

# THE ENFORCEMENT OF EUROPEAN UNION LAW: THE ROLE OF THE EUROPEAN COURT OF JUSTICE AND THE COURT'S LATEST CHALLENGE\*

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## I. INTRODUCTION

The European Court of Justice (ECJ), the main judicial institution of the European Union (EU), has among its tasks the duty to decide cases concerning member nations' application of and compliance with EU law. To date, the Court has operated very successfully in this area. This comment will provide a guide to the most common ways that the ECJ enforces EU law in and against member nations<sup>1</sup> and analyze the new challenge presented by the case of *Commission v. Hellenic Republic*.<sup>2</sup>

In April 1994, the European Commission filed suit in the ECJ against the Hellenic Republic (Greece) under Article 225 of the Treaty Establishing the European Community (EC Treaty), alleging that Greece's institution of a unilateral trade blockade against the Former Yugoslavian Republic of Macedonia (FYROM) violates EC Treaty Article 113 dealing with a common trade policy<sup>3</sup> and does not comply with EC Treaty Article 224.<sup>4</sup> Article 225 states that the European Commission may bring suit in the ECJ against any member nation that wrongfully uses EC Treaty Article 224 to justify a unilateral act which distorts trade.<sup>5</sup> Article 224 enumerates certain situations in which unilateral measures are appropriate.<sup>6</sup> *Hellenic Republic* is the first case in the history of the ECJ filed by the Commission under Article 225.<sup>7</sup> Unfortunately, the way in which this

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1. The European Court of Justice (ECJ) also enforces law against European Union (EU) institutions, but this is not within the scope of this comment. See David Stoelting, *The Jurisdictional Framework of the European Court of Justice*, 29 COLUM. J. TRANSNAT'L L. 193, 202-10 (1990).

2. See Case C-120/94 R, *Commission v. Hellenic Republic*, 1994 E.C.R. I-3037 (ruling of the ECJ rejecting the Commission's request for interim measures); *Commission v. Greece*, Case No. C-120/94 slip op. (Opinion of Advocate General Jacobs) (on file with the author); Cases before the Court of Justice, 3 Common Mkt. Rep. (CCH) ¶ 90,100, 16,583 (1994).

3. See *infra* parts VI.E & VI.G.

4. *Commission Refers Greek Embargo of Former Yugoslav Republic to European Court*, EUR. UNION NEWS, release no. 19/94, Apr. 6, 1994 [hereinafter *Commission Refers*] (on file with the author); see also *infra* text accompanying note 293.

5. TREATY ESTABLISHING THE EUROPEAN COMMUNITY [EC TREATY] art. 225.

6. *Id.* art. 224.

7. *Injunction Against Greece Far From a Formality*, Reuter, Apr. 13, 1994 [hereinafter *Injunction*] (on file with the author).

case concluded provides an unsatisfactory resolution to this matter—one which the EU may later regret.

## II. BRIEF HISTORY OF THE EUROPEAN UNION

The first of the three European Communities was the European Coal and Steel Community (ECSC).<sup>8</sup> The treaty establishing this community (ECSC Treaty) was signed by Belgium, Luxembourg, The Netherlands, Germany, France, and Italy on April 18, 1951.<sup>9</sup> On March 25, 1957, the remaining two Communities were created when these countries signed the Treaty Establishing the European Economic Community (the EEC Treaty), now the EC Treaty,<sup>10</sup> and the Treaty Establishing the European Atomic Energy Community (Euratom).<sup>11</sup> Though the ECSC Treaty provided for the creation of all four Community institutions (Commission, Council, Parliament, and ECJ) in one form or another, the Merger Treaty, effective in 1967, provided that all four institutions serve the Communities together.<sup>12</sup>

Great Britain, Ireland, and Denmark entered the Communities on January 1, 1973.<sup>13</sup> Greece joined on January 1, 1981, and Spain and Portugal joined on January 1, 1986.<sup>14</sup> On January 1, 1995, Finland, Sweden, and Austria became part of the EU, increasing the total number of members to fifteen.<sup>15</sup>

Two additional treaties worth mentioning are the Single European Act (SEA), effective on July 1, 1987,<sup>16</sup> and the Treaty on European Union (Union Treaty), effective on November 1,

8. *E.g.*, GEORGE BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 5 (1993).

9. *Id.*

10. The Treaty Establishing the European Union (Union Treaty) changed the name of the Treaty Establishing the European Economic Community (EEC Treaty) to the Treaty Establishing the European Community (EC Treaty), effective November 1, 1993. TREATY ON EUROPEAN UNION [TEU] art. G(A); see generally RALPH H. FOLSOM, EUROPEAN UNION LAW at xviii (2d ed. 1995) (stating that with the passage of the Union Treaty, the EEC was changed to the EC).

11. *E.g.*, BERMAN ET AL., *supra* note 8, at 7.

12. *E.g.*, *id.* at 50.

13. *Id.* at 11.

14. *Id.*

15. *Belgium: Chronology of EU Enlargement*, Reuter, Jan. 2, 1995, available in WESTLAW, INT-NEWS Database, at \*2 [hereinafter *Chronology*].

16. *E.g.*, BERMAN ET AL., *supra* note 8, at 15.

1993.<sup>17</sup> These treaties were created in order to provide for a single internal market<sup>18</sup> and to facilitate a new state of economic, monetary, and political union.<sup>19</sup>

### III. OUTLINE OF EUROPEAN UNION INSTITUTIONS AND THEIR INTERACTION

A general understanding of EU institutions and their interaction is a prerequisite to appreciating the ECJ's role in enforcement of EU law. The EU has four main bodies: the Council, the Commission, the European Parliament, and the Court of Justice.<sup>20</sup>

#### A. *The Council*

The Council is "the decision making body within the Community,"<sup>21</sup> and the EC Treaty explains that the Council's role is to "ensure co-ordination of the general economic policies of the member states."<sup>22</sup> The Single European Act (SEA) complements the EC Treaty by adding chapters "on 'co-operation in economic and monetary policy,' . . . 'economic and social cohesion,' and . . . 'research and technological development.'"<sup>23</sup> These treaties, however, do not impose definite obligations on the Council.<sup>24</sup>

The Council is composed of representatives of each member nation.<sup>25</sup> Although each representative is appointed by his

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17. *E.g.*, Heinrich Kirschner, *The Framework of the European Union Under the Treaty of Maastricht*, 13 J.L. & COM. 233, 233 (1994).

18. *See, e.g.*, BERMANN ET AL., *supra* note 8, at 14-15.

19. *See, e.g., id.* at 16-19.

20. *E.g.*, Kirschner, *supra* note 17, at 235. After the Community's passage of the Single European Act (SEA), the Council attached the Court of First Instance to the ECJ. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 96 (5th ed. 1990). The ECJ can review cases on points of law decided by the Court of First Instance (CFI) which is subordinate to the ECJ. Kirschner, *supra* note 17, at 239; *see also infra* text accompanying notes 89-96.

21. MATHIJSEN, *supra* note 20, at 25.

22. EC TREATY art. 145 (as amended 1987).

23. MATHIJSEN, *supra* note 20, at 34 (quoting the SEA).

24. *Id.* at 34-35.

