

# 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 1993

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The following survey covers the period from 1 January to 31 December 1993.<sup>1</sup>

### I. Re Lomé Cases

*Case C-257/90 Italsolar SpA v. Commission, Judgment of 14 January 1993, [1993] ECR I-9;*  
*Case C-370/89 Société générale d'entreprises électro-mécaniques (SGEEM) v. European Investment Bank, Judgment of 25 May 1993, [1993] ECR I-2583;*

*Case C-182/91 Forafrique Burkinabe SA v. Commission, Judgment of 29 April 1993, [1993] ECR I-2161*

In three different cases which dealt with financial and technical aid within the framework of the third ACP-EEC Lomé Convention, the Court confirmed its prior jurisprudence<sup>2</sup> and sought to minimize the Community's involvement in the implementation of development projects at the national level. This was achieved by stressing a clear-cut division of tasks and powers between the Community institutions and the authorities of the ACP State concerned.

#### *a. Italsolar*

The Commission had sent a letter to the plaintiff Italsolar confirming the rejection of its tender for an EDF-funded project on the use of photovoltaic energy. The decision had been made by CILSS, a body which represents nine countries of the Sahel zone, the parties to and beneficiaries of the Lomé Convention,<sup>3</sup> and various entities involved in the project's financing arrangements. *Italsolar* filed suit under Article 173(2) EEC against the

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1 Apart from III. Opinion 2/91 no complete English versions of the judgments were available at the time this Survey was written and this will probably continue to be the case for another year. We therefore indicate the identical source in the French 'Recueil de la jurisprudence de la Cour des Communautés européennes'.

2 Case 126/83, *STS/Commission*, [1984] ECR 2769; Case 126/83, *CMC v. Commission*, [1985] ECR 2325.

3 OJ 1986 L 86/3.

Commission's letter, and made a further complaint under Article 175(3) and the damages provisions of Articles 178 and 215(2).

The Court found the application inadmissible since the Commission's letter could not possibly be of direct concern to Italsolar. ACP-EEC cooperation provided for a strict division of competences, leaving the preparation, negotiation and conclusion of EDF-financed contracts to the exclusive responsibility of the ACP States. Once the ACP States had decided to award the contract to a specific company, the Commission was restricted to assessing independently whether or not the conditions for Community financing as laid down in the Lomé Convention and the financing agreement were met. Given the fact that the Commission did not have the power to award the contract to Italsolar, its letter could not have any legal effects on the plaintiff's interests, and could not be contested under Article 173(2) EEC.<sup>4</sup> For the same reason the plaintiff's application under Article 175(3) EEC was held inadmissible, since the action for failure to act expressly concerns only legally binding acts other than recommendations or opinions.<sup>5</sup> In rejecting the damages claim made under Articles 178 and 215(2), the Court held that given the Commission's limited role, it did not have any obligation to protect the plaintiff's interests. Nor had the plaintiff established that the Commission had entered into any other form of illegal conduct, such as unduly influencing the decision-making process within CILSS or pursuing arbitrary motives with regard to Community financing.<sup>6</sup>

*b. SGEEM*

The plaintiff SGEEM had submitted a tender for the construction of an electricity line in Mali to be financed by the European Investment Bank (EIB) within the framework of the Lomé III Convention. The Mali authorities responsible for the tendering procedure initially followed the advice of an independent expert who had considered SGEEM's offer as unsound. Upon direct intervention by the Mali Government,<sup>7</sup> both changed their minds and decided to recommend that SGEEM had made the best offer. The EIB, however, was not convinced by the results of the reevaluation, and refused to provide finance. SGEEM sued for damages under Articles 178, 215(2) EEC.

Recalling the division of tasks and powers between the Community and the ACP States as laid down in Articles 192(2), 225(3) and 192(4) of Lomé III, the Court stressed the independence of EIB's responsibilities when acting on behalf of the Community. The EIB not only had the right but the obligation to safeguard the Community's financial interests by making sure that the financing conditions were actually met. For this purpose the EIB is free to gather all information it deems necessary in order to make its decision. Since the plaintiff had not managed to establish that the EIB had either overstepped its powers or interfered with the exclusive competences of the Mali authorities, the denial of Community financing by the EDF was therefore legitimate.<sup>8</sup> The action was unfounded.

*c. Forafrique*<sup>9</sup>

The plaintiff Forafrique Burkinabe SA, had performed a contract for an EDF-funded rural development project in Burkina Faso, but did not receive the payment which had been

4 Recitals 21-27 of the judgment.

5 Recitals 28-31 of the judgment.

6 Recitals 32-36 of the judgment.

7 See point 10 of AG Gulmann's conclusions.

8 Recitals 29-35 of the judgment.

9 For a more detailed analysis see Folz, Vedder, 31 *CML Rev.* (1994) 413.

agreed. Forafrique suspected that Community funds had been embezzled by the authorities of Burkina Faso, and obtained a garnishee order against the Commission before a Belgian Court. The Commission refused to comply with the garnishee order and authorized further payments to Burkina Faso. Forafrique brought an action under Article 173(2) EEC for annulment of the Commission's refusal to comply with the order, and sued for damages under Articles 178, 215(2) EEC.

The Court found that the Commission was entitled to disregard the garnishee order as long as the Community's immunity under Article 1 of the Protocol on the Privileges and Immunities of the European Communities<sup>10</sup> had not been lifted by the Court. Given that the purpose of the immunity was to prevent any interference with the functioning and independence of the Community, it applied as of right and did not have to be invoked by a Community organ. Since Forafrique had not asked for an authorization by the Court, and since no exception applied, the action for annulment was unfounded.<sup>11</sup> For the same reason the Commission did not act illegally when it continued to pay funds to Burkina Faso despite the garnishee order. As for the notification of suspected embezzlement of the Community funds, the Court found that, given the division of tasks and powers between Community and ACP States, the plaintiff had entered into a legal relationship solely with Burkina Faso even though the contract was funded by EDF. As long as the Commission acted in accordance with financing conditions, the interests of private undertakings involved in the implementation of the projects did not have to be taken into consideration. Since the plaintiff had not substantially disputed the compliance of the Commission with the applicable financing conditions, the claim of illegality could not succeed, and the action for damages was unfounded.<sup>12</sup>

The jurisprudence of the Court therefore safeguarded the Community's freedom of development policy decision-making by insulating its institutions from the process of policy implementation; even though this may have been achieved at the expense of private interests.

## II. Deutsche Shell

*Case C-188/91 Deutsche Shell v. Hauptzollamt Hamburg-Harburg, Judgment of 21 January 1993, [1993] ECR I-363*<sup>13</sup>

The Court confirmed and extended its jurisprudence on the effects in the Community legal order of decisions taken by institutions which are established by international agreements concluded by the Community.

### 1. Facts

In 1987 the EEC and the EFTA countries<sup>14</sup> concluded a Convention on a common transit regime<sup>15</sup> in order to accelerate the movement of goods across borders and established a Joint Committee in charge of the administration and implementation of the Convention. The Convention provided that, as a rule, goods in transit should be identified by sealing the containers in which they are transported. Exceptionally, national customs authorities can allow certain 'authorized consignors' to identify their goods by simply describing them. The

10 JO 1967 152/13.

11 Recitals 10-19 of the judgment.

12 Recitals 20-25 of the judgment.

13 See also Castillo de la Torre, 30 *CML Rev.* (1993) 1043.

14 At that time being Austria, Finland, Iceland, Norway, Sweden and Switzerland.

15 OJ 1987 L 226/1.

use of this less cumbersome and therefore privileged procedure led to an increase of customs controls at the Swiss and Austrian borders, which was contrary to the objectives of the Treaty. In 1988 the Joint Committee adopted an 'arrangement' stating that exceptions to the sealing procedure should be construed narrowly. In reliance on this 'arrangement', German customs authorities ceased authorizing the identification of goods by the plaintiff Deutsche Shell by way of description. Since the sealing procedure proved to be much more complicated and expensive for Deutsche Shell, it filed suit before the *Finanzgericht*. The German court asked for a preliminary ruling under Article 177 EEC on the effects and validity of the 'arrangement' of the Joint Committee.

## 2. The Judgment

In interpreting the Transit Convention the Court found that the 'arrangement' was not binding but must be regarded as a mere recommendation under Article 15(2) of the Convention. Recalling its *Sevince* decision<sup>16</sup> the Court held that the acts of bodies established under an international agreement entered into by the Community had a direct connection with the basic agreement insofar as such acts sought to implement it. Consequently, they were held to form an integral part of the Community legal order. Since the Joint Committee's 'arrangements' had the purpose of implementing the Transit Convention they formed part of Community law.<sup>17</sup> The jurisdiction of the Court under Article 177 EEC was not precluded by the fact that the 'arrangements' were not legally binding.<sup>18</sup> Although the Joint Committee's recommendations could not confer rights on individuals and therefore could not have direct effect, the national courts were required to take them into account for the purpose of resolving disputes, in particular when the recommendations are, as in the present case, useful for interpreting the provisions of the Transit Convention. The Court further held that the Joint Committee had not exceeded the limits of its competences when it reaffirmed the general system of the Convention allowing for derogations from the principle of sealing only as an exception.<sup>19</sup>

## 3. Analysis

In the judgments *Greece v. Commission*,<sup>20</sup> *Sevince*<sup>21</sup> and *Kazim Kus*<sup>22</sup> the Court held that decisions taken by an Association Council become an integral part of the Community legal order<sup>23</sup> as soon as they enter into force. The association agreements expressly provided that the decisions of the Association Council were binding on the contracting parties, i.e. the

16 Case C-237/91 *Sevince v. Staatssecretaris van Justitie*, [1990] ECR I-3461; see de Areilza, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1990-91', 2 *EJIL* (1991) 177.

17 Recitals 14-17 of the judgment.

18 Recital 18 of the judgment. The Court cited its jurisprudence on non-binding internal Community measures in this respect, e.g., Case C-322/88, *Grimaldi*, [1989] ECR 4407.

19 Recitals 20-26 of the judgment.

20 Case 30/88, *Greece v. Commission*, [1989] ECR 3711.

21 See *supra* note 18.

22 Case C-237/91, *Kazim Kus v. Landeshauptstadt Wiesbaden*, Judgment of 16 December 1992, [1993] CMLR 887; see Vedder, 'Rechtswirkungen von Assoziationsratsbeschlüssen: Die Kus-Entscheidung des EuGH', to be published in *EuR* (1994) No. 2; Brandtner, Folz, 'A Survey of Principal Decisions of the European Court of Justice Pertaining to International Law in 1991-92', 4 *EJIL* (1993) 430, 446.

23 Case 30/88, *Greece v. Commission*, [1989] ECR 3711, 3738, Recital 13.

Community and the third State. As the Court has affirmed in *Sevince* and *Kazim Kus* such decisions can have direct effect.

In *Deutsche Shell* the Court extended this jurisprudence to decisions taken by Joint Committees established under agreements based on Article 113 EEC. The Court implicitly rejected the submissions of the Commission<sup>24</sup> and followed the opinion of Advocate General Van Gerven<sup>25</sup> by dismissing the relevance of the non-binding character of such recommendations. The decisive factor was the direct connection between the basic agreement and the decision which was taken by the international body implementing it. All such acts whether binding or not form an integral part of Community law.

Consequently, *Deutsche Shell* can be seen as another step towards the recognition by the Court of a Community 'power of integration'.<sup>26</sup> As can be seen from the decisions in *Opinion 1/76*,<sup>27</sup> *Opinion 1/78*<sup>28</sup> and *Kramer*<sup>29</sup> the treaty-making power of the Community includes the competence to establish institutions within the framework of international agreements and to vest them with specific powers of implementation. The acts of such international bodies are an integral part of Community law and enjoy the same prerogatives as any other provision of Community law such as supremacy and direct effect. Even if they are not binding under international law, they have to be taken into account as interpretive guidelines for the purpose of implementation of the basic agreement.

### III. Opinion 2/91<sup>30</sup>

*Opinion 2/91 regarding ILO Convention No. 170 on Chemicals at Work, Decision of 19 March 1993 [1993] 3 CMLR 800*

In *Opinion 2/91* the Court, while taking into account the specific nature of ILO and its conventions, clarifies certain aspects of the ERTA jurisprudence.

#### 1. Facts

The ILO, a specialized agency of the United Nations,<sup>31</sup> pursues the aim of improving labour conditions and promoting social justice on a universal scale by the adoption of conventions

24 Report of the Hearing, Part II.

25 Point 10 of AG Van Gerven's opinion.

26 For a more detailed analysis of the Court's jurisprudence in this respect see Vedder, 'Die Integrationskompetenz der EG in der Rechtsprechung des EuGH', in A. Randelzhofer *et al.* (ed.), *Gedächtnisschrift Grabitz*, forthcoming.

27 *Opinion 1/76, Draft Agreement establishing a European laying-up fund for inland waterway vessels*, [1977] ECR 741.

28 *Opinion 1/78, International Agreement on Natural Rubber*, [1979] ECR 2871.

29 *Cases 3, 4 and 6/76, Cornelis Kramer and others (Biological resources of the sea)*, [1976] ECR 1279.

30 See also Emiliou, 'Current Survey: Towards a Clearer Demarcation Line? The Division of External Relations Power Between the Community and Member States', 19 *ELR* (1994) 76; Raux, 'L'Avis de la Cour du 19 Mars 1993 (Avis 2/91) à propos de: La Convention No. 170 concernant la sécurité dans l'utilisation des produits chimiques au travail', 374 *RMC* (1994) 45.

31 The International Labour Organization is in fact much older than the United Nations. It was founded in 1919 in the aftermath of the First World War and its founding charter was part of the peace treaties, such as Part XIII of the Versailles Treaty. Unlike traditional governmental organizations ILO has a tripartite structure, which means that in addition to government officials, representatives of employers and labour organizations take part in the process of decision-making and implementation.

and recommendations. ILO conventions are open for ratification by ILO Member States only<sup>32</sup> and are limited to providing minimum requirements for labour standards which members are free to exceed.<sup>33</sup> All Member States of the European Community are also members of the ILO, but the ILO constitution prohibits the Community from joining in its own right as accession is reserved to States.<sup>34</sup> ILO Convention No. 170 seeks to protect workers against the harmful effects of using chemicals in the workplace, and contains rules on topics as diverse as the handling of chemical products from their point of origin to their actual use, the rights and responsibilities of employers and workers, and health and safety requirements for the export of hazardous chemicals.<sup>35</sup> The subject matter of Convention No. 170 had been regulated in the Community by several directives founded on different legal bases, such as Articles 118a, 100 and 100a EEC. The directives contain rules of different legal nature, varying from minimum to total harmonization.<sup>36</sup>

The Commission argued that the Community had exclusive competence to conclude ILO Convention No. 170, and requested an advisory opinion from the Court under Article 228(1) subparagraph 2 EEC<sup>37</sup> on the compatibility of Convention No. 170 with the Treaty. The Commission contended that under the *ERTA* jurisprudence,<sup>38</sup> the Community had the competence to conclude an international agreement on any subject matter which fell under the internal legislative jurisdiction of the Community. This competence was exclusive insofar as the Member States cannot assume obligations which might affect or alter the scope of rules which have been enacted by the Community internal legislation. As Article 118a EEC provided for a general legislative competence of the Community to regulate the safety of the working environment, the Community could conclude the entire Convention No. 170. Since the subject matter of Convention No. 170 was covered by internal Community legislation, the Community's competence was exclusive. The Commission further argued that it was irrelevant that some of these rules laid down only minimum standards, since the co-existence of Community law and partial obligations entered into by the Member States would jeopardize the autonomy of the Community legislature.

Germany and other Member States contested the admissibility of the Commission's request. Article 228(1), subparagraph 2 EEC only concerned agreements to be concluded by the Community. The conclusion of Convention No. 170 by the Community was excluded by Article 19(5)(d) of the ILO Constitution, which reserved ratification to its Member States. On the merits several Member States argued that in any case the Community's competence was not exclusive, since the *ERTA* rationale only applied within the framework of a common policy, not in areas of functional harmonization such as social policy under Article 118a EEC.

32 Article 19(5)(d) of the ILO Charter, UNTS 15, 35.

33 Compare Article 19(8) of the ILO Constitution which provides that: '... in no case shall the adoption of any Convention or any Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation'.

34 Consequently, the Community only has observer status. For a description of Community cooperation with ILO see points 13-20 of the Facts.

35 For the contents of ILO Convention No. 170 see Points 21-30 of the Facts.

36 See Point 40 of the Facts and Recital 21 of the Opinion.

37 Now Article 228(6) EC Treaty.

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

## 2. The Opinion

Rejecting the plea of inadmissibility, the Court held that the request for an opinion under Article 228 EEC did not concern the Community's capacity to act on the international plane but related exclusively to the respective competences of the Community and the Member States; and this was a question to be judged solely by reference to Community law.<sup>39</sup> Since rules in international agreements concluded by the Member States could also affect internal Community rules adopted in areas falling outside common policies, the question of an exclusive Community competence could not be dismissed, simply because the ILO Convention dealt with social policy.<sup>40</sup> After asserting the general internal legislative competence of the Community in the area of social policy, and a corresponding external competence, the Court went on to determine its exclusive or non-exclusive nature.<sup>41</sup> In assessing the ILO Convention's ability to affect or alter the scope of Community law, the Court examined the internal Community rules by reference to their legal bases and their legal nature. ILO Convention No. 170 did not affect rules based on Article 118a EEC, because both the Convention and Article 118a EEC provided for minimum legislative standards only. For the same reason, ILO rules did not interfere with the directives which had been passed under Article 100 laying down minimum requirements.<sup>42</sup> The Court expressly refuted the Commission's argument that the mere co-existence of the ILO and Community minimum standards could impair the development of Community law because future difficulties in the Community legislative process could not be a basis for exclusive Community competence.<sup>43</sup> However, the Court found that several directives covered by Convention No. 170 which had been based on Article 100 and 100a EEC provided for total harmonization.<sup>44</sup> Even though there was no conflict between both sets of rules, the ILO measures were deemed to affect the Community rules laid down in the directives, which therefore excluded any parallel competence of the Member States.<sup>45</sup> Given that the Community alone had the exclusive competence to conclude part of the ILO Convention, while the Member States retained concurrent competence regarding other parts of the agreement, the conclusion of Convention No. 170 was a matter falling within the joint competence of the Member States and the Community.<sup>46</sup>

## 3. Analysis

In *Opinion 2/91* the Court extended the *ERTA* rationale beyond the framework of common policies to all areas of internal legislative competences of the Community, forcing it to confront the relationship between Community and Member State competences. In *ERTA*, the Court stressed the exclusive nature of the Community's treaty-making powers in the strongest possible terms but also found that the concurring competence of Member States would be excluded only when Community rules might be affected or altered in scope. In this opinion,

39 Recital 4 of the Opinion.

40 Recitals 10 and 11 of the Opinion.

41 Recitals 13-17 of the Opinion.

42 E.g., Council Directive 80/1107/EEC on the protection of workers from the risk related to exposure to chemical, physical and biological agents at work, OJ 1980 L 327/8; Recitals 17-21 of the Opinion.

43 Recitals 19 and 20 of the Opinion.

44 E.g., Council Directive 88/379/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations, OJ 1988 L 187/14.

45 Recitals 22-26 of the Opinion.

46 Recitals 36-39 of the Opinion.

the Court has to clarify this reservation and, in doing so, reveals the inconsistencies present within the doctrine of exclusivity.

Since Article 118a EEC only provides for minimum harmonization (which according to Article 118a(3) EEC the Member States are free to exceed) there can be no conflict between Community and ILO rules even if the Community should decide to set lower standards of social legislation. Member States could still fulfil their ILO obligations without violating internal Community law. However, if the Community should promulgate more stringent rules, an ILO convention, because of its character as minimum standard, could never be invoked by Member States as a defence for derogating from Community law. ILO rules could not possibly affect Community directives based on Article 118a EEC.

The Court went on to declare that 'for the same reasons' no exclusive Community competence could be founded on directives based on Article 100 EEC if they merely laid down minimum requirements. However, it is important to bear in mind that there is a fundamental difference between the two different kinds of directives. Although there can be no actual conflict between ILO and Community rules, since they both contain minimum standards, the Community can reform existing legislation based on Article 100 EEC and substitute minimum standards with measures of total harmonization. ILO conventions and Community law would be in conflict if the Community rules of total harmonization contained lower standards.<sup>47</sup> Consequently, Community law could be affected.

The discrepancy between the results in the first two categories is even more acute because the Court found that those directives based on Article 100 and 100a EEC containing rules of total harmonization covered by Convention No. 170 can be affected by ILO rules, even when there is no actual conflict between the two different sets of standards. As in the second category, there is only a potential possibility of conflict; it will only arise should the Community decide to lower its standards. Although the last two categories discussed by the Court appear similar, the Member States retain a concurrent treaty-making power in one case, while in the other the Community's competence is exclusive.

#### IV. Findling Wälzlager

*Case C-136/91 Findling Wälzlager Handelsgesellschaft m.b.H. v. Hauptzollamt Karlsruhe, Judgment of 1 April 1993, [1993] ECR I-1793*

In this case the Court employed a teleological method in interpreting an antidumping regulation in accordance with the GATT Antidumping Code.<sup>48</sup>

Findling Wälzlager m.b.H. imported housed bearing units from Japan into the Community and were charged an antidumping duty under Article 1(3) of Council Regulation 374/87/EEC.<sup>49</sup> This provision contained a list of bearing manufacturers and their affiliated exporters stating different duty rates for each. For all manufacturers and exporters not specifically listed, the regulation fixed a single rate of 13.39%. Since Findling Wälzlager m.b.H. did not appear by name in Article 1(3) of Regulation 374/87/EEC it had to pay the subsidiary rate, although the bearings had actually been manufactured by a listed firm which would only have been charged a dumping duty of 2.24%. Findling Wälzlager m.b.H. filed suit before the *Finanzgericht Baden-Württemberg* claiming that the regulation completely disregarded the position of independent exporters.

47 In case of such a conflict, Member States arguably could invoke Article 234 EEC in order to fulfil their obligations under the ILO convention. See Vedder in E. Grabitz, *Kommentar zum EWG-Vertrag*, (September 1987) and Article 234 EEC, Recital 21.

48 For earlier developments see Brandtner, Folz, *supra* note 22, at 431.

49 OJ 1987 L 35/32.



Although Article 1(3) of the Regulation 347/87/EEC seemed unequivocal and did not leave much room for interpretation, the Court followed an argument of Advocate General Van Gerven<sup>50</sup> by pointing out that, in interpreting a provision of Community law, not only its wording but also its context and purpose have to be taken into account. As could be seen from the basic Antidumping regulations<sup>51</sup> and Article 8 of the GATT Antidumping Code,<sup>52</sup> the amount of antidumping duties must not exceed the established dumping margin. To charge an independent exporter a higher antidumping duty than the rate to be paid by the original manufacturer would clearly breach this principle, since the latter amount already reflected the relevant dumping margin. If the exporter could establish that the goods to be imported in fact originated from one of the listed manufacturers, only the duty rate applicable to the manufacture was payable.<sup>53</sup>

## V. Re Aid to Bangladesh

*Joined Cases C-181/91 and C-248/91 Parliament v. Council, Judgment of 30 June 1993, [1993] ECR I-3283*

The Court confirmed the non-exclusive nature of Community competence in the field of humanitarian aid and sanctioned another form of 'mixed' cooperation between Member States and Community institutions.<sup>54</sup>

Acting on an initiative of the Commission, the Representatives of the Governments of the Member States meeting in Council decided to grant special aid to Bangladesh within the framework of general Community action. The aid was to be paid either directly by individual Member States or through an account administered by the Commission. Only Greece chose the second alternative and the Commission entered their contribution into the Community budget. The Commission was responsible for the overall coordination of the entire aid package. The Parliament initiated proceedings under Article 173(2) EEC against Council and Commission, claiming that its budgetary prerogatives had been violated.

Both the Council and Commission questioned the admissibility of the action. In responding the Court first pointed out that, as was apparent from the wording of Article 173 EEC, acts adopted by the Representatives of the Member States exercising their national competences collectively were not subject to the jurisdiction of the Court. However, the Court recalled its *ERTA* jurisprudence<sup>55</sup> and made it clear that the determination of whether a measure amounted to a Council decision did not depend so much on its form, but on its substance, having regard to the measure's content and all of the circumstances in which it had

50 Point 10 of AG Van Gerven's opinion.

51 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/EEC, OJ 1988 L 209/1.

52 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.

53 Recitals 11-16 of the judgment. In another case Case C-216/91, *Rima Eletrometalurgia SA v. Council*, Judgment of 7 December 1993, [1993] ECR I-6303, Recitals 14 -16, the Court relied on Article 5(1) GATT Anti-Dumping Code to conclude that given the purpose of this provision to prevent exporters from being subjected to anti-dumping investigations which are not justified on objective grounds the opening of an investigation even in the course of a review of a regulation imposing anti-dumping subsidies had to be based on sufficient evidence of dumping and the injury resulting therefrom.

54 See also III. Opinion 2/91 of this Survey.

55 Case 22/70, *supra* note 38.

been adopted. Since the Community competence in the field of humanitarian aid is not exclusive, the Member States retained the power to act individually and collectively, and to cooperate with the Community in this respect. The Treaty, Article 155 4th indent in particular, did not preclude Member States from entrusting the Commission with the coordination of collective action. Neither the fact that the Commission had initiated special aid nor the use of Community concepts for the division of national contributions could change the nature of the contested act into a Council decision falling under the jurisdiction of the Court under Article 173 EEC.<sup>56</sup> As Member States' contributions did not form part of the revenue or expenditure of the Community for the purpose of Article 199 EEC, it was therefore held that the Commission's decision to enter the Greek contribution into the budget could not infringe Parliament's budgetary prerogatives.<sup>57</sup> Consequently, both applications were held to be inadmissible.<sup>58</sup>

## VI. Eurim-Pharm

*Case C-207/91 Eurim-Pharm GmbH v. Bundesgesundheitsamt, Judgment of 1 July 1993, [1993] ECR I-3723*

The Court here dealt with problems resulting from the free movement of pharmaceuticals and parallel imports under the EEC-Austria Free Trade Agreement (FTA).<sup>59</sup>

Eurim-Pharm purchased pharmaceuticals under the trademark 'Adalat R' in Austria which had originally been manufactured in France by Bayer AG with the intention to reimport these into Germany. German law prohibited the sale of pharmaceuticals not formally licensed by the *Bundesgesundheitsamt*. Even though Bayer AG had obtained the required licence for 'Adalat R' and the identity of Eurim-Pharm's merchandise had been established, the *Bundesgesundheitsamt* refused to allow the pharmaceuticals in question to be sold, arguing that no exception from the licensing requirement applied to parallel imports from countries outside the Community. Eurim Pharm filed suit before the administrative tribunal of Berlin claiming a violation of Articles 13 and 20 of the EEC-Austria Free Trade Agreement<sup>60</sup> which guaranteed the free movement of goods. The plaintiff relied on the line of authority which the Court has adhered to since *de Peijper*.<sup>61</sup> Eurim-Pharm contended that, given that the wording of Articles 13 and 20 of the EEC-Austria Free Trade Agreement were identical to Articles 30 and 36 EEC, the same case-law should apply to the free trade provisions as that which had been formulated under the Rome Treaty.

The United Kingdom and Italy had argued that the FTA did not apply to reimports. Therefore the Court first pointed out that the rules of origin did not distinguish between imports and reimports. The objective of the FTA was to contribute to a harmonious development of economic relations among the parties.<sup>62</sup> Interpreting Articles 13 and 20 FTA,

56 Recitals 11-25 of the judgment.

57 Recitals 28-32 of the judgment.

58 See also Case C-316/91, *Parliament v. Council*, Judgment of 2 March 1994 (not yet reported).

59 For earlier developments see Brandtner, Folz, *supra* note 22, at 440.

60 OJ 1972 L 300/2.

61 Case 104/75, *de Peijper*, [1976] ECR, 613. The Court held that licensing requirements for parallel imports of pharmaceuticals constitute measures equivalent to a quantitative restriction if the State of import demands the production of documents identical to those which an authorized importer or the manufacturer has already lodged. While the necessity of documentation in order to verify the identity of a particular batch of medicine may be legitimate, a complete reiteration of the original authorization procedure is clearly not necessary to protect human health and is therefore prohibited under Articles 30 and 36 EEC.

62 Recitals 11-15 of the judgment.

the Court left open the question whether the Community rules regarding parallel imports of pharmaceuticals under Articles 30 and 36 EEC could be read into the FTA in their entirety. At least in cases where the State of import already had all the relevant information on file and the identity of a particular batch of medicine had been established, the FTA's *effet utile* would be considerably impaired if Articles 13 and 20 were to be construed narrowly.<sup>63</sup> The Court implied that these provisions had direct effect and found that these provisions stood in the way of the German licensing requirement.<sup>64</sup>

## VII. Metalsa

*Case C-312/91 Metalsa SRL, Judgment of 1 July 1993, [1993] ECR I-3751*

The Court confirmed its *Kupferberg* jurisprudence<sup>65</sup> and refused to extend an interpretation of Article 95 EEC to Article 18 of the EEC-Austria Free Trade Agreement.<sup>66</sup>

Metalsa had been charged by the Italian Public Prosecutor with an attempt to fraudulently import aluminium from Austria without paying VAT. The aluminium had been seized and Italian law provided for confiscation upon conviction as a supplementary penalty. Metalsa requested the release of its goods arguing that the Italian sanctions violated Article 18 of the EEC-Austria Free Trade Agreement which prohibited discriminatory measures of an internal fiscal nature. Since no confiscation was foreseen in cases of internal infringements of VAT-legislation, Italian law punished fraud connected to imports more severely. Invoking the *Drexel* judgment<sup>67</sup> of the Court, Metalsa argued that since Article 95 of the Treaty prohibited such disproportionate sanctions Article 18 FTA should be interpreted in the same way.

The Court summarized its jurisprudence on free trade agreements and concluded that an extension of a specific interpretation of a Treaty provision to a free trade agreement depended on a comparison of both provisions and their objectives within their respective regulatory framework. Citing Article 31 of the Vienna Convention on the Law of Treaties,<sup>68</sup> the Court pointed out that provisions of international agreements must be interpreted in the light of their object and purpose. The Court reassessed its reasoning in *Drexel* and found that the prohibition on disproportionate sanctions in Article 95 EEC was motivated by their potential to endanger the free movement of goods, which could compromise the achievement of the primary objective of the Treaty, the establishment of a common market. On the other hand, the free trade agreement had the more limited purpose of establishing a free trade area between the contracting parties in conformity with the GATT by progressively abolishing all obstacles to trade. Consequently, Article 18 of the free trade agreement prohibited discrimination resulting from the determination, conditions or modalities of any internal tax on products of the other contracting party. However, this provision did not mean that a comparison necessarily had to be drawn between sanctions for internal infringements against VAT legislation and sanctions for import connected offences. Given the difference of objectives between the free trade agreement and the Treaty, their similar wording did not

63 Recitals 24-25 of the judgment.

64 One marginal aspect of *Case C-228/91, Commission v. Italy*, Judgment of 25 May 1993, [1993] ECR I-2701, concerned the EEC-Norway FTA. In an Article 169 EEC procedure the Court held that Italy's systematic veterinary border controls on fish imported from Norway were in parts disproportionate and correspondingly constituted a violation of Articles 15(2) and 20 FTA.

65 *Case 104/81, Kupferberg*, [1982] ECR 3641.

66 *See supra* note 62.

67 *Case 299/86, Drexel*, [1988] ECR 1213. The Court had held that a system of sanctions distinguishing between internal offences and imports was compatible with Article 95 EEC as long as the penalties provided for the latter were not manifestly disproportionate.

68 UNTS 1155, 331.

warrant the inclusion of comparatively disproportionate sanctions into the prohibition by Article 18 of the free trade agreement.<sup>69</sup> The Court did not deal with the approach suggested by AG Jacobs in his opinion who had argued that the Member States were bound in general by the principle of proportionality when imposing sanctions for offences connected with the free movement of goods under Article 13 of the EEC-Austria Free Trade Agreement.<sup>70</sup>

## VIII. Levy

*Case C-158/91 Ministère public et Direction du travail et de l'emploi v. Jean-Claude Levy, Judgment of 2 August 1993, [1993] ECR I-4287*

For the first time the Court was asked whether human rights conventions concluded by the Member States before the entry into force of the Treaty could override directly applicable provisions of Community law due to Article 234 EEC.

### 1. Facts

Levy had been charged with illicitly employing women as night workers contrary to Article L 213-1 of the French *Code du Travail*. The main grounds of defence invoked were the *Stoeckel* judgment,<sup>71</sup> and Article 5 of Directive 76/207/EEC on equal treatment in employment<sup>72</sup> which the defendant argued was directly applicable and therefore supreme over conflicting national laws. It was argued that these provisions set aside national laws prohibiting women from working at night if there were no similar provisions applicable to men. However, Article L 213-1 *Code du Travail* had been adopted in order to implement ILO Convention No. 89 of 9 July 1948 on night work for women in industry. ILO Convention No. 89 originally sought to protect women by imposing a general prohibition on night work,<sup>73</sup> and arguably fell under Article 234 EEC. The Tribunal de Police de Metz referred the preliminary question to the Court on whether it had to apply the Community rules, even if the conflicting national provision was intended to implement an ILO convention concluded by a Member State and third States prior to the entry into force of the EEC Treaty.

### 2. The Judgment

The Court cited its *Burgoa* judgment<sup>74</sup> and emphasized that Article 234 EEC is of general scope and that it applies to any international agreement, irrespective of its subject-matter, which was capable of affecting the application of the Treaty.<sup>75</sup> The Commission had argued

<sup>69</sup> Recitals 9-21 of the judgment.

<sup>70</sup> Points 28-36 of AG Jacobs opinion.

<sup>71</sup> Case C-345/89, *Stoeckel*, [1991] ECR I-4047. In this case the Commission and Advocate General Tesauro had already dealt at some length with the problems arising from ILO Convention No. 89 and Article 234 EEC. (See the submissions of the Commission *ibid.*, at I-4053 and the AG's opinion *ibid.*, at I-4060.) The Court avoided an answer by strictly adhering to the wording of the preliminary question.

<sup>72</sup> Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, OJ 1976 L 39/40.

<sup>73</sup> For an account of the historical background of ILO Convention No. 89 see the opinion of AG Tesauro in Case C-345/89, *Stoeckel*, [1991] ECR I-4047, 4056.

<sup>74</sup> Case 812/79, *Burgoa*, [1980] ECR 2787.

<sup>75</sup> Recital 11 of the judgment.

that in any case Article 234 EEC was not applicable since this provision could not justify derogations from the principle of equal treatment for men and women, which was a fundamental human right and part of the general principles of law protected by the Court.<sup>76</sup> Instead of dealing with the question concerning why Article 234 EEC should not be applicable in case of a conflict between a general principle of Community law and a Member State obligation, the Court refuted this argument while avoiding any theoretical debate. It held that even within the Community legal order the realization of this principle had been the result of an ongoing evolution which required the active intervention of Council by secondary Community legislation. Such measures also recognized temporary derogations from the right to non-discrimination. Under these circumstances it was not sufficient to invoke the principle of equal treatment to deny the applicability of Article 234(1) EEC and to prevent compliance with obligations a Member State had assumed in a prior convention. But the Court also pointed to the latest developments in international law in this field, such as the Convention on the Elimination of All Forms of Discrimination against Women<sup>77</sup> which had been ratified by France in 1983 as well as in the framework of ILO itself, which all reflect a change of attitude towards night work for women. Recalling Article 59(1)(b.) of the Vienna Convention of the Law of Treaties the Court found that ILO Convention No. 89 could have been repealed by later conventions on the same subject matter binding the same parties. However, it is not the task of the Court in proceedings for a preliminary ruling under Article 177 EEC to determine the obligations of a Member State under Article 234 EEC. It is up to the national courts to ascertain whether obligations resulting from a prior convention are still binding for a Member State under international law and whether the provisions of national law in question have been adopted for the purpose of their implementation.<sup>78</sup>

### 3. Analysis

The Levy decision is of considerable interest in two respects. Firstly, prior to this case the Court had stressed<sup>79</sup> that 'rights and obligations' in Article 234(1) EEC had to be understood as the rights of third States and the corresponding obligations of the Member States. This concept implies a relationship of reciprocity which is absent in human rights treaties.<sup>80</sup> General public international law substitutes the concept of *erga omnes* obligations in treaties for the protection of human rights so that any Member State owes compliance to all other contracting parties.<sup>81</sup> The Court sidesteps this debate by simply affirming that Article 234

76 Recital 15 of the judgment.

77 19 ILM (1980) 33.

78 Recitals 15-21 of the judgment. See also Case C-13/93, *ONEM v. Minne*, Judgment of 3 February 1994 (not yet reported). In another case dealing with the principle of equal treatment between men and women, Case C-337/91, *van Gemert-Derks v. Bestuur van de Nieuwe Industriële Bedrijfsvereniging*, Judgment of 27 October 1993, [1993] ECR I-5435, the Court held that Community law does not preclude a national court from interpreting Article 26 of the International Covenant on Civil and Political Rights as requiring equal treatment for men and women as regards survivor's benefits, inasmuch as the matter lies outside the scope of Directive 79/7/EEC.

79 Constant jurisprudence since Case 10/61, *Commission v. Italy*, [1962] ECR I.

80 AG Tesouro, at Point 5 of his opinion, seeks to establish an element of reciprocity by stating that the contracting parties of ILO conventions assume their obligations so that none of them should benefit from distortion of competition due to social dumping.

81 A. Verdross, B. Simma, *Universelles Völkerrecht* (3rd ed. 1984) 76; See also the report of the European Commission for Human Rights in the *Pfunders* case, YB 4 (1961) 116, at 138: '... it clearly appears from these pronouncements that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of

EEC applies to any international agreement capable of affecting the application of the treaty. Consequently, human rights treaties concluded by the Member States prior to the entry into force of the EEC can be invoked under article 234 EEC against Community law.<sup>82</sup>

Secondly, although the Commission had not presented a coherent and conclusive legal argument, its plea that Article 234 EEC cannot excuse the violation of fundamental human rights and general principles of Community law, could be interpreted as a first step towards a Community *ordre public*. The Court does not flatly refuse to countenance such an idea but rather stresses the special evolutionary nature of the right to equal treatment. It limits the scope of its decision to the particular circumstances of the case and leaves open the question as to whether other general principles of Community law could effectively constitute an *ordre public* within the Community legal order excluding the fulfilment of agreements valid under international law pursuant to Article 234 EEC.

### IX. Mondiet

*Case C-405/92 Etablissements Armand Mondiet SA v. Armement Islais SARL, Judgment of 24 November 1993, [1993] ECR I-6133*

The Court for the first time expressly confirmed that the legislative competence of the Community defined *ratione materiae* by the Treaty has the same reach under international law as the legislative jurisdiction of the Member States.

Article 1(8) Regulation 345/92/EEC<sup>83</sup> introduced a general prohibition of fishing nets longer than 2.5 km. It was partially influenced by Resolution No. 44/225 of the UN General Assembly aimed towards the protection of marine biological resources. The prohibition applied to all boats within waters over which the Member States exercised their sovereignty or territorial jurisdiction and to all ships flying the flag of a Member State even when sailing on the High Sea. Armement Islais SARL had ordered fishing nets which exceeded this length from Etablissements Armand Mondiet SA. With the entry into force of Article 1(8) Regulation 345/92/EEC Armement Islais revoked its order and Mondiet sued for performance. The French Court found that the prohibition might constitute *force majeure* and asked the Court for a preliminary ruling under Article 177 EEC on the validity of Article 1(8) Regulation 345/92.

Armement Islais disputed the competence of the Community under international law to regulate fishing activities on the High Sea. The Court confirmed *Poulsen/Diva*<sup>84</sup> and expressly held that the Community within the tasks and powers conferred on it by the Treaty had the same regulatory competences under international law as the Member States. In matters relating to the High Sea the Community has the same legislative jurisdiction as the flag state or the state of register. The Court found these competences recognized by the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Sea<sup>85</sup> and the 1982 UN Convention on the Law of the Sea<sup>86</sup> which in the view of the Court

Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe...'

82 In retrospect, the importance of the report by the European Commission for Human Rights in the *Melchers case, C. Melchers & Co KG v. Federal Republic of Germany, 50 ZaBRV* (1990) 865, must be underlined.

83 Council Regulation 345/92/EEC amending Council Regulation 3094/86/EEC laying down certain technical measures for the conservation of fishery resources OJ 1992 L 42/15.

84 Case C-286/90, *Poulsen/Diva*, Judgment of 24 November 1992, [1992] ECR I-6019. See Brandtner, Folz, *supra* note 22, at 442.

85 UNTS 559, 286.

86 21 ILM (1982) 1261.

codified or reflected existing customary international law. Assuming a general obligation *erga omnes* to contribute to the conservation and management of the biological resources of the High Sea, the Court concluded that the Community had the competence under international law to enact Article 1(8) Regulation 345/92.<sup>87</sup>

## X. Huygen

*Case C-12/92 Edmond Huygen, Judgment of 7 December 1993, [1993] ECR I-6381*

The Court had to strike a balance between a cooperation mechanism between administrations in the framework of a free trade agreement and the interest of individuals.

A Belgian company bought a machine from an Austrian firm in 1985 which had originally been manufactured in Germany and exported to Austria in 1970. The Austrian exporter had obtained a EUR.1 certificate from the Austrian customs authorities so that the machine could benefit from the preferential tariff system under the EEC-Austria Free Trade Agreement<sup>88</sup> for the reimport into the Community. The Belgian Customs Authorities asked the Austrian administration to back-check the origin of the machine pursuant to Article 17 of Protocol No. 3 on the Rules of Origin.<sup>89</sup> The Austrian administration replied that it was unable to establish the origin of the machine in question. Acting on this response the Belgian customs imposed the tariff due under the Common Customs Tariff (CCT) and Huygen, the manager responsible in the Belgian company was prosecuted. He was acquitted at first and second instance because the Belgian Courts found that, firstly the Austrian Administration had made no serious effort to find out the origin of the machine and secondly the defendant possessed an invoice from the first sale in 1970 which showed that the machine actually had been produced within the Community. On appeal the *Hof van Cassatie van België* asked the Court for a preliminary ruling under Article 177 EEC on the effects of a back-checking procedure under Article 17 of Protocol No. 3.

The Court held that if an exporting State is asked to recheck the origin of goods for which it has granted an EUR.1 certificate and cannot determine their correct origin, it must decide that the goods are of unknown origin and revoke their privileged status.<sup>90</sup> Answering the question whether in such a case the State of import was obliged by Community law to claim the customs duties not paid upon importation, the Court pointed to the particular circumstances of the Austrian-Belgian transaction. According to Article 9(3) subparagraph 2 Protocol No. 3 in reimport situations the previously granted EUR.1 certificate was the necessary evidence of origin and the basis for the new EUR.1 certificate to be delivered by the export State. In *Huygen* there was no previous EUR.1 certificate of the sale in 1970 since the EEC-Austria Free Trade Agreement had only been concluded in 1972.<sup>91</sup> Under these particular circumstances no provision of Protocol No. 3 prevented the authorities of the import State from determining the correct origin of the goods in question by using alternative evidence. Consequently, the import State was not definitively bound by the negative result of the back-checking procedure to demand payment of the unpaid customs duties but could take into consideration other evidence indicating the origin of the goods as well.<sup>92</sup> The Court decided that, depending on the circumstances, an importer may plead *force majeure* where

87 Recitals 11-15 of the judgment.

88 See *supra* note 62.

89 Protocol No. 3 in relation to the definition of the concept of 'originating products' and methods of administrative cooperation, OJ 1984 L 323/4.

90 Recitals 16-18 of the judgment.

91 Recitals 20-22 of the judgment.

92 Recitals 27-28 of the judgment.

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the customs authorities in the export State are unable, owing to their own neglect, to establish the correct origin of goods in the course of a back-checking procedure according to Article 17 Protocol No. 3. It is the task of the national court to establish all the relevant facts.<sup>93</sup>

Apart from demonstrating the hazards of trading in Europe *Huygen* offers an insight into the actual functioning of a free trade agreement. The impact of the judgment is, however, limited by the Court's insistence on the particularity of the facts of the case.<sup>94</sup>

93 Recitals 29-35 of the judgment.

94 In another case dealing with the EEC-Yugoslavia cooperation agreement, Case C-292/91, *Gebr. Weis GmbH v. Hauptzollamt Würzburg*, Judgment of 4 May 1993, [1993] ECR I-2219, the Court refused to answer a preliminary ruling question under Article 177 EEC pertaining to rules of origin. The Court held that as no duties were due anyway because the importer could rely on 'force majeure' the question whether the goods in question could actually benefit from the preferential tariff system was irrelevant.