

INTERNATIONAL DECISIONS

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European Community law—Greek—Slavo-Macedonian conflict—embargoes

COMMISSION OF THE EUROPEAN COMMUNITIES v. HELLENIC REPUBLIC. Case C-120/94. Court of Justice of the European Communities, filed April 22, 1994.

Greece maintains that the Former Yugoslav Republic of Macedonia (FYROM) is threatening Greece's territorial integrity, as well as its national identity, by calling itself "Macedonia," using an ancient Macedonian symbol in its national flag and indulging in propaganda hostile to Greek interests. Therefore, in February 1994, Greece unilaterally imposed a trade embargo on FYROM, which inflicts serious pressure on the weak economy of the new state. In spring 1994, the Commission of the European Communities (the Commission) filed a suit against Greece at the European Court of Justice (the Court). The suit claimed that the Greek trade embargo violates the European Community's legal regime of commercial policy, which prohibits unilateral measures involving trade policy by member states. The Court refuted the Commission's request for interim relief for lack of the requisite urgency by preliminary injunction. The lawsuit was still pending at the time of writing, but some observers interpret the Court's decision as a sign that the Court favors a political solution, and might try to avoid judicial clarification of the sensitive issues at stake. This case raises the question of the extent to which a regional legal regime should tolerate unilateral actions, based on national interests, that tend to hamper economic and legal integration.

The dissolution of the Socialist Federal Republic of Yugoslavia began with the secessions of Slovenia and Croatia in June 1991. The Macedonian government organized a referendum on independence on September 8, 1991. After 95 percent of the voters endorsed the proposition, the republic enacted a state constitution on November 17, 1991. Finally, by the spring of 1992, Yugoslavia ceased to exist as a subject of public international law.¹

Greece claims that the creation of the new independent state at its northern border constitutes a double threat: a danger to its territorial integrity and a menace to its national identity and cultural heritage. According to Greece, the threat to its territorial integrity consists in the Slavic republic's name, irredentist propaganda against Greece, certain provisions in the Macedonian Constitution, and the official use of schoolbooks containing misleading geographical facts.² The impact on Greek national identity is attributed to usurpation and monopolization of Macedonian history, art and symbols.³

¹ See Opinion No. 8 of July 4, 1992, of the so-called Badinter Commission, 4 EUR. J. INT'L L. [EJIL] 87 (1993), 31 ILM 1521 (1992). This commission, composed of members of the Constitutional Courts of several European states under the chairmanship of the former French Minister of Justice, Robert Badinter, was set up by the European Community and its member states in the summer of 1991 as the arbitral body of the Peace Conference on Yugoslavia, and it delivered several opinions on legal questions regarding the breakdown of Yugoslavia.

² The Greek position is summarized in *Dia ta vta zitoume tin aporipsi*, TO BIMA (Athens), June 12, 1994, at A20. See also INSTITUTE OF POLITICAL AND STRATEGIC STUDIES (Athens), THE MACEDONIAN AFFAIR: A HISTORICAL REVIEW OF THE ATTEMPTS TO CREATE A COUNTERFEIT NATION 5 (1991).

³ See the summary of the Greek Government's response of May 19, 1994, to the Commission's action, TO BIMA, June 12, 1994, at A20.

Among these grievances, the issues of the new state's name and the national flag are central, although they appear at first glance to be of merely symbolic importance. Greece, however, sees them as evidence of its neighbor's nationalist and revisionist tendencies. The Greek Government officially deplores that the former Yugoslav republic, once it attained independence in 1991, called itself "Republic of Macedonia."⁴ In December 1992, with a view to gaining international recognition, the Slavic Macedonian Assembly decided to add "Skopje" to the state's name, and promised to use only "Republic of Macedonia (Skopje)" as the official denomination in international relations.⁵ But Greece also rejects this name. The national flag of FYROM is criticized for showing not only the star of Vergina, but also three waves, which could be read as symbolizing that Macedonia stretches to the Mediterranean.

The grievances must be seen against the historical and political background of the area that now constitutes FYROM. As a result of the Balkan Wars of 1912–1913, the region was divided among Greece, Bulgaria and Serbia. It was only in the twentieth century that politicians and historians virtually created a "Macedonian" nation within the newly founded state of Yugoslavia by a conscious effort of nation building.⁶ However, the neighboring countries tend to deny that a Macedonian nation exists at all.⁷ Greece now advances elaborate historical, ethnical and geographical arguments to prove that Macedonia is essentially Greek.⁸

In sum, a host of political, psychological and ideological factors led Greece to impose a total trade embargo on FYROM on February 16, 1994. The embargo bans transshipments to FYROM from all Greek customs points and allows entry only to food and medicine.⁹

The Commission of the European Communities criticized the Greek action as violative of the Community's common commercial policy and filed suit against Greece at the Court on April 22, 1994. For the first time in the Community's history, the case is being handled as a nonpublic suit under Article 225 of the Treaty Establishing the European Community (EC Treaty).¹⁰ This is an exception to the general rule of Article 28 of the Statute of the Court of Justice, which provides for a public procedure. The special procedure is being utilized to protect the defendant's national security interests.

Simultaneously, the Commission also sought an interlocutory injunction that would suspend the measures taken by Greece.¹¹ Generally, the Court can grant interim relief when circumstances establish urgency and factual and legal grounds offer a *prima facie* justification for it.¹² This determination also involves balancing the interests at stake. In this case, the Court held that the Commission had failed to show the requisite urgency. Thus, the Court dismissed the Commission's application by order on June 29, 1994.¹³

The Commission argues that the unilateral imposition of the trade embargo violated Articles 113 and 224 of the EC Treaty, as well as obligations arising from common

⁴ *Id.*

⁵ Jens Reuter, *Politik und Wirtschaft in Makedonien*, 42 *SÜDOSTEUROPA* 96 (1993).

⁶ Stefan Troebst, *Makedonische Antworten auf die "makedonische Frage" 1944–1992: Nationalismus, Republikgründung, nation-building*, 41 *SÜDOSTEUROPA* 432 (1992); MICHAEL B. COSMOPOULOS, *MACEDONIA, AN INTRODUCTION TO ITS POLITICAL HISTORY* 89–93 (1992).

⁷ See Duncan M. Perry, *Macedonia: From Independence to Recognition*, 3 *RADIO FREE EUROPE/RADIO LIBERTY RESEARCH REPORT*, No. 1, Jan. 7, 1993, at 119, 120.

⁸ See POLYS A. MYLONAS, *I ELLINIKOTITA TIS MAKEDONIAS* (1984).

⁹ *WASH. POST*, Feb. 19, 1994, at A22.

¹⁰ *TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY*, Mar. 25, 1957, as amended by Treaty on European Union, Feb. 7, 1992, 31 *ILM* 247 (1992) [hereinafter *EU Treaty*].

¹¹ Such injunctions are possible under Article 186 of the EC Treaty and Articles 83–86 of the Rules of Procedure of the Court of Justice.

¹² See Article 83(2) of the Rules of Procedure of the Court.

¹³ Case C–120/94 R, Notice No. 94/218/08, 1994 O.J. (C 218) 4.

importation and exportation rules under various EC regulations.¹⁴ The legal basis for this argument is the following: as the EC was primarily constructed as an economic community, its member states are not supposed to pursue individual trade policies but a "common commercial policy based on uniform principles" (title VII of the EC Treaty). This means that, as a rule, the member states do not have legal competence to undertake measures of trade policy that deviate from the common principles.

By contrast, the areas of foreign and security policy are not integrated within the Community's legal regime. The member states retain sole authority over their national foreign policies, although some level of coordination is attempted. With the foundation of the European Union on the basis of the Treaty of Maastricht of February 7, 1992, this coordination theoretically reached a new dimension. Under the auspices of the European Union (EU), an institutionalized Common Foreign and Security Policy (CFSP) was introduced as a second pillar beside the European Community.¹⁵

The legal issue presented in this case arises from the fact that the imposition of a trade embargo falls in a gray area between trade policy and foreign policy. "Trade embargo" as a legal term means the unilateral or collective restriction of importation or exportation of goods, materials, capital or services from or to a certain country for political or security reasons, with the intention of forcing that state to adopt a certain course of conduct as a result of the deprivation of goods.¹⁶ Thus, the acting state uses trade policy to achieve a foreign policy goal. Because of this double nature, scholars have disputed whether an embargo constitutes a measure of trade policy in terms of the EC Treaty and therefore falls within the power of the Community, or whether it is a foreign policy measure to be taken by the member states.¹⁷