25. *Id.* at 35. Member nations include Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Spain, Portugal, and the United Kingdom. BERMANN ET AL., *supra* note 8, at 53. Sweden, Finland, and Austria became members of the EU on January 1, 1995. *Chronology, supra* note 15, at \*2.

respective member nation, the representatives are to act in the best interest of the EU as a whole.<sup>26</sup> More than one Council meeting can take place at any one time because there are both general and specialized Councils.<sup>27</sup>

The Council issues regulations, directives, and decisions based on drafts presented by the Commission.<sup>28</sup> Council regulations apply to all member nations and are binding without any additional implementation by the member nations.<sup>29</sup> Directives apply to the member nations to whom they are addressed, and those member nations then choose the form and method of implementation.<sup>30</sup> Decisions bind only those parties to whom they are addressed.<sup>31</sup> Essentially, through these acts, the Council is continuing "the work of the draftsmen" of the various treaties that create the EU<sup>32</sup> since the obligations placed on the Council by the treaties are not precise.<sup>33</sup> Thus, the Council is the legislative body of the EU.<sup>34</sup>

The European Council is a separate body composed of the Heads of State or Government that meets three times a year, though the SEA only requires the body to meet two times a year.<sup>35</sup> The European Council mainly considers policy issues requiring political cooperation both within the EU and with its relations with nonmember nations.<sup>36</sup> This council makes "the necessary decision on the highest political level" that the general Council has difficulty in making.<sup>37</sup> The European Council

26. See MATHIJSEN, *supra* note 20, at 45.

27. See *id.* at 35-36. The "'general' Councils . . . are composed of the Ministers of Foreign Affairs . . ." *Id.* at 35. Specialized Councils are composed of the member country representatives responsible for the area handled by the special Council, *i.e.* the agriculture minister will attend the Agriculture Council. See *id.*; see also Kirschner, *supra* note 17, at 236-37 (describing the Council and its functions after the passage of the Treaty on European Union (Union Treaty)).

28. *E.g.*, MATHIJSEN, *supra* note 20, at 45. Some treaty provisions also require the Council to involve the European Parliament in its decision making process. See *infra* text accompanying notes 49-54.

29. EC TREATY art. 189 (as amended 1993).

30. *Id.*

31. *Id.*

32. See MATHIJSEN, *supra* note 20, at 47.

33. *Id.* at 34-35.

34. See Kirschner, *supra* note 17, at 236.

35. See MATHIJSEN, *supra* note 20, at 42-43.

36. See *id.*

37. *Id.* at 34-41.

has also enunciated general guidelines for the Commission and Council.<sup>38</sup>

### B. *The Commission*

The Commission is responsible for the functioning and development of the common market and is the "guardian of the Treaty," *i.e.* it makes sure everybody acts in accordance with the rules included therein. The Commission also administers the EU's finances, negotiates international agreements, represents the EU both inside the EU and in the international field and exercises its own power of decision. In short, it should be seen as the executive branch of the Community.<sup>39</sup>

The Union Treaty states that member nations are to appoint the members of the Commission in cooperation with the European Parliament.<sup>40</sup> The member states nominate the President of the Commission in consultation with the Parliament, and then nominate the remaining members of the Commission in consultation with the nominated President.<sup>41</sup> The Parliament then has a "vote of approval" before the member nations appoint the Commission members by a common accord.<sup>42</sup> The addition of Austria, Finland, and Sweden to the EU on January 1, 1995 increased the size of the Commission to twenty members.<sup>43</sup>

The Commission has the responsibility for investigating and initiating proceedings against member states who do not abide by EU law.<sup>44</sup> This body may settle these conflicts out of court, or the member states can force the Commission to file suit in court.<sup>45</sup> The Commission also has some power to make regulations, directives, and decisions.<sup>46</sup> Treaties confer some of these powers, and the Council, through secondary legislation, confers

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38. *Id.* at 42.

39. *Id.* at 52-53.

40. Kirschner, *supra* note 17, at 236.

41. *Id.*

42. *Id.*

43. *EU: Norway's No Means Certain Changes to Accession Treaty*, Agence Eur., Dec. 29, 1994, available in WESTLAW, INT-NEWS-C Database, at \*1-\*2 [hereinafter *Certain Changes*].

44. *E.g.*, MATHIJSEN, *supra* note 20, at 55-56.

45. *Id.* at 57; see *infra* notes 142-167 and accompanying text.

46. *E.g.*, MATHIJSEN, *supra* note 20, at 58-59.

other powers.<sup>47</sup> Even though it has the power to issue directives, regulations, decisions, and opinions, the Commission is mainly an executive body; however, sometimes it is hard to distinguish the Commission's duties from those of the Council.<sup>48</sup>

### C. *The European Parliament*

The European Parliament does not have the extensive legislative power that is normally associated with a parliament.<sup>49</sup> Even after the passage of the Union Treaty, the European Parliament is not "a true bicameral legislature consisting of two equal Houses," possibly because other political entities do not want to give up the power existing in the Council.<sup>50</sup> Member nations do, however, choose their parliamentary representatives through an election process.<sup>51</sup>

Before the passage of the Union Treaty, the European Parliament only had the following duties:

to participate in the legislative procedure; to put questions to the Council and Commission; to adopt a motion of censure where it disapproves of the activities of the Commission; to discuss the annual General Report submitted to it by the Commission; to participate in the budgetary procedure; to initiate procedures in the Court of Justice against the Council or the Commission in the case they fail to act, or to protect its own rights and to intervene in other cases; to participate in other activi-

47. *Id.* at 59.

48. *Id.* But see Kirschner, *supra* note 17, at 238 (stating that the member nations play a large executive role while the Council and Commission perform some limited executive functions).

49. See MATHIJSEN, *supra* note 20, at 17; see also Kirschner, *supra* note 17, at 237 (describing the European Parliament's power after the passage of the Union Treaty).

50. Kirschner, *supra* note 17, at 237.

51. MATHIJSEN, *supra* note 20, at 18. The EEC Treaty, now the EC Treaty, provides that these elections should be held by a uniform method through the EU, but the member nations have not agreed upon a common method so the elections are held in accordance with the procedure used in each member nation for national elections. *Id.*; see also *supra* note 10. The EC Treaty provides that an EU citizen may run for election to the European Parliament in the member state in which she resides and be treated as a national for election purposes even if she is not a national of that state. Kirschner, *supra* note 17, at 237. This right is subject to regulation by the Council. *Id.*

ties of the Communities.<sup>52</sup>

Certain provisions of the Treaty provide that the Council must only consult with Parliament (consultation procedure)<sup>53</sup> before passing measures dealing with certain areas of community law; however, Parliament's opinion is not binding on the Council.<sup>54</sup>

Since the passage of the Union Treaty and the SEA, two new procedures have increased Parliament's power: (1) the co-decision procedure; and (2) the cooperation procedure.<sup>55</sup> The co-decision procedure<sup>56</sup> is used as specified in various EC Treaty articles,<sup>57</sup> and "essentially gives Parliament a veto power, but it still leaves the Council with something of an upper hand."<sup>58</sup> After the Council passes a proposal to Parliament and then to a Conciliation Committee, the proposal returns to the Council and may still become law if Parliament does not unanimously vote against it.<sup>59</sup>

The cooperation procedure<sup>60</sup> requires the Council to adopt a "common position" and send it to Parliament, which may or may not approve it.<sup>61</sup> If Parliament approves of the common position, the Council is obligated to pass it; if it disapproves, the Council may only adopt the measure by a unanimous vote.<sup>62</sup> Parliament may also vote to propose amendments to the common position, and in this situation, the text is sent back to the Commission which must satisfy both the Council and Parlia-

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52. MATHIJSEN, *supra* note 20, at 20; *see generally id.* at 20-31 (describing in detail the duties of the European Parliament).

53. *See generally* FOLSOM, *supra* note 10, at 80-81 (diagraming the consultation procedure).

54. *Id.* at 43.

55. *E.g.*, BERMAN ET AL., *supra* note 8, at 80.

56. *See id.* at 89-90 (describing the co-decision procedure in detail); *see also* FOLSOM, *supra* note 10, at 82-83 (diagraming the co-decision procedure).

57. *See, e.g.*, EC TREATY arts. 100A-B (as amended 1993) (requiring the adoption of harmonization measures and other directives to achieve an internal market). The requirements of these articles call for the application of the new co-decision procedure. BERMAN ET AL., *supra* note 8, at 89.

58. BERMAN ET AL., *supra* note 8, at 89.

59. *See id.* at 89-90.

60. *See id.* at 84-85 (describing the cooperation procedure in detail); *see also* FOLSOM, *supra* note 10, at 80-81 (diagraming the cooperation procedure).

61. BERMAN ET AL., *supra* note 8, at 84.

62. *Id.*

ment.<sup>63</sup> It is this version that the Council may either pass by a qualified majority, or amend by unanimous decision.<sup>64</sup>

#### D. *The Courts*

##### 1. *The European Court of Justice*

The EC Treaty provides that "[t]he Court of Justice shall ensure that in the interpretation and application of this treaty the law is observed."<sup>65</sup> The ECJ enforces treaty provisions as well as regulations, directives, and decisions made by the Commission and the Council.<sup>66</sup> The ECJ also has the duty to "state what that law is when the Community provisions do not explicitly provide the answer."<sup>67</sup> The most common cases handled by the ECJ are as follows:

- (1) Proceedings [brought] by the Commission against a Member State for failure to comply with Treaty obligations, for example, proceedings against a Member State for non-implementation of a directive (under Article 169).
- (2) Actions by one Member State against another for infringement of Treaty obligations (under Article 170).
- (3) Actions by a Member State, the Council or the Commission (and in limited circumstances private parties) against Community institutions challenging Community acts (under Article 173).
- (4) Actions against the Council or the Commission by Member States or other Community institutions for infringement of the Treaty by failure to act (under Article 175).
- (5) Complaints by private parties that a Community institution has failed to address to that person any act, other than a recommendation or opinion (under Article 175(3)). . . .

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63. *Id.* at 85.

64. *Id.*

65. EC TREATY art. 164.

66. Nicholas Stewart, *The Relationship Between the European Court of Justice and the Courts of the Member States of the European Communities*, 5 INT'L L. PRACTICUM 41 (1992), available in WESTLAW, JLR Database, at \*3; see *supra* text accompanying notes 28–31.

67. MATHIJSEN, *supra* note 20, at 69.

(6) Preliminary rulings under Article 177 . . . .

(7) Actions for damages against the Community (under Article 215).<sup>68</sup>

The ECJ has approached the interpretation of the basic EU treaties in what has been described as a "constitutional mode."<sup>69</sup> The ECJ declared that the EC Treaty created "its own legal system' whose rules were supreme over national laws, and even over national constitutions."<sup>70</sup> Every national court in each member nation must enforce EU law and must set aside any conflicting piece of national law.<sup>71</sup> The ECJ's interpretation of EU law binds the member states, placing the ECJ at the top of a legal structure composed of EU member's national courts.<sup>72</sup>

After the accession of Sweden, Austria, and Finland on January 1, 1995, fifteen judges and eight Advocates General make up the ECJ.<sup>73</sup> Members of the ECJ serve renewable six-year terms<sup>74</sup> and are appointed by the member nations by means of common accord.<sup>75</sup> The judges and Advocates General must be independent and meet the qualifications "required for appointment to the highest judicial offices in their respective countries,' or be 'jurisconsults of recognised competence."<sup>76</sup> The ECJ's president is elected by the ECJ judges and serves for a three-year term.<sup>77</sup> The court sits either in a plenary session<sup>78</sup>

68. Stewart, *supra* note 66, at \*3-\*4. For actions listed in numbers (1), (2), and (6), see *infra* respectively part IV.B., part IV.C., and part IV.A.

69. Carol F. Lee, *Europe 1992: Roundup on the Law and Politics of the European Community*, 85 AM. SOC'Y INT'L L. PROC. 152, 164 (1991).

70. *Id.*

71. *E.g.*, Stewart, *supra* note 66, at \*5.

72. Stoelting, *supra* note 1, at 195.

73. *Certain Changes*, *supra* note 43, at \*1-\*2; see also Christine Alice Corcos, *EC Law: A Practical Guide*, 22 CASE W. RES. J. INT'L L. 195, 220 (1990) (noting that there were six Advocates General before the January 1, 1995 accession); *Belgium: First Woman Judges at Enlarged European Court*, Reuter, Jan. 9, 1995, available in WESTLAW, INT-NEWS Database [hereinafter *Enlarged European Court*] (explaining that two new Advocates General were added to the court after accession).

74. Corcos, *supra* note 73, at 221.

75. MATHIJSEN, *supra* note 20, at 70.

76. *Id.* (citing EC TREATY art. 167).

77. *Id.*

78. Plenary is defined as "full, entire, complete, absolute, perfect, unqualified." BLACK'S LAW DICTIONARY 1154 (6th ed. 1990). Plenary sessions have a quorum of seven judges. BERMANN ET AL., *supra* note 8, at 70.

or in one of six chambers composed of anywhere from three to five judges, with each panel electing its own president for a one-year term.<sup>79</sup>

The Advocates General hold a unique, independent position in that they are required to investigate each case individually and express a personal opinion about it.<sup>80</sup> These opinions do not bind the ECJ, but they are influential and generally more exhaustive than the court's opinions.<sup>81</sup> Furthermore, the Advocate General's opinion is given under his own name, while the court's judgment is rendered by a majority and thus may involve compromise.<sup>82</sup> The Advocate General's opinion is also printed with the court's ruling on the case.<sup>83</sup>

All judges sign ECJ opinions regardless of their personal opinion and there are no dissenting or concurring opinions.<sup>84</sup> Some judges do, however, participate in academic writing while members of the ECJ.<sup>85</sup> The ECJ's opinions are persuasive authority, and are not recognized as binding precedent in the traditional Anglo-American sense.<sup>86</sup> In practice, however, the court has followed its case law, implicitly or explicitly.<sup>87</sup> The ECJ tends to reiterate its reasoning from one case to the next when dealing with the same or similar issues.<sup>88</sup>

## 2. *The Court of First Instance*

In 1989, the Council and member nations created the Court of First Instance (CFI) and attached it to the ECJ<sup>89</sup> in order to reduce the ECJ's caseload.<sup>90</sup> Initially, the CFI had limited jurisdiction, but since 1993, the CFI's jurisdiction has expanded

79. BERMAN ET AL., *supra* note 8, at 70.

80. *Id.* at 71; see GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 8 (1981).

81. BEBR, *supra* note 80, at 8.

82. *Id.* at 9.

83. *See id.*

84. BERMAN ET AL., *supra* note 8, at 70.

85. *Id.*

86. *See* BEBR, *supra* note 80, at 9-10.

87. *Id.* at 11.

88. *See id.* at 11-12.

89. *See supra* note 20.

90. Kirschner, *supra* note 17, at 238.

considerably.<sup>91</sup> Fifteen judges sit on the court,<sup>92</sup> but they may sit in chambers of three to five judges.<sup>93</sup>

The ECJ has exercised appellate jurisdiction over the CFI concerning questions of law since the CFI's creation.<sup>94</sup> An unsuccessful party must file the appeal within two months of its notification of the CFI's decision.<sup>95</sup> The ECJ may decide to quash the CFI's decision, remand it for final judgment, or issue a final judgment itself.<sup>96</sup>

#### IV. COMMON MEANS OF ENFORCEMENT OF EUROPEAN UNION LAW IN AND AGAINST MEMBER NATIONS THROUGH THE EUROPEAN COURT OF JUSTICE<sup>97</sup>

##### A. *EC Treaty Article 177*

###### 1. *General Description*

Article 177 cases are the most common form of action seen by the ECJ, excluding actions of EU officials.<sup>98</sup> The purpose of Article 177 is to assure uniformity and consistency in the national courts' application of EU law<sup>99</sup> though no right to

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91. See *id.* at 238–39; BERMAN ET AL., *supra* note 8, at 73. The CFI's jurisdiction does not include Article 177 references for preliminary opinions. *Id.* At first, the CFI heard mostly competition and staff cases. Kirschner, *supra* note 17, at 238–39. After the Union Treaty's passage, EC Treaty Article 168A provides a mechanism by which the Council, at the ECJ's request and after consulting Parliament and the Commission, can expand the CFI's jurisdiction so that it may hear all but Article 177 cases. EC TREATY art. 168A (as amended 1993).

92. *E.g.*, *Enlarged European Court*, *supra* note 73.

93. BERMAN ET AL., *supra* note 8, at 73.

94. *Id.*; MATHIJSEN, *supra* note 20, at 91.

95. BERMAN ET AL., *supra* note 8, at 73.

96. *Id.*

97. See *supra* text accompanying note 67; see also BEBR, *supra* note 80, at 309–26 (describing EC Treaty articles that are seldom used to enforce EU law against member nations). Only those actions listed in numbers (1), (2), and (6) above will be discussed in this comment. The other types of common actions, numbers (3)–(5) and (7), involve the ECJ's enforcement of law against EU institutions, *i.e.* the Commission and the Council, and are outside of the scope of this comment.

98. BEBR, *supra* note 80, at 543.

99. See *id.*; Ole Due, *Legal Remedies for the Failure of European Community Institutions to Act in Conformity with EC Treaty Provisions*, 14 FORDHAM L. REV. 341, 343–44 (1991). Ole Due was a member of the ECJ (1979–1994) and had been its president since 1988. See *id.* at 341; Personnel: The Court of Justice, 3 Common Mkt. Rep. (CCH) ¶ 90,080 (1994); Brick Court Chambers,

appeal from a national court to the ECJ exists.<sup>100</sup> This article concerning preliminary rulings states:

[1] The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

[2] Where such a question is raised before any court or tribunal of a member state, that court or tribunal may, if it considers that decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

[3] Where any such question is raised in a case pending before a court or tribunal of a member state against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.<sup>101</sup>

There are two situations where national courts ask the ECJ for a preliminary ruling: (1) a discretionary reference under Article 177[2]; and (2) a compulsory reference under Article 177[3].<sup>102</sup>

The role of the ECJ in this national litigation is simply to interpret EU law and not to apply national law to the case since the latter is the job of the national court alone.<sup>103</sup> The national courts are not to determine the validity of an EU act since this is the job of the ECJ, but they can reject arguments as to the invalidity of the act.<sup>104</sup> When the ECJ invalidates an EU act, its decision "is binding on the national court which referred the matter to the Court,"<sup>105</sup> and other member nation

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*Business and the Law: New Faces on the Bench—European Court*, FIN. TIMES, Oct. 11, 1994, at 13. Recently, Judge Rodriguez Iglesias was chosen to succeed the retiring Judge Due. *Id.*

100. Kirschner, *supra* note 17, at 239.

101. EC TREATY art. 177 (as amended 1993). The Union Treaty simply added the words "and of the ECB" to paragraph [1](b). TEU art. G(56).

102. Stewart, *supra* note 66, at \*8.

103. *See id.* at \*9.

104. *Id.*

105. Stoelting, *supra* note 1, at 212.

courts should also see this act as invalid as applied to the whole Community.<sup>106</sup> The ECJ does not apply Community law to the case at hand, leaving it up to the referring court to follow the preliminary ruling in its decision.<sup>107</sup>

Generally, for all referred questions under Article 177[2] or [3], the national court has the authority to decide whether a question of community law is relevant to the case at hand.<sup>108</sup> The ECJ "will refuse to accept a reference where it considers that the procedure is being abused by artificially contrived proceedings designed for the purpose of having Community law points decided."<sup>109</sup> Regardless of whether the ruling comes under Article 177[2] or Article 177[3], it is binding on the referring court and any higher national court which may hear the case.<sup>110</sup>

The national court must consider whether or not the answer to the EU law question is necessary to formulate a decision in the case before it makes discretionary referral under Article 177[2].<sup>111</sup> The ECJ wants the national court to consider the following when deciding whether to make a discretionary referral to the ECJ: "(i) establish the facts first; (ii) define the national law context of the Community law question; and (iii) explain the reasons why the question needs to be answered."<sup>112</sup>

The ECJ stated that in dealing with mandatory referral under Article 177[3],

'a national court or tribunal against whose decisions there is no judicial remedy under national law' must refer questions of EC [EU] law to the Court unless: (1) the issue is irrelevant; (2) the Court has already addressed the question; or (3) the correct application of EC [EU] law is obvious.<sup>113</sup>

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106. *Id.*

107. *See id.*; BEBR, *supra* note 80, at 361, 391.

108. Stewart, *supra* note 66, at \*9.

109. *Id.*

110. *See* BEBR, *supra* note 80, at 409.

111. Stewart, *supra* note 66, at \*10.

112. *Id.*

113. Stoelting, *supra* note 1, at 211-12 (quoting C.I.L.F.I.T. Srl v. Minister of Health, Case 283/81, 1982 E. Comm. Ct. J. Rep. 3415, 3428, [1983] Comm. Mkt. L.R. 472, 489).

This does not necessarily mean that only the highest court in the nation can make an Article 177[3] reference.<sup>114</sup> If there is no national law allowing a judicial remedy or an appeal from a lower national court, then that court must make a referral.<sup>115</sup>

The ECJ has used Article 177 to develop several unique concepts of EU law.<sup>116</sup> One doctrine is that of "direct effect," which in essence declares that there are certain Treaty provisions that (1) are precise enough to be directly effective, (2) are unqualified, and (3) require no discretion in their application by the court.<sup>117</sup> The ECJ made it clear that these Treaty provisions apply to all member nations who must comply with them without the necessity for implementing measures.<sup>118</sup> Member nations must set aside any national measure that conflicts with these Treaty provisions.<sup>119</sup> The Treaty provisions that have direct effect on member nations are also enforceable by individuals in their respective national courts.<sup>120</sup> Article 177 references have also ended some legislative initiatives that became superfluous after an ECJ decision.<sup>121</sup> Additionally, Article 177 proceedings have given the ECJ the opportunity to give direct effect to clear directive provisions which member nations have not correctly implemented within the required time period.<sup>122</sup> The Court stated that these clear "directives have direct effects in national courts in the sense that they can be relied upon against the state or state bodies . . . irrespective of whether the directive has been implemented."<sup>123</sup> The national court must also interpret enabling legislation or measures so that the implementation of community law is carried out and is compatible with the directive's terms.<sup>124</sup> The ECJ also ruled that the national courts must use available national remedies "to protect

114. Stewart, *supra* note 66, at \*10.

115. *Id.*

116. See Stoelting, *supra* note 1, at 212-13; Due, *supra* note 99, at 344-46.

117. See Stoelting, *supra* note 1, at 212.

118. *Id.*

119. Due, *supra* note 99, at 344.

120. Stoelting, *supra* note 1, at 212.

121. Due, *supra* note 99, at 345.

122. *Id.* at 344-45.

123. John Temple Lang, *New Legal Effects Resulting from the Failure of States to Fulfill Obligations Under European Community Law: The Francovich Judgment*, 16 FORDHAM INT'L L.J. 1, 4 (1992/1993).

124. *Id.* at 5.

rights given by directly applicable rules of Community Law."<sup>125</sup> Furthermore, the ECJ gave national courts the power to suspend national legislation which appears to conflict with EU law even though the national court may not have this suspension power under national law.<sup>126</sup> The decision in *Francovich v. Italian Republic*<sup>127</sup> also gave the ECJ an opportunity to deal with a situation in which individuals were injured when a member nation failed to implement a directive that did not have direct effect.<sup>128</sup>

## 2. Case Example: *Francovich v. Italian Republic*<sup>129</sup>

The *Francovich* case actually consists of two cases, each involving employees who were not paid wages owed to them because of their respective employers' insolvencies.<sup>130</sup> Council Directive 80/987, which took effect October 23, 1983, provides that EU member nations must enact certain measures to protect employees from this situation.<sup>131</sup> In each case the plaintiff filed suit against Italy in an Italian court for Italy's failure to implement this directive. The plaintiffs sought to obtain the guarantees stated in the directive or compensation.<sup>132</sup> The Italian court referred this matter to the ECJ under Article 177.<sup>133</sup>

After examining the directive, the ECJ determined that its provisions were precise and unconditional regarding which people are entitled to a guarantee, but that the directive did not give enough information so that individuals can "rely on those provisions before the national courts" regarding the guarantee's contents.<sup>134</sup> These provisions do not specify the person liable for providing the guarantee, "and the State cannot be consid-

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125. *Id.* at 6.

126. *Id.* at 8.

127. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

128. *See infra* text accompanying notes 129-141.

129. Cases C-6/90 & C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357.

130. *Id.* at I-5406.

131. *Id.* at I-5405.

132. *Id.* at I-5406.

133. *Id.* at I-5405.

134. *Id.* at I-5412.

ered liable on the sole ground that it has failed to take transposition measures within the prescribed period."<sup>135</sup>

In deciding whether the employees should be compensated, the ECJ noted that the EEC Treaty, now the EC Treaty,<sup>136</sup> "created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply: The subjects of that legal system are not only the Member States but also their nationals."<sup>137</sup> Thus, the Treaty and community law impose obligations on individuals, member nations, and community institutions.<sup>138</sup> In *Francovich*, the ECJ held that it would weaken the force of EU law and the individual rights it bestows on its citizens if individuals are not compensated when harm is caused to them because of a breach of EU law for which a member nation is responsible.<sup>139</sup> In order to find liability, the court must determine that (1) the directive in question provides individuals with rights, (2) these rights are identifiable in the directive itself, and (3) a causal link exists between the state's breach and the individual's injuries.<sup>140</sup> Thus, the national court, applying national rules on liability, must "uphold the right of employees to obtain reparation of loss and damage caused to them as a result of failure to transpose the directive."<sup>141</sup>

## B. EC Treaty Article 169

### 1. General Description

Article 169 permits the Commission to initiate proceedings against member nations who are not in compliance with EU law.<sup>142</sup> The text of Article 169 states,

If the Commission considers that a member state has failed to fulfil an obligation under this treaty, it shall deliver a reasoned opinion on the matter, after giving the state concerned the opportunity to submit its obser-

135. *Id.*

136. *See supra* note 10.

137. *Francovich*, 1991 E.C.R. at I-5413.

138. *Id.*

139. *Id.* at I-5414.

140. *Id.* at I-5415.

141. *Id.* at I-5416.

142. *See* BEBR, *supra* note 80, at 278-80.

vations. If the state concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.<sup>143</sup>

This article provides two stages for a proceeding initiated by the Commission under the article's authority: (1) an informal, flexible administrative procedure; and (2) a judicial procedure, in the event the first stage fails.<sup>144</sup> The first stage is intended to resolve the dispute without the necessity of going to court and without unnecessary publicity.<sup>145</sup> "National authorities not infrequently infringe Community law because of lacking understanding of and experience with it, rather than by their intent to disregard or to violate it."<sup>146</sup> Only twenty percent of the cases initiated under Article 169 end in actual litigation.<sup>147</sup> Thus, most nations that receive notification under Article 169 from the Commission cure their violations before court action becomes necessary.<sup>148</sup>

In the stage one proceeding, Article 169 gives the Commission the authority to begin an infringement proceeding without any time restraints.<sup>149</sup> The Commission usually notifies the member nation of its infringement through a formal letter and allows the nation involved the opportunity to respond before issuing the "reasoned opinion" referred to in Article 169.<sup>150</sup> This reasoned opinion includes the legal and factual grounds for the alleged infringement and the actions necessary to remedy the infringement.<sup>151</sup> This opinion also "establishes and delimits the object of an action of the Commission before the Court, should the Member State fail to comply with [the] opinion;"<sup>152</sup> thus the Commission may only raise issues in the opinion when litigating this matter.<sup>153</sup> The Commission still may bring this

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143. EC TREATY art. 169.

144. See BEBR, *supra* note 80, at 279-98.

145. *Id.* at 279-80.

146. *Id.* at 279.

147. Stoelting, *supra* note 1, at 199.

148. See *id.*

149. BEBR, *supra* note 80, at 280.

150. See *id.* at 280-81. The state may choose not to respond. See *id.* at 281.

151. *Id.* at 281.

152. *Id.* at 281-82.

153. *Id.* at 283-84.

action before the ECJ to determine the consequences of the infringement even if the infringement ceases.<sup>154</sup>

The ECJ's judgement in determining a member nation's infringement of EU law is basically a declaratory judgment.<sup>155</sup> This judgment is retroactive in effect<sup>156</sup> unless otherwise specified in the judgment.<sup>157</sup> A member nation's state authorities are obligated under Article 171<sup>158</sup> to comply with EU law once the ECJ has declared that the nation is not in compliance.<sup>159</sup> If the national authorities do not comply at this time, another Article 169 action may follow for the member nation's failure to comply with the ECJ judgment.<sup>160</sup>

Commission proposals that have been stalled in the Council have been reinvigorated by Commission actions under Article 169.<sup>161</sup> For example, in an insurance case against Germany, the Commission in its case before the ECJ was able to present questions that member states could not agree upon, thus stalling the Commission's proposal in the Council.<sup>162</sup> The ECJ essentially answered these questions by balancing treaty rules on insurance consumer protection and "free exchange of services," making it possible for the Council to adopt a directive within a year after the judgement.<sup>163</sup>

The Commission has also used Article 169 to get the ECJ to establish new rules in an area in which the EU alone can act but where the Council has not acted.<sup>164</sup> One case involved member states who wanted to protect their fisheries, but could not agree on common quotas.<sup>165</sup> The ECJ ruled that competency in this area was irrevocably in the hands of the EU.<sup>166</sup> Any

154. *Id.* at 287-88.

155. *Id.* at 293.

156. *Id.* at 296.

157. See BERMANN ET AL., *supra* note 8, at 141.

158. See *infra* text accompanying note 231.

159. See Stoelting, *supra* note 1, at 199.

160. *Id.*; see also *infra* text accompanying notes 203-238 (describing Article 171, both before and after its amendment by the Union Treaty).

161. Due, *supra* note 99, at 347-48.

162. *Id.* at 349 (citing Case 205/84, Commission v. Germany, 1986 E.C.R. 3755).

163. *Id.*

164. *Id.*

165. *Id.*; see Case 804/79, Commission v. United Kingdom, 1981 E.C.R. 1045, 1050.

166. Due, *supra* note 99, at 349.

individual member state could act only in the interest of all the EU members and even then only with the Commission's consent.<sup>167</sup>

2. *Case Example: Commission v. Kingdom of Belgium*<sup>168</sup>

The Commission does not always win the cases it files with the ECJ under Article 169, as evidenced by the decision in *Commission v. Belgium*.<sup>169</sup> This action concerned the implementation of Council Directive 79/7, which requires that there be no direct or indirect gender discrimination in the provision of social security benefits.<sup>170</sup> The Commission contended that Belgium created a scheme which provided for indirect discrimination against women when it implemented the directive.<sup>171</sup>

The Belgian scheme of benefits provides for the division of recipients into three different groups: "—a worker residing with a married or cohabitating partner, parent or child with no earned or replacement income (group 1); —a worker residing alone (group 2); [and] —a worker cohabitating with a person with earned or replacement income (group 3)."<sup>172</sup> Unemployment payments and invalidity payments differ for each group.<sup>173</sup> Belgian statistics of June 1982 unemployment benefits show that group one consisted of 81.4% men and group three consisted of 65.2% women.<sup>174</sup> The court made the point that if

Belgium can show that the means chosen meet a necessary aim of its social policy and that they are suitable and requisite for attaining that aim, the mere fact that the system of allowances favours a much greater number of male workers cannot be regarded as an infringement of the principle of equal treatment.<sup>175</sup>

Belgium contended that it provided "a minimum replacement income, having regard to the family situation of the claimant,

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167. *See id.*

168. Case C-229/89, *Commission v. Kingdom of Belg.*, 1991 E.C.R. I-2205.

169. *Id.* at I-2231.

170. *Id.* at I-2206, I-2224.

171. *Id.* at I-2224.

172. *Id.* at I-2225-26.

173. *See generally id.* at I-2226 (describing the differences in benefits).

174. *Id.* at I-2217 (Opinion of Mr. Advocate General Darmon).

175. *Id.* at I-2228.

who may be faced with supplementary needs because he had dependents or, on the other hand, may benefit from a spouse's income.<sup>176</sup> The ECJ then declared that these income grants form a necessary part of a member state's social policy.<sup>177</sup> Thus, Belgium's system employs satisfactory means to attain its social policy goals, and therefore, it is not discriminatory on the basis of sex.<sup>178</sup> The ECJ dismissed the Commission's application and ordered it to pay costs.<sup>179</sup>

### C. *EC Treaty Article 170*

#### 1. *General Description*

The procedure under Article 170 in which a member state initiates action against another member state for violating EU law is similar to that of Article 169.<sup>180</sup> The text of Article 170 is as follows:

[1] A member state which considers that another member state has failed to fulfil an obligation under this treaty may bring the matter before the Court of Justice.

[2] Before a member state brings an action against another member state for an alleged infringement of an obligation under this treaty, it shall bring the matter before the Commission.

[3] The Commission shall deliver a reasoned opinion after each of the states concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

[4] If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.<sup>181</sup>

A big difference between Article 170 and Article 169 is that the Commission's reasoned opinion is not required in order to

176. *Id.* at I-2229.

177. *Id.*

178. *Id.* at I-2230.

179. *Id.*

180. Stoelting, *supra* note 1, at 201.

181. EC TREATY art. 170.

initiate an action in court under Article 170.<sup>182</sup> Member states seem to prefer to have the Commission enforce EU law<sup>183</sup> and thus rarely utilize Article 170.<sup>184</sup>

When notifying the Commission of another member state's violation of EU law, the notifying member state must specify that it is acting under Article 170 so that the Commission will not proceed under Article 169.<sup>185</sup> The prejudicial proceeding required by Article 170 is a contentious one in which the Commission does not assume the role of arbitrator.<sup>186</sup> The Commission is to issue a reasoned opinion that is somewhat broader in scope than is required by Article 169 in that it states whether an infringement of EU law has occurred.<sup>187</sup> If the reporting member nation does not pursue the action against the violating member nation, this prejudicial procedure could potentially substitute for the procedure provided for in Article 169, depending on how much formalism the ECJ will require.<sup>188</sup>

## 2. Case Example: *France v. United Kingdom*<sup>189</sup>

France filed this Article 170 action against the United Kingdom (U.K.) alleging that the U.K. did not act in accordance with its EC Treaty obligations in dealing with fish conservation and fishing.<sup>190</sup> Pursuant to Article 170, the Commission issued a reasoned opinion which stated that the U.K. was in violation of Regulation No. 101/76 and The Hague Resolution, Annex VI, and thus had violated its EEC Treaty<sup>191</sup> obligations.<sup>192</sup>

The Hague Resolution, adopted October 30, 1976, deals with fishing zones and states that no unilateral measures will be taken by member nations relating to conservation of resources

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182. See *id.* arts. 169–170.

183. See Stoelting, *supra* note 1, at 201.

184. *Id.* Apparently, only one case has been filed under this article. See BEBR, *supra* note 80, at 305.

185. See BEBR, *supra* note 80, at 305.

186. *Id.* at 306.

187. *Id.* at 307.

188. *Id.* at 308.

189. Case C-141/78, French Republic v. United Kingdom, 1979 E.C.R. 2923 (predating the case discussed *supra* in the text accompanying notes 165–167, which also concerns fisheries).

190. *Id.* at 2927–28.

191. See *supra* note 10.

192. *French Republic*, 1979 E.C.R. at 2928.

and that if the Community could not adopt an autonomous measure and if the Community could not make an agreement with the international fisheries commission in 1977, member nations could adopt interim measures to protect their fishing resources in consultation with and with the approval of the Commission.<sup>193</sup> In early 1977, the Council passed several regulations regarding the fishing industry, fishery products, and fishery resources.<sup>194</sup> One of the regulations, Council Regulation No. 101/76, required a member nation to give notification to other member nations before changing any fishery rules.<sup>195</sup> In early March, the Minister in charge of fisheries and the Secretaries of State for Northern Ireland and Scotland issued an order banning the use of a certain small-mesh net in British fishery waters.<sup>196</sup> Approximately seven months later, British authorities boarded a French trawler within British fishery waters which was using the small-mesh net.<sup>197</sup> The master of the boat appeared in court and was fined.<sup>198</sup> Shortly thereafter, France filed the case with the Commission under Article 170.<sup>199</sup>

The ECJ declared that the U.K. violated The Hague Resolution and Council Regulation No. 101/76 by failing to seek the Commission's approval and by not notifying other member nations of any changes in its fishery rules.<sup>200</sup> Thus, the Court found that the U.K. was in violation of EU law and ordered the U.K. to pay court costs.<sup>201</sup>

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193. *Id.* at 2926-27.

194. *Id.* at 2927.

195. *Id.* at 2939.

196. *Id.* at 2927.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 2943.

201. *Id.*

V. ENFORCEMENT OF ECJ JUDGMENTS<sup>202</sup>

## A. EC Treaty Article 171

## 1. Pre-Union Treaty Amendment

Prior to its amendment by the Union Treaty, Article 171 stated, "If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgement of the Court of Justice."<sup>203</sup> Thus, the national authorities of a member nation which the ECJ has found in violation of EU law must take measures to comply with the judgment.<sup>204</sup> The measures necessary to comply with the court's ruling are often evident in its reasoning,<sup>205</sup> but the ECJ can also render a judgment that is very general in nature and gives no indication as to how the member nations can comply.<sup>206</sup> Article 171 has been effective, however, because "in the vast majority of cases, member states have complied with ECJ decisions."<sup>207</sup> Even if the noncompliant member state has

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202. Enforcement of judgements in cases in which the Commission or Council has imposed pecuniary obligations is handled by the national authorities. EC TREATY arts. 187 & 192. This is a physical means of collecting penalties and will not be discussed in this comment. *See id.*

203. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 171 (before the 1993 amendment).

204. BEBR, *supra* note 80, at 299.

205. *Id.* at 293.

206. Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GA. L.J. 2369, 2383 (1993); *see supra* text accompanying notes 155-160.

207. Sullivan, *supra* note 206, at 2383. "[L]eaving enforcement of European Community law in the hands of the member states does not appear, up to this point, to have been a mistake." George A. Bermann, *Europe 1992: Roundup on the Law and Politics of the European Community*, 85 AM. SOC'Y INT'L L. PROC. 152, 154 (1991). The member states seem to be willing to enforce EU law. *Id.* "It has [also] been a long time since a pattern of noncompliance by a member state has caused one or more other members to feel that the fabric of Community law has been irretrievably impaired." *Id.* *But see* Lee, *supra* note 69, at 167 (stating that "[m]ember states frequently fail to comply with their obligations, even after they have been condemned by the Court of Justice for doing so"). As of the printing of this article, WESTLAW searches unearthed only 15 judgments that found member states in violation of Article 171 because they did not comply with a previous ECJ judgment: three cases discussed *infra* beginning, respectively, with notes 211, 219, and 226; Case C-291/93, *Commission v. Italian Republic*, 1994 WL 693J0291; Case C-19/91, *Commission v. Kingdom of Belg.*,

no desire to comply with the ECJ judgment, other member states may place political and economic pressure on that nation to encourage compliance.<sup>208</sup> Still, some member nations' legislative or other decision making processes make it virtually impossible for them to comply with EU deadlines for implementing EU law.<sup>209</sup> Strong sanctions encouraging compliance do exist in some member countries whose national legal systems permit individuals to file suit against the government for damages when the government has not complied with EU law.<sup>210</sup>

*a. Commission v. Italian Republic*<sup>211</sup>

The Commission, filing this action under Article 169, claimed that Italy was in violation of Article 171 because it had not complied with the ECJ's judgment of December 10, 1968 in case 7/68, *Commission v. Italian Republic*.<sup>212</sup> In this prior case, the court declared that Italy was not fulfilling its obligations under EEC Treaty<sup>213</sup> Article 16 since it continued to levy a progressive tax after January 1, 1962 on the exportation of artistic, historical, archaeological, and ethnographic articles to other member nations.<sup>214</sup> Italy stated that it knew it had to comply with this judgment, but it had parliamentary procedural difficulties in doing so because the necessary measures must be

1991 WL 691J0019; Case C-375/89, *Commission v. Kingdom of Belg.*, 1991 WL 689J0375; Case 383/85, *Commission v. Kingdom of Belg.*, 1989 WL 685J0383; Case 169/87, *Commission v. Republic of Fr.*, 1988 WL 687J0169; Case 225/86, *Commission v. Republic of Italy*, 1988 WL 686J0225; Case 391/85, *Commission v. Belg.*, 1988 WL 685J0391; Cases 227, 228, 229, and 230/85, *Commission v. Belg.*, 1988 WL 685J0227; Case 69/86, *Commission v. Republic of Italy*, 1987 WL 686J0069; Case 160/85, *Commission v. Republic of Italy*, 1986 WL 685J0160; Case 131/84, *Commission v. Republic of Italy*, 1985 WL 684J0131; Case 281/83, *Commission v. Italian Republic*, 1985 WL 683J0281.

208. Nicola Preston, *Several States, One Unity, One Law?*, 24 AKRON L. REV. 141, 150 (1990).

209. See Henry G. Schermers, *Comment on Weiler's The Transformation of Europe*, 100 YALE L.J. 2525, 2535 (1991).

210. *Id.* at 2535-36; see *supra* text accompanying note 141 (indicating what national courts must do in deciding government liability for failure to transpose a directive).

211. Case 48/71, *Commission v. Italian Republic*, 1972 E.C.R. 527. This case was decided on July 13, 1972. *Id.* at 533.

212. *Id.* at 529.

213. See *supra* note 10.

214. *Italian Republic*, 1972 E.C.R. at 528.

adopted according to Italian constitutional law.<sup>215</sup> The court noted that in *Eunomia v. Italian Republic*, the ECJ ruled that the Article 16 prohibition directly affects the national law of every member state.<sup>216</sup> If Community law were not applicable until appropriate action could be taken by the state, that would be equivalent to deciding that Community law is inferior to the laws of member nations and its application impossible if it contradicts national law.<sup>217</sup> Thus the court found Italy in violation of Article 171.<sup>218</sup>

*b. Commission v. Hellenic Republic*<sup>219</sup>

The Commission initiated this action against Greece under Article 169 based on two violations of Article 171 for not complying with judgments issued in case 147/86, *Commission v. Hellenic Republic*, and in case 38/87, *Commission v. Hellenic Republic*.<sup>220</sup> Both cases dealt with Greek restrictions on employment opportunities for citizens of other member states residing in Greece; specifically, these restrictions violated EEC Treaty<sup>221</sup> Articles 48, 52, and 59.<sup>222</sup> Greece argued that measures were currently being devised which would comply with these two judgments.<sup>223</sup> The ECJ declared that while Article 171 does not provide a time within which member nations have to comply with judgments, "the process of compliance with a judgment must be initiated immediately and must be completed

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215. *Id.* at 531.

216. *Id.* at 532; see *supra* text accompanying notes 117-120 (explaining direct effect).

217. *Italian Republic*, 1972 E.C.R. at 532.

218. *Id.* On July 4, 1972, Italy notified the court that it had repealed the tax retroactively to January 1, 1962. *Id.*

219. Case C-328/90, *Commission v. Hellenic Republic*, 1992 E.C.R. I-425. The ECJ decided this case on January 30, 1992. *Id.* at I-425.

220. *Id.* at I-427-28. The judgment in case 147/86 was rendered on March 15, 1988, and case 38/87 was decided on July 14, 1988. *Id.* at I-428.

221. See *supra* note 10.

222. See *Hellenic Republic*, 1992 E.C.R. at I-428. Article 48 deals with the free movement of workers within the EU. EC TREATY art. 48. Article 52 deals with the abolishing of restrictions on the nationals of member states to establish a business in another member state. *Id.* art. 52. Article 59 deals with the abolishing of restrictions on providing cross-frontier services within the EU. *Id.* art. 59. None of these articles were amended by the Union Treaty. See TEU, art. G.

223. *Hellenic Republic*, 1992 E.C.R. at I-437.

as soon as possible."<sup>224</sup> The court found Greece in violation of Article 171 in both cases.<sup>225</sup>

c. *Commission v. Kingdom of The Netherlands*<sup>226</sup>

The Commission claimed in this Article 169 proceeding that The Netherlands had violated Article 171 since it had not complied with the judgment in case 236/85, *Commission v. Kingdom of The Netherlands*.<sup>227</sup> This judgment declared that The Netherlands had not implemented the necessary measures to comply with Council Directive 79/409 on wild bird conservation.<sup>228</sup> The Netherlands admitted that it had not yet taken the necessary steps to comply with the judgment but that this was due to the time needed to amend its laws on hunting and birds.<sup>229</sup> The ECJ declared The Netherlands to be in violation of Article 171 because its compliance with this judgment had not taken place in a reasonable time period.<sup>230</sup>

2. *Union Treaty Amendment and Its Predicted Effect*

After amendment by the Union Treaty, the text of Article 171, "compliance with judgments; fines," states:

(1) If the Court of Justice finds that a member state has failed to fulfil an obligation under this treaty, the state shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

(2) If the Commission considers that the member state concerned has not taken such measures it shall, after giving that state the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the member state concerned has not complied with the judgment of the Court of Justice.

If the member state concerned fails to take the necessary measures to comply with the court's judgment within the time limit laid down by the Commis-

224. *Id.*

225. *Id.* at I-438-39.

226. Case C-75/91, *Commission v. Kingdom of The Neth.*, 1992 E.C.R. I-549. The ECJ decided this case on February 6, 1992. *Id.* at I-549.

227. *Id.* at I-554. The judgement was rendered on October 13, 1987. *Id.*

228. *Id.*

229. *Id.* at I-555.

230. *See id.*

sion, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the member state concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the member state concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to article 170.<sup>231</sup>

The amendment provides that the Commission may issue a reasoned opinion if a member nation is not complying with an ECJ judgment.<sup>232</sup> If compliance does not occur by the deadline set by the Commission, the Commission may file a case in the ECJ.<sup>233</sup> If the court finds that the member nation is not in compliance with the earlier judgment, it may impose a fine.<sup>234</sup>

At least one authority predicts that it is highly unlikely that the ECJ will utilize this new power.<sup>235</sup> Article 88 of the ECSC Treaty is similar to the new Article 171, but it has never been used.<sup>236</sup> Implementation also appears to be difficult, increasing the unlikelihood that fines will be imposed.<sup>237</sup> However, the use of the new Article 171 appears to depend more on the need for its use, and it seems, based on old Article 171 activity, that the amended article will only be needed in somewhat infrequent instances.<sup>238</sup>

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231. EC TREATY art. 171 (as amended in 1993). Compare EC TREATY Art. 171 with text accompanying note 203 (quoting Article 171 prior to 1993 amendment).

232. Union Treaty: Institutions—The Courts, 3 Common Mkt. Rep. (CCH) ¶ 25,180 (1994).

233. *Id.*

234. *Id.*

235. Kirschner, *supra* note 17, at 240.

236. *Id.*

237. *Id.*

238. See *supra* note 207 and accompanying text.

VI. NEW CHALLENGE TO ENFORCEMENT—THE FIRST  
EC TREATY ARTICLE 225 CASE: *COMMISSION V.  
HELLENIC REPUBLIC*<sup>239</sup>

A. *Greece's European Union Background*

1. *Entrance*

In July 1959, Prime Minister Constantine Karamanlis' government decided to apply for associate status with the EU, then the EC.<sup>240</sup> America was decreasing its economic aid to Greece, and this association would provide new resources for Greece's economic development.<sup>241</sup> The idea of joining the EC appealed to the Greek people because this would result in a closer alliance with Europe as opposed to the rest of the Balkans and other unfavorable Anglo-American influences.<sup>242</sup> After considerable debate, the proponents of EC association prevailed.<sup>243</sup> The EC was also eager for Greece's association to take place because of the opportunity member nations would have to initiate new commercial ventures in Greece, an area that previously was dominated by Anglo-American interests.<sup>244</sup> The treaty providing for association with the EC was signed in Athens on July 10, 1961.<sup>245</sup>

Greece applied for membership to the EC in June 1975.<sup>246</sup>

239. Case C-120/94 R, *Commission v. Hellenic Republic*, 1994 E.C.R. I-3037 (ruling of the ECJ rejecting the Commission's request or interim measures); *Commission v. Greece*, Case No. C-120/94, slip op. (Opinion of Advocate General Jacobs, delivered on April 6, 1995) (on file with the author); Cases before the Court of Justice, 3 Common Mkt. Rep. (CCH) ¶ 90,100, 16,583 (1994); see also *supra* text accompanying notes 4-7.

240. D. GEORGE KOUSOULAS, *MODERN GREECE PROFILE OF A NATION* 248 (1974).

241. *Id.*

242. *Id.* at 249.

243. *Id.*

244. *Id.*

245. *Id.*

246. Dimitrios Evrigenis, *Legal and Constitutional Implications of Greek Accession to the European Communities*, 17 COMMON MKT. L. REV. 157, 157 (1980). During Greece's association with the EC and negotiations for accession to the EC Treaty, Karamanlis resigned as Prime Minister for unrelated reasons. See E.M. WOODHOUSE, *KARAMANLIS: RESTORER OF GREEK DEMOCRACY* 147-54 (1982) [hereinafter WOODHOUSE, RESTORER]. In April 1967 a military coup occurred in Greece. See generally C.M. WOODHOUSE, *THE RISE AND FALL OF THE GREEK COLONELS* (1985) (describing the years of the military junta in Greece). In 1974,

Karamanlis, once again Prime Minister, traveled extensively to the other member nations' capitals, arguing his case for Greece's full entrance into the EC with a waiting period of less than the ten years that the EC members wanted.<sup>247</sup> On June 28, 1979, the Greek Parliament passed the bill approving accession to the EC,<sup>248</sup> though the Panhellenic Socialist Movement (PASOK) and the Communists boycotted the vote and parliamentary debate.<sup>249</sup> Greece became the tenth member of the EC on January 1, 1981, one year later than Karamanlis wanted and three years earlier than the EC members wanted.<sup>250</sup>

## 2. *Greek Attitude Towards the European Union*

### a. *The Government*

At the time the Greek Parliament approved accession to the EU, PASOK, led by Andreas Papandreou, opposed Greece's membership in the EU.<sup>251</sup> Within less than a year of accession, Papandreou became Prime Minister of Greece.<sup>252</sup> Papandreou indicated that he would like a referendum on EU membership but also noted that calling a referendum was the prerogative of the President.<sup>253</sup> This conveniently took the matter neatly out of his hands because Karamanlis was President at that time.<sup>254</sup> The Prime Minister's attitude towards

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when this military dictatorship collapsed, former Prime Minister Constantine Karamanlis, who had been living in self-imposed exile in Paris, came back to put back together the pieces of Greek democracy. See WOODHOUSE, RESTORER, *supra*, at 208-13.

247. WOODHOUSE, