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EDITORIAL COMMENTS

Relations between international courts and Community courts: Mutual deference or subordination?

Recently, both the Court of First Instance and the Court of Justice have rejected claims for damages resulting from the incorrect implementation by the European Commission of the Panel and Appellate Body reports in the so-called Banana case. The fact that the initial implementation by the Community authorities was incorrect had, moreover, been clearly established in an implementation panel procedure.[1] Not too long ago, the European Court of Human Rights rejected a claim by private operators under Article 6 of the ECHR directed against the 15 Member States to the effect that the Community authorities, in that case also the Court of Justice, had not sufficiently safeguarded the procedural rights of shipping companies in an anti-trust procedure, and in particular their right to a judicial appeal against a Court of Justice ruling rejecting their request for a suspension of the payment of a fine.[2]

These cases raise interesting questions about the relationship between international courts and the Community courts. The question arises whether this relationship must be seen as one between two international courts which show each other deference or as the relationship between two courts where the one is clearly subordinate to the other. Or is an intermediate position possible?

An example which is characteristic of a relationship between two international Courts one of which shows deference to the other concerns an Arbitral Tribunal under the Law of the Sea Convention and the Court of Justice. The

1. See Case T-19/01, *Chiquita* v. *Commission*, judgment of the CFI of 3 Feb. 2005, nyr, and Case C-377/02, *Van Parys*, judgment of 1 March 2005, nyr. It is to be noted that the question of damages for lawful government acts (*égalité devant les charges publiques*) is still before the CFI. For the report of the Panel confirming the inadequate implementation by the Community, see EC Bananas WT/DS 27/RW/ECU (Art. 21.5 – Ecuador), adopted 6 May 1999.

2. European Court of Human Rights, Appl. N° 56672/00, *DSR Senator Lines* v. *15 Member States of the European Union*. The Court in the end declared the application inadmissible, on the grounds that the shipping companies were deemed not to be victims of a breach of the right of access to a Court, as the CFI quashed the fine for other reasons. Joined Cases T-212–214/98, *Atlantic Container Line* v. *Commission*, judgment of the CFI of 30 Sept. 2003, nyr.

case in question relates to the dispute between Ireland and the United Kingdom over the nuclear installations at Sellafield (in the UK). The case was suspended by the Arbitral Tribunal, pending the resolution of the question whether the matters at issue were subject to the exclusive jurisdiction of the European Court of Justice – a question which is presently pending before the Court of Justice in an infringement case brought by the Commission against Ireland.[3]

The case in which the European Court of Human Rights broadly accepts what the EC anti-trust and judicial authorities have done in the *Senator Lines* case also seems to be characterized by a certain deference, a certain distance between the two court systems and two legal systems involved. The Strasbourg Court's approach seems very much inspired by that of the German Constitutional Court in human rights cases: the *Solange* approach.[4] As long as the European Court of Justice succeeds in maintaining a broadly effective protection of human rights, the Strasbourg Court will not look too closely at individual cases. The Community legal order and the ECJ are left to their own devices in their own domain, and usually, as in *DSR Senator Lines*, the Strasbourg Court avoids "piercing the corporate veil" of the Community and holding the Member States responsible for Community acts, unless there is no other way out.[5]

Deference for the Community legal order and the European Court of Justice and respect for their own domain, therefore, occurs whether or not the Community is a party to the international agreement "belonging" to the other Court in question: the Community is a party to the Law of the Sea Convention, but not (yet) to the European Convention on Human Rights. Whether the Community, as a party, is supposed to respect an international agreement, does not stand in the way of respect being shown for the Community legal order and its very specific way of dealing with deviancy. From the point of view of arguments comparable to the local remedies rule, it is perhaps considered "better" that the Community system deals with the problem, instead of (or before) having the "international system" – to which the Community belongs formally (Law of the Sea) or "in the spirit" (human rights) – imposing itself on the Community legal system.

3. See Permanent Court of Arbitration, The MOX Plant Case, *Ireland* v. *United Kingdom*, Order No. 3, Suspension of Proceedings etc., 24 June 2003, prolonged by Order No. 4 of 14 Nov. 2003. For the infringement case, see Case C-459/03, *Commission* v. *Ireland*, pending, O.J. 2004, C 7/24.

4. See BVerfGE 37, 271 (*Solange I*) and BVerfGE 73,223 (*Solange II*), confirmed by the "Banana decision" of 27 June 2000; see annotation by Hoffmeister, 38 CML Rev. (2001), 791–804.

5. See ECHR, Judgment of 18 Feb. 1999, *Matthews* v. *United Kingdom*.

There are, however, also situations where the European Court of Justice itself shows deference to the international legal system or to one of its subsystems and submits to or invokes the law concerned. In its case law on customary international law, for instance, the Court does not hesitate to declare that the Community, including the Court itself, must respect international customary law. And in deciding *what* is customary international law, the European Court of Justice almost routinely defers to judgments of the International Court of Justice and its Hague predecessor, the PCIJ.[6]

The Community Courts have also been ready to take account of Strasbourg jurisprudence and been quite willing to be influenced by it, especially the ECHR case law on Article 6 of the European Convention. However, there have been occasions on which the European Court of Justice has felt the need to distinguish the Community legal system, and in particular its own structure, and hence not to follow the Strasbourg case law fully.[7]

However, in respect of international agreements, and in particular the WTO, the situation seems fundamentally different. It is well known that the European Courts do not accept that the WTO agreement has direct effect.[8] The new cases mentioned at the beginning of this editorial, however, go a step further in making it clear that the reports of a panel or the Appellate Body do not lead to such direct effect either. Moreover, it is clearly stated that, though the Community is bound by a general obligation to give effect to the recommendations and decisions taken by the Dispute Settlement Body when it adopts panel and Appellate Body reports, the Community is not bound to this in a specific way; it has a certain freedom of choice of means in order to put itself into conformity with the requirements of the WTO agreements as interpreted by the panels and the Appellate Body.[9]

Moreover, the Community Courts, once again, lay emphasis on the various possibilities of continuing negotiation, even after the reasonable period of time for implementing a panel or Appellate Body report is over.[10] There are many instances on both sides of the Atlantic where the reasonable period

6. See the Court's case law in this domain discussed in Kuijper, "From Dyestuffs to Kosovo Wine: from Avoidance to Acceptance by the European Community Courts of Customary International Law as Limit to Communtiy Action", in Dekker and Post, *On the Foundations and Sources in International Law*, dedicated to the memory of Professor Herman Meijers (The Hague, 2003), pp. 151–171.

7. See Order of the Court in Case C-17/98, *Emesa Sugar*, where the Court is of the view that the case law of the Strasbourg Court on advocates general and the right of reply is not applicable to its own advocates general.

8. Case C-149/96, *Portugal* v. *Council*, [1999] ECR I-8395.

9. See *Chiquita*, *supra* note 1, para 256.

10. See *Van Parys*, *supra* note 1, paras. 41–48.

of time is prolonged, where the right of suspending concessions or other advantages is not immediately invoked or exercised, or where a second or third round of compliance litigation under Article 21(5) of the Dispute Settlement Understanding is begun.[11] The Community Courts are quite right in taking the view that they had better not interfere with these political activities in the framework of the WTO Agreements.

This case of law of the Community Courts and the despair that some seem to feel about it, should not make us lose sight of the fact that the European Court of Justice has gone quite far in interpreting Community and national law in conformity with the WTO Agreements. After some initial hesitation in a number of cases concerning the relationship between Article 50(6) of the TRIPs agreement and the summary procedure on infringement of intellectual property rights in the Dutch courts of first instance, the European Court of Justice in the end went quite far in spelling out its guidance to the national courts on the effects that Article 50(6) ought to have on their national civil procedure.[12] If the Community Courts were to have the opportunity to give such interpretations more often, the difference between that and granting direct effect might turn out to be rather minimal.

There is, therefore, in the final analysis no lack of respect for WTO law in the Community Courts and no lack of deference for the panels or, in particular, the Appellate Body,[13] but the Community Courts treat the "Geneva system" in many ways like the "Strasbourg system", even though the Community is a party to the former and not to the latter. The outcomes of each system and its case law are treated with respect and, as best as possible, in-

11. The best known examples are the *Banana* Cases, the *FSC* cases and case on the US Antidumping Act of 1916.

12. Contrast Case C-53/96, *Hermès*, [1998] ECR I-3603 with Case C-89/99, *Schieving-Nijstad* v. *Groeneveld*, [2001] ECR I-5851. A particularly interesting treatment of these two and other similar cases is to be found in Mengozzi, "Private International Law and the WTO Law", 292 RCADI (2001), 252–385.

13. In the numerous banana cases that the Community Courts have had to decide in the course of the years, the Courts usually treats the reports of panels and of the Appellate Body as facts, which is in conformity with what courts normally do when taking into account the judgments of foreign courts, as long as there is no question of execution or enforcement. More interesting are the cases in which the panel and Appellate Body reports are used to make a point, see Opinion of A.G. Jacobs in Case C-339/98, *Peacock AG* v. *Hza Paderborn*, [2000] ECR 8947, paras. 24–26, or to underline that an interpretation given to a provision of Community law is confirmed by the interpretation given by a panel or Appellate Body report to a provision of WTO law, see the way A.G. Stix-Hackl used the interpretation of Art. 13 TRIPS given in DS/160 (US – Section 10(5) of the Copyright Act) in the so-called betting data bases cases, Cases C-203/02, *The British Horseracing Board Ltd and Others*, C-46/02, *Fixtures Marketing Ltd*, C-338/02, *Fixtures Marketing Ltd*, and C-444/02, *Fixtures Marketing Ltd*, judgments of 9 Nov. 2004, nyr.

corporated in the interpretation of Community law, but with a certain distance and filtered through the Community system. In the case of the "Strasbourg system" this has been a consequence, so far, of not really belonging to it. In the case of the "Geneva system" it has been the result of creating a small carve-out of de facto dualism in the otherwise generally monist approach of the Court to international agreements, linked to the need to respect the internal institutional balance of the Community and leaving the Community executive and legislative bodies the same freedom of movement under the post-dispute settlement procedures in the WTO as those its partners have. As stated earlier, this does not stand in the way of a respectful attitude to the WTO system and in particular its dispute settlement system, and may even lead to the kind of indirect co-operative dialogue that has existed between the Luxemburg and Strasbourg courts over the years and also between national constitutional courts and international courts.[14]

14. In this respect it is also interesting to refer to the recent case of the German *Bundesverfassungsgericht* concerning the consequences of Strasbourg rulings for the German court system, see Decision of 14 Oct. 2004, 2 BvR 1481/04, *Görgülü*, annotated by Hoffmeister in (2005) *International Constitutional Law* (I-Con), (forthcoming). Another example is the aftermath of the so-called *Avena* Case, judgment of 31 March 2004 (*Mexico* v. *United States*), with respect to the ICJ and the US Courts.