In *Commission v. Hellenic Republic*, the Commission pointed out that the EC Treaty transferred former state powers in the field of trade policy to the Community, so that the member states are no longer totally free to choose the means to realize a certain foreign policy. Greece claimed that the embargo measures were permissible because they were not *directed* at the regulation of the flow of commerce with a third country.¹⁸ This view had indeed been favored by the Council of the European Community until 1980. It maintained that the states were competent to impose embargoes, whereas the Commission and the majority of scholars of EC law have always held that embargoes fall within the scope of the common trade policy.¹⁹ Supporters of the latter position, in my view, are correct in observing that present-day linking of political and economic state action rules out any narrow conception of trade policy.²⁰ This view was explicitly adopted by the European Court in an opinion concerning development policy. Here the Court stated that Article 113 does not "restrict the common commercial policy to the use of instruments intended to have an effect only on the traditional aspects of external trade" and reasoned that a "restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations

¹⁴ See Notice No. 94/C174/23, 1994 O.J. (C 174) 10-11.

¹⁵ See title V of the EU Treaty for details.

¹⁶ Hans G. Kausch, *Embargo*, in [Installment] 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 169, 170 (Rudolf Bernhardt ed., 1985).

¹⁷ See KAI HAILBRONNER, *HANDKOMMENTAR ZUM EWGV*, Rnr. 40 zu Art. 113 EWGV (Supp. No. 2, 1994) (giving further authorities).

¹⁸ Notice No. 94/C174/23, 1994 O.J. (C 174) 10-11.

¹⁹ Christoph Vedder, *Rnr. 57 zu Art. 113 EWGV*, in *KOMMENTAR ZUM EG-VERTRAG* (Eberhard Grabitz ed., Supp. No. 5, 1992) (giving further authorities).

²⁰ See, e.g., Pieter Jan Kuyper, *Trade Sanctions, Security and Human Rights and Commercial Policy*, in *THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION* 387, 422 (Marc Maresceau ed., 1993).

with non-member countries.”²¹ However, the question of embargoes can be distinguished from all cases decided by the Court up to now with regard to Article 113 of the EC Treaty, because an embargo does not have any trade political goals, but pursues foreign policy goals exclusively. Only once has the Court dealt with the question whether a strategic embargo was compatible with the EC Treaty.²² In this case, however, the Court examined the question merely with reference to the rules of the *internal* movement of goods, and did not apply Article 113 of the EC Treaty.

Indeed, EC practice has conformed to the notion that embargoes fall within the scope of the Community’s Common Commerce Policy. Conceding the political nature of an embargo, however, EC practice has acknowledged a two-step competence of the Community and its member states. Embargoes are decided upon by the member states within the framework of the CFSP²³ and then executed as a Community measure. This practice is reflected by the new Article 228a, which was inserted into the EC Treaty by the Maastricht amendments²⁴ and clarifies that the Community can rely on its exclusive power to regulate trade, even if its action serves a foreign policy goal, and thus impose an embargo.²⁵

In sum, the treaty provisions, their underlying rationale and the Community practice justify the Commission’s position that the mere fact that the Greek action was not intended as a commerce regulation does not remove it from the scope of the EC Treaty.²⁶

Once imposition of an embargo is understood as a Community measure, the escape clauses of Articles 223 and 224 of the EC Treaty and, as a special clause concerning the common rules for exports, Article 11 of Council regulation (EEC) No. 2603/69²⁷ come into play when vital interests of member states are affected. In this case, the most pertinent provision is Article 224:

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbance affecting the maintenance of law and order, in the event of war or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and security.

Article 224 seeks to reconcile the security interests of a single member state with the Community’s interest in the smooth functioning of the Common Market. Its wording shows that it refers to such unilateral actions as are generally foreclosed by the Community’s legal regime, because only such actions may “affect” the “functioning of the common market.” The provision thus implies that, whenever a member state takes a unilateral measure in a field where, under normal conditions, only Community organs are competent, the functioning of the Common Market will be threatened. In this case,

²¹ Opinion 1/78, International Agreement on Natural Rubber, 1979 ECR 2871, 2913, paras. 44–45.

²² Case C–367/89, Aimé Richardt and Les Accessoires Scientifiques SNC, 1991 ECR I–4621.

²³ Before Maastricht within the CFSP’s forerunner, the so-called European Political Co-operation.

²⁴ EC Treaty Article 228a states:

Where it is provided, in a common position or in a joint action adopted according to the provisions of the EU Treaty relating to a common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent means. The Council shall act by a qualified majority on a proposal from the Community.

²⁵ RUDOLF GEIGER, EG-VERTRAG. KOMMENTAR ZU DEM VERTRAG ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT, Rnr. 7 zu Art. 224 (1993). At the same time, the provision implies that such a measure will be decided on by the member states within the CFSP and only then be executed as an overall Community embargo.

²⁶ Cf. Notice No. 94/C174/23, 1994 O.J. (C 174) 10.

²⁷ 1969 O.J. (L 324) 28.

the functioning of the Common Market may be endangered by the fact that firms from other member states cannot trade with FYROM via Greece.

The clause does not explicitly empower the member states to resort to unilateral action but implies that, under the enumerated conditions, such measures are permitted as an exception to the general rule.²⁸ The three authorizing conditions can be summarized as reasons of internal security, external security or international security. Greece now claims that its exterior, as well as its interior, security is endangered, because Skopje's conduct constitutes a threat of war and the Greek people are so deeply disturbed that, without the economic sanctions imposed on FYROM, the public authorities would no longer be able to control the interior situation of the state.²⁹

Ultimately, of course, the Court's task is to balance the competing interests and decide whether a state may lawfully resort to the clause. However, in view of the absence of substantive case law on Article 224,³⁰ it is unclear what degree of judicial scrutiny is to be exercised with respect to the clause. States and also scholars have often maintained that the safeguard clause of Article 224 is a true reserve of sovereignty, and is therefore subject only to loose judicial review.³¹ That is, the decision whether a situation is "serious" and what is a necessary response to that situation is to a certain extent a matter of political evaluation.³² The Court has not explicitly rejected this view of Article 224, but it has done so for other EC Treaty provisions allowing exceptions from specific Community obligations, such as Articles 36, 48(3) and (4), 55, 56, and 100a(4), cl. 1.³³ Additionally, the Court has twice placed Article 224 on the same footing as the other exceptions.³⁴ This could lead to the conclusion that the rules providing for strict judicial review of the specific exceptions also apply to Article 224 and that Article 224 is therefore subject to full judicial scrutiny.

Notably, a parallel between Articles 36 and 224 suggests itself. Under Article 36, member states' deviations from the rules on the free movement of goods may be justified for reasons of "public security." In the *Aimé Richardt* case, the Court explicitly stated that this justification also covers reasons of exterior security.³⁵ In the instant case, the Commission relies on a parallel interpretation of Articles 224 and 36 by arguing that Greece did not establish that its security is objectively threatened by reference to objective circumstances.³⁶ In an earlier case the Court had indeed required that, within the ambit of Article 36, the action in question "must be justified by objective circumstances corresponding to the needs of public security."³⁷ However, in the more recent *Aimé Richardt*, which was the Court's first decision on the compatibility of a trade embargo for security reasons with the EC Treaty, the Court did not analyze the issue in a

²⁸ Peter Gilsdorf, *Rnr. 2 zu Art. 224*, in 4 KOMMENTAR ZUM EWG-VERTRAG (Hans von der Groeben et al. eds., 2d ed. 1991); Advocate General Jacobs, Opinion, in *Aimé Richardt*, 1991 ECR at 4643, para. 32.

²⁹ TO BIMA, June 12, 1994, at A20.

³⁰ In the *Johnston* case, the referring state had asked for an interpretation of Article 224, but the Court did not pronounce itself on the substantive requirements of the clause, because it deemed specific provisions in a directive as a sufficient legal basis for resolution of the conflict. Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 ECR 1651, 1692, para. 60.

³¹ Waldemar Hummer, *Rnr. 6 vor Art. 223-225*, in KOMMENTAR ZUM EWG-VERTRAG, *supra* note 19 (giving further authorities).

³² The Greek Government pointed this out in its response to the Commission's action. TO BIMA, June 12, 1994, at A20.

³³ See, e.g., Case 2/74, *J. Reyners v. Belgian State*, 1974 ECR 631, 654, para. 43; and *Aimé Richardt*, 1991 ECR at I-4651, para. 19.

³⁴ *Johnston*, 1986 ECR at 1684, para. 26; Case 13/68, *SpA Salgoil v. Italian Ministry for Foreign Trade*, 1968 ECR 453, 463. However, the differences must be noted: on the one hand, Article 224 is broader than the specific exceptions, because it allows a deviation from *all* treaty obligations. On the other hand, its conditions are narrower.

³⁵ 1991 ECR at I-4652, para. 22.

³⁶ Notice No. 94/C174/23, 1994 O.J. (C 174) 11.

³⁷ Case 72/83, *Campus Oil Limited v. Minister for Energy*, 1984 ECR 2727, 2752, para. 36.

similar way, but allowed member states discretion in determining the kind of restrictions necessary to protect public security.³⁸ In contrast, the Court had formerly stated that Article 224 deals “with exceptional and clearly defined cases”³⁹ and concluded that the limited character of the clause rules out any broad interpretation.⁴⁰ However, the Court’s strict interpretation of Article 224 is problematic, because it is hardly conceivable that in all the various situations falling short of Article 224, member states’ political decisions are actually foreclosed by Community law.

In addition, the limits of judicial review are quite clearly indicated by the notion of “misuse” in Article 225(2), holding that complaints under Article 225 are well-founded only when the “Member State is making improper use of its powers provided for in art. . . . 224.” Thus, Greece cannot turn to Article 224 if the contested measure, although in principle covered by the provision, constitutes a misuse of its powers. I now examine whether such misuse is present here.

In *Commission v. Hellenic Republic*, the Commission describes “misuse” in the sense of Article 225 by saying that the Greek Republic *used the exceptional powers for ends other than those provided for in the Treaty*.⁴¹ This phrase relies on the usual understanding of “misuse of powers” as grounds for illegality in an action for annulment under Article 173 of the EC Treaty, which is itself based on the French administrative law concept of “*détournement de pouvoir*.”⁴² This understanding of “misuse,” focusing on the ends of powers provided for in the Treaty, raises the question whether Greece’s ultimate purpose of preserving its national identity and cultural heritage is a legitimate objective in terms of the safeguard clause, or—as the Commission put it—outside the purpose of the Treaty and therefore a misuse of the powers the clause confers on one member state.

The 1992 EU Treaty is not completely indifferent to the member states’ interest in preservation of their national identity and cultural heritage. Hence, the Preamble formulates the goal of the EU as “desiring to deepen the solidarity between the peoples while respecting their culture and their traditions.” Although, according to Article L of the EU Treaty, the Court has no jurisdiction to interpret and apply title I (common provisions, Articles A–F) and the Preamble is not an operative part of the Treaty, the Court—which usually favors the teleological interpretation⁴³—may use it as a guideline for treaty interpretation.⁴⁴ Moreover, Article F(1) of the EU Treaty reads: “The Union shall respect the national identities of its Member States.” If Article F(1) of the EU Treaty is deemed applicable, the clause can only clarify that national identity *may be* a legitimate argument against Community claims for unification and harmonization. It is obvious that national interests cannot altogether trump the treaty obligations, but that a compromise must be found.

Another argument in relation to the Treaty of Maastricht can be made in favor of the defendant: Greece had conditioned its signature of the EU Treaty on a promise by the other members that they would recognize a “special Greek interest in Macedonia.” Henceforth, all relevant EC statements employed the name “Skopje.”⁴⁵ Moreover, the EC member states made several, albeit vague, statements to the effect that they would

³⁸ *Aimé Richardt*, 1991 ECR I-4621.

³⁹ *Johnston*, 1986 ECR at 1684, para. 26.

⁴⁰ *Id.*; also *SpA Salgoil*, 1968 ECR at 463.

⁴¹ See Notice No. 94/C174/23, 1994 O.J. (C 174) 11.

⁴² See, e.g., JOSEPHINE SHAW, *EUROPEAN COMMUNITY LAW* 201 (1993).

⁴³ Cf. HENRY G. SCHERMERS, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 18–26 (5th ed. 1992).

⁴⁴ The lacking of competence to apply a certain provision directly does not seem to preclude the interpretation of other rules in the light of this provision, as the practice of national courts interpreting national laws in a Community-conforming fashion shows.

⁴⁵ Reuter, *supra* note 5, at 97.

pursue a recognition policy acceptable to all parties.⁴⁶ However, the Greek demands and the positive response of the other members were not formal treaty reservations in a legal sense, but arrangements on a political level. Still, as a bona fide consideration it might to a certain extent weaken the argument that Greece is now misusing the escape clause.

On the whole, it can be concluded that concerns of national identity are not per se illegitimate as a justification for deviations from the Community's legal regime. Therefore, the misuse can hardly be founded solely on the concept of misuse based on a "détournement de pouvoir," as endorsed by the Commission. Moreover, this conception of misuse is problematic because of its vagueness, and because it seems difficult to ascertain the acting state's "true" motives. It may be more illuminating to consider different categories of misuse.

Scholars have pointed to the following categories of misuse: the obligation to consult the other member states has been violated; the member state's reaction is unreasonable; the factual situation described in Article 224 is altogether absent.⁴⁷ The first two categories deserve some explanation. If a member state intends to rely on Article 224, it must meet not only the substantive conditions of the clause, but also procedural requirements. The acting state must "consult" the other members. To serve its purpose of protecting the functioning of the Common Market, the consultation must take place before the enactment of the unilateral measure.⁴⁸ In this case, Greece informed the other member states five days *after* the imposition of the embargo.⁴⁹

The second category of misuse is seen as an unreasonable or disproportionate reaction.⁵⁰ The overriding principle of proportionality generally governs the Community's legal regime.⁵¹ In the context of Article 224, the principle of proportionality demands that the acting state take such means as will affect the functioning of the Common Market in the most minimal way, while still effectively serving the state's purpose.⁵² It is a question of fact whether Greece has taken enough diplomatic steps to induce FYROM to change its name and flag. Since FYROM has already made compromises by adding "Skopje" to its name and amending its Constitution, intensive pressure seems necessary to force FYROM to comply further with Greek demands. On the other hand, experience shows that economic sanctions such as boycotts are often ineffective. A measure of dubious ability to further the foreign policy goal that is certain to affect the European Common Market probably must be characterized as unreasonable.

In addition to the commonly held categories of misuse of the extraordinary permission given to member states under Article 224, the principle of estoppel provides some guidelines for determining whether a case of misuse is present. Estoppel might bar Greece from relying on the argument that the use of the name "Macedonia" and the symbol in the national flag constitutes a threat to its national identity and thus creates serious tension as described in Article 224. The doctrine of estoppel, as it operates in public international law and EC law, serves to protect the settled expectations of states that relied in good faith on clear and unambiguous representations by another state

⁴⁶ Council Decision of May 2, 1992; statement of the Council of June 27, 1992. See paras. 16, 17 of the Court's order of June 29, 1994, not yet reported.

⁴⁷ Vedder, *Rnr. 4 & 6 zu Art. 224*, in *KOMMENTAR ZUM EWG-VERTRAG*, *supra* note 19.

⁴⁸ *Id.*, *Rnr. 4 zu Art. 224*.

⁴⁹ Nikos Marakis, *Poia tha einai i grammi yperaspisis*, *TO BIMA*, Apr. 10, 1994.

⁵⁰ Advocate General Jacobs, Opinion, in *Aime Richardt*, 1991 ECR at I-4644, para. 33. See also the observations of the Commission in *Johnston*, 1986 ECR at 1674.

⁵¹ JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 708-866 (1988, Eng. trans. ECSC-EEC-EAEC, 1992).

⁵² Gilsdorf, *supra* note 28, *Rnr. 7 zu Art. 224*.

by precluding the latter from subsequently adopting different statements.⁵³ It must therefore be seen whether Greece's present claim contradicts its previous attitude in the context of FYROM's struggle for international recognition.⁵⁴

On December 16, 1991, the EC member states enacted the "Guide-lines on the Recognition of New States in Eastern Europe and in the Soviet Union," which set up conditions that the states seeking international recognition had to meet. The guidelines required, *inter alia*, "respect for the inviolability of all frontiers which can be changed only by peaceful means and by common agreement."⁵⁵ The guidelines were endorsed within the framework of the European Political Co-operation, that is, unanimously, including the Greek vote. On the same day, the EC members adopted a common position with regard to the recognition of the Yugoslav republics.⁵⁶ This document stated that those republics seeking recognition had to submit an application to the Community, which would be presented to an arbitration commission. This commission had been installed on August 27, 1991, by the EC member states, again with Greek support. The so-called Badinter Commission examined the Macedonian application for recognition and took into consideration certain provisions of the new Macedonian Constitution of November 17, 1991. Notably, the Macedonian parliament had enacted two constitutional amendments with a view to the European guidelines on recognition. These amendments, of January 6, 1992, read as follows:

I. 1. The Republic of Macedonia has no territorial claims against neighbouring states. The borders of the Republic of Macedonia could be changed only in accordance with the Constitution, and based on the principle of voluntariness and generally accepted international norms.

....

II. 1. The Republic shall not interfere in the sovereign rights of other states and their internal affairs.⁵⁷

The second amendment was designed with regard to Article 49 of the Constitution. This provision, which states that "[t]he republic looks after the position and the rights of members of the Macedonian people in the neighbouring countries and emigrants from Macedonia, supports their cultural development and promotes the ties to them," had been interpreted by Greece as further evidence of Macedonian territorial ambitions.

Its examination of the submitted material led the tribunal to the conclusion that the former republic of Macedonia satisfied the conditions in the European guidelines. In an opinion of January 11, 1992, the Badinter Commission stated

that the Republic of Macedonia has, moreover, renounced all territorial claims of any kind in unambiguous statements binding in international law; that the use of

⁵³ Although EC law is a legal body distinct from public international law, both legal orders derive general principles from national law, such as the notion of estoppel, which originated in the common law. For the incorporation of estoppel into Community law, see the Opinion of the Advocate General, Joined Cases 63 and 64/79, 1980 ECR 2975, 3002, but see Case 230/81, 1983 ECR 255, 296, para. 23. The rule that a member state failing to implement a directive "may not, against individuals, plead its own failure to perform the obligations which the directive entails," Joined Cases C-6/90 and C-9/90, 1991 ECR I-5357, 5408, para. 11, can be analyzed as a case of estoppel, Opinion of the Advocate General, Case C-262/88, 1990 ECR I-1889, 1935-36. However, the Court did not accept estoppel as a bar to bringing an action before the Court, *see* Case 166/78, 1979 ECR 2575, 2596, para. 6, contrary to the opinion of the Advocate General, *id.* at 2605-08.

⁵⁴ See Reuter, *supra* note 5, at 95-98, on the political background of the recognition of FYROM by the EC member states.

⁵⁵ For the English text, see 4 EJIL 72 (1993).

⁵⁶ Text in *id.* at 73.

⁵⁷ For an English translation of the Macedonian Constitution, including amendments, see 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, Release 94-6 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994).

the name "Macedonia" cannot therefore imply any territorial claim against another State; and

... that the Republic of Macedonia has given a formal undertaking in accordance with international law to refrain, both in general and pursuant to Article 49 of its Constitution in particular, from any hostile propaganda against any other State.⁵⁸

Despite this positive opinion, the EC member states did not recognize the Slavo-Macedonian republic, because of the Greek concerns about its name.⁵⁹ Instead, the European Council stated at the Lisbon summit meeting in June 1992 that the Community would recognize the state only under a name not containing the word "Macedonia."⁶⁰ On April 8, 1993, the EC member states approved the admission of FYROM to the United Nations. Again, this decision was taken unanimously by all EC members, including Greece. Most of the EC member states consider their vote in the UN General Assembly for FYROM's UN membership as conclusive international recognition of the republic under the name FYROM.

To sum up the decisive elements of the politics concerning Slavo-Macedonia's name and borders: as an EC member, Greece enacted the guidelines on recognition. The EC Arbitration Commission, endorsed by Greece, decided that use of the name "Macedonia" alone does not constitute a threat to Greece's territorial integrity. Skopje enacted constitutional amendments to underscore its acceptance of the present borders. The other member states could reasonably conclude from these events that Greece has endorsed the Community policy with respect to FYROM and will not insist on further modifications of the Yugoslav republic's name, especially since significant compromises have been reached. In this situation, Greece's attempt to justify unilateral economic sanctions on the basis of the issues of name and flag does appear as a misuse of the exceptional power under Article 224 of the EC Treaty.

It is worth reiterating that this legal argument against Greece is not based on any judicial decision overruling the state's evaluation of the political situation, but on the fact that the defendant has previously signaled to the other member states that it will accept the name FYROM and thereby raised legitimate expectations.

If the parties do not reach a nonjudicial compromise and thereby render the pending case moot, the Court will face a difficult task. Because the notion of misuse is vague, the result will depend on the degree of scrutiny the Court chooses to apply to Greece's action. As it is disputed how much political discretion Article 224 leaves to the acting member state, the Court, as a Community organ, will probably try to avoid a political evaluation of the Greek-Slavo-Macedonian conflict as much as possible. Resort to the concept of estoppel, as suggested here, would serve this aim. Seen from the general perspective of Community policy, however, reliance on the concept of estoppel might have a chilling effect on Community decision making: member states might hesitate to take positions for fear of being estopped later.⁶¹ If we nevertheless accept the idea of estoppel, it would lead here to the conclusion that the Commission's action can be considered justified without determining whether the Greek fears and concerns regarding FYROM are lacking in reason. Greece seems to be estopped from invoking national

⁵⁸ Opinion No. 6, 4 EJIL at 77, 31 ILM at 1507, 1511.

⁵⁹ Parliamentary resolution of Dec. 10, 1992. See Reuter, *supra* note 5, at 96.

⁶⁰ See para. 17 of the order, not yet reported.

⁶¹ In the context of Community sanctions, at least one incident of contradictory behavior of member states was tolerated. Italy, Ireland and Denmark did not support the prolongation of Community sanctions against Argentina during the Falkland/Malvinas conflict, although they had previously supported the Community sanctions against the Soviet Union. Opting out was thus not consistent with their former position and could hardly be justified in terms of Article 224. Still, the Commission did not sue any member state for breach of Community law.

interests because it has tolerated the EC policy with respect to FYROM, thus acknowledging that FYROM's policy does not constitute a serious threat to its territorial integrity. However, the case illustrates that seemingly irrational fears cannot easily be swept aside by economic rationality. Even within the European Community, the conflict between indispensable economic and political integration and cooperation, on the one hand, and growing nationalism, on the other hand, must be handled. The question remains whether a judicial procedure is the appropriate means to solve such a conflict. Still, when other mechanisms are exhausted and when legal arguments are available to maintain an attitude of judicial self-restraint, the Court seems to be an appropriate decision maker.

ANNE PETERS*

International claims—expropriation—standard of compensation—prompt, adequate and effective versus appropriate compensation

SHAHIN SHANE EBRAHIMI v. GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN. AWD 560-44/46/47-3.

Iran—United States Claims Tribunal, October 12, 1994.

This case concerns the important issue of the standard of compensation in cases of expropriation of an investor's property by a national government. This note discusses the Tribunal's opinion, authored by Gaetano Arangio-Ruiz and concurred in by Richard C. Allison, the U.S. member of the Tribunal,¹ and Judge Allison's separate opinion.² It does not discuss the dissenting opinion of the Iranian member of the Tribunal, Judge Mohsen Agahosseni, which was not issued until February 9, 1995, too late to be considered in this note.

Claimants were former shareholders who sought recovery of damages for the expropriation of their interests in Gostaresh Maskan Company (the Company), an Iranian construction firm allegedly expropriated in 1979. Claimants asserted that, following the Islamic Revolution, the Government of Iran appointed its own directors to govern the Company, thereby depriving claimants of their ownership rights as shareholders. Claimants sought compensation for their shares in the Company, totaling 19 percent of the Company's outstanding stock, in the amount of approximately \$20 million, together with interest from the date of expropriation, attorney's fees and costs.

In 1989 the Tribunal issued an interlocutory decision on jurisdiction, holding that the dominant and effective nationality of each of the claimants during the relevant period was that of the United States. In March 1993, the Tribunal's expert presented his report on valuation. The final award and Judge Allison's separate opinion were issued on October 12, 1994.

The Tribunal found that the Company was expropriated pursuant to the Law Concerning the Appointment of Provisional Manager(s) to Supervise Productive, Industrial, Commercial, Agricultural and Service Units in the Private and Public Sections (the Act), which was promulgated by the Islamic Revolutionary Council in 1979. The Act permitted the Government of Iran to appoint directors to manage private corporations if "the managers and/or owners . . . deserted [the corporation], or stopped the work, or [were] not accessible for any reason whatsoever and upon request of [the

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¹ AWD 560-44/46/47-3 (Oct. 12, 1994) (Chamber 3) [Final Award].

² AWD 560-44/46/47-3, Separate Opinion of Richard C. Allison (Oct. 12, 1994) [Allison Opinion].