legal order, and particularly the Common Fisheries Policy, are highly complex systems, detailed knowledge of which, at the time of accession, could arguably not be assumed. The same holds true for internal Council proceedings. The Court's trust in the perfect equity of these proceedings does not seem totally convincing. The impression transpires[63] that, in Council, Spanish and Portuguese claims were simply overruled by the qualified majority of the States in whose interest the system had been established. How could the new States foresee this *ex ante*? How can they *ex post* hope to modify the scheme?

Finally, how could such a situation not lead to discrimination, if the initial scheme established after lengthy negotiations[64] naturally mirrors the initial Member States' interests? It is difficult to accept that the fishing interests of Spain and Portugal were declared identical to those of, say, Luxembourg.

X. Poulsen/Diva

Case C-286/90, Poulsen/Diva, Judgment of 24 November 1992 (not yet reported)

This judgment contains the most important pronouncement of the Court on the relationship between international law and Community law since *Wood Pulp*.[65]

61 Ibid., at recitals 52-53.

62 Ibid., at recital 44 the Court declares: *'Dans n'importe quel domaine du droit communautaire'*.

63 Particularly in recitals 52-53 ibid.

64 A fact pertinently raised by the Advocate General, ibid., at point 22 of his opinion.

65 Joined Cases 89/85, 114/85, 116-117/85, 125-128/85, *Ahlström v. Commission/I*, [1988] ECR 5193; see *supra* note 8.

1. Facts

Article 6(1) of Council Regulation 3094/86/EEC[66] prohibited the fishing of salmon in certain areas outside the Member States' territorial jurisdiction. Illegal catches could not be kept aboard or brought into the Community. *Poulsen*, the captain of a fishing vessel registered in Panama, had been fishing salmon in the forbidden zones and was on his way to Poland where he intended to sell the catch. Because of a storm and technical problems, *Poulsen* sought shelter in a Danish port, where the vessel was searched by Danish authorities and the catch was seized. *Poulsen* was indicted before a Danish court for violation of Article 6(1) of Regulation 3094/86/EEC. The Danish Court asked the European Court of Justice, under Article 177 EEC, whether this provision was applicable to *Poulsen* and whether the catch could be seized, particularly in case of distress.

2. The Judgment

The Court found that Community competences had to be exercised in conformity with international law. Consequently, Article 6 Regulation 3094/86/EEC must be interpreted and applied in accordance with the pertinent rules of customary international law of the sea, as codified and reflected by the 1958 Geneva Convention[67] on the Territorial Sea and the 1982 UN Convention[68] on the Law of the Sea.[69]

The purpose of Article 6 Regulation 3094/86/EEC was conservation of protected species and thus implementation of a universally applicable international obligation. This obligation contributed to the conservation and management of the biological resources of the High Sea, as enshrined in Article 118 of the 1982 UN Convention. Article 6 thus had to be construed in this sense, so as to gain as much *effet utile* as possible.[70]

But Article 6 did not apply to the vessel at stake. The Member States were prevented, by customary international law,[71] from extending their jurisdiction over a ship flying a third country flag, even if it had a more substantial link to a Member State than to its country of registration.[72] For the same reason, Article 6 did not apply to the crew, even if composed of Community nationals. Regulation 3094/86/EEC did not intend to impose obligations upon Community nationals sailing on third country ships.[73]

The Court then defined the scope of Article 6 under the territoriality principle, by assessing Community jurisdiction on the High Sea, the Exclusive Economic Zone and the Territorial Sea. Whereas on the High Sea, activities on board of ships could only be regulated by the flag state, the Community was competent, under international law, for the Exclusive Economic Zone and the Territorial Sea of its Member States, but had to respect the customary right to innocent

66 Council Regulation 3094/86/EEC laying down certain technical measures for the conservation of fishery resources, OJ 1986 L 288/1.

67 UNTS, Vol. 516, 205.

68 ILM, Vol. 21 (1982) 1261.

69 Case C-286/90, *Poulsen/Diva* Judgment of 24 November 1992 (not yet reported) at recital 10.

70 Ibid., at recital 11.

71 As codified in Articles 5 and 6 of the 1958 Geneva Convention and Articles 91 and 92 of the 1982 UN Convention.

72 *Poulson/Diva, supra* note 70, at recitals 13-16.

73 Ibid., at recitals 18-19.

passage and to freedom of navigation of third country ships.[74] Article 6 thus only applied to a third country vessel if it was in a Member State's port or internal waters.[75]

The Court finally scrutinized the legality of the cargo's seizure. Although in principle a Member State measure, this seizure sought to enforce Community law. It was thus only lawful if the Community rule was applicable itself. Since neither the ship's nationality nor the cargo's fortuitous presence in the Danish port had any material effect on the illegality of the transport, Regulation 3094/86/EEC actually applied and the cargo could be lawfully seized.[76]

The relevant provisions of Community law did not contain any rules on distress. Its effects were thus not a matter of Community law, but were a matter for the Member States. Therefore, determination of the effects of distress, in accordance with international law, was for the national courts.[77]

3. Analysis

Questions of international jurisdiction[78] have been debated since the *Lotus* decision of the Permanent Court of International Justice.[79]

The judgment at hand is not only a contribution to the development of customary international law, (being evidence of the Community's international practice) under Article 38(1)(c) of the ICJ Statute. It also reveals the Court's perception of the Community's position under international law.

Jurisdiction could be defined as the Community's power to regulate activities in and outside of its territory and to enforce it's policies.

The Court's express exhortation, that the Community competences be exercised in accordance with international law, could therefore be read as an assertion of powers hitherto only guaranteed to states. To the extent of the Member States' transfer of competence, the Community will accept no further jurisdictional limits than those traditionally imposed on states.

This impression is reinforced by the Court's unusually thorough assessment of the relevant rules of international law. The assumption of a worldwide obligation to conserve and manage the High Sea's resources, under customary international law, seems rather activist,[80] but remains an *obiter dictum*. The Court established the different bases of jurisdiction (territoriality principle, personality principle), their modifications by international law (exclusive flag state jurisdiction on the High Sea) and the exemptions from the coastal state's territorial jurisdiction (innocent passage, freedom of navigation) in a very traditional and restrictive way. It

74 Ibid., at recitals 22-27.

75 Ibid., at recital 29: Here the Court does not follow AG Tesauro. The Advocate General had suggested at points 10-15 of his opinion that vessels not actually landing illicit cargo should not be subject to Community jurisdiction.

76 Ibid., at recitals 31-33.

77 Ibid., at recital 38.

78 For a detailed discussion of the different forms of jurisdiction (jurisdiction to prescribe and to enforce) and their problems under international law see: The American Law Institute, Third Restatement: *The Foreign Relations Law of the United States* (1987), at paragraphs 402 and 431.

79 PCIJ Rep., Judgment of 7 September 1927, Series A, No. 10, 25; quoted but distinguished by AG Tesauro in *Poulsen/Diva supra* note 69 at point 8 of his opinion.

80 It is at least open to discussion whether protection of the 'Common Heritage of Mankind', in the present state of international law, is an obligation *erga omnes*. See R. Jennings, A. Watts, *Oppenheim's International Law* (9th ed. 1992) at paras. 306-309.

distinguished jurisdiction to prescribe and jurisdiction to enforce, and defined the latter's limits according to established principles. Having thus paid due respect to international law, the Court however reached a conclusion different from that of its Advocate General. AG Tesauro had pleaded that one could not distinguish a lawful catch from an illicit transport. The Court, however, affirmed the Community's unlimited territorial jurisdiction and approved the catches' seizure. Even the vessel's provisional presence in port did not change the applicability of Community law.

But the Court left room for an equitable solution. As Community law contains no legal concept of distress, assessment of its effects concerns the implementation of the fishing prohibition entrusted to the Member States. The Court thus lacked jurisdiction and left the decision whether, under international law, distress can excuse an otherwise illegal transport, to the national courts. This permitted the Court to affirm the full reach of Community legislation and to leave to the Member States the more intricate problems of implementation.

XI. Koua Poirrez

Case C-206/91, Koua Poirrez, Judgment of 16 December 1992 (not yet reported)

As in *Simba*, the Court avoided interpretation of a Lomé Convention[81] by strictly adhering to the text of preliminary questions. However, the employment of this technique in *Koua Poirrez* gave rise to effects diametrically opposed to those which appeared in *Simba*.

Koua Poirrez, a citizen of the Ivory Coast, had been adopted by a French national but had not acquired French nationality. His application for a disablement allowance was rejected for lack of French nationality. Koua Poirrez argued that disablement allowances had to be granted to dependents of Community nationals. Having been adopted by a French national, he should therefore qualify. Koua Poirrez also claimed that the allowance's denial constituted discrimination and violated provisions of the third and fourth Lomé Conventions,[82] but the French court confined it's preliminary reference to Articles 7 and 48(2) EEC.

The Court treated the case as a typical example of reverse discrimination, without mentioning the Lomé Conventions, and held that Articles 7 and 48 EEC did not apply to situations purely internal to one Member State.[83] Advocate General Van Gerven had asked the Court for a comprehensive reply dealing with all aspects of Community law relevant to the main proceedings.[84] After analysis of the Lomé Conventions, he however found that Article 5(2) of Lomé IV contained only a non-binding declaration of principles and that the limited commitments undertaken by the Contracting Parties in the last sentence of Article 5(2) Lomé IV did not list nationality as an illicit criterion for differentiation.[85]

81 *In casu*, the fourth Lomé Convention, OJ 1991 L 229/3, and in particular the prohibition on discrimination contained in Art. 5(2).

82 Case C-206/91 *Koua Poirrez*, Judgment of 16 December 1992 (not yet reported), in the Report of the Hearing, Part II.

83 Ibid., at recitals 10-15.

84 Ibid., at point 11 of the opinion of AG Van Gerven.

85 Ibid., at point 16 of the opinion of AG Van Gerven.

XII. Kazim Kus

Case C-237/91, Kazim Kus v. Landeshauptstadt Wiesbaden, Judgment of 16 December 1992 (not yet reported)

The Court here confirms *Demirel*[86] and *Sevince*[87] through teleological interpretation of Decision 1/80 of the EEC-Turkey Association Council.

In 1981/82, Kazim Kus, a Turkish national, had been granted a residence and working permit in Germany because of his marriage to a German citizen and had been continually employed ever since. In 1984 his application for the renewal of his permits was rejected because he had been divorced in the meantime, and thereby lost a privileged status conferred by German law. He attacked the decision in court and was granted provisional residence for the time of the proceeding. The Court of Appeals asked the Court, under Article 177 EEC, whether in such cases Article 6 of Decision 1/80 of the EEC Turkey-Association Council gave rise to a right to a working and residence permit.

The German government[88] in its intervening submissions had asked the Court to reconsider its jurisprudence concerning decisions of the organs implementing association agreements. However the Court, in the absence of any new arguments to the contrary, upheld its earlier position.[89]

The Court, citing *Sevince*, found that a provisional residence permit such as the one in issue could not provide the employment stability necessary for free access to any open position granted by Article 6 indent 3 of Decision 1/80.[90]

The only qualification to the rights contained in Article 6 indent 1 of Decision 1/80 was that a work permit would only be renewed if the person holding it had been in regular employment for one year. The Court noted that there were no other requirements, such as continuity of the original reason underlying the permit's grant.[91]

Moreover, under *Sevince*, Article 6 indent 1 of Decision 1/80 was directly applicable. It thus not only expressly granted access to employment but presupposed a right to reside in the Member States.[92]

The practical conclusion is that Member States, while still free to regulate the entering of Turkish nationals and their access to the national employment markets, can no longer deprive the Turkish workers, once admitted, of their rights under Community law.[93] The Court thus reaffirmed the Community's extensive competence regarding association agreements.

86 Case 12/86, *Demirel*, [1987] ECR 3719; see Vedder, *supra* note 8 at 375.

87 Case 192/89, *Sevince*, [1990] ECR I-3461; see Areukza, *supra* note 13.

88 Case C-237/91, *Kazimkus v. Landes hauptstaat Wiesbaden*, Judgment of 16 December 1992 (not yet reported) in the Report of the Hearing, Part II.A.1.

89 Ibid., at recital 9.

90 Ibid., at recitals 12-18.

91 Ibid., at recitals 21-25.

92 Ibid., at recitals 28-36.

93 Ibid., at point 55 of the opinion of AG Darmon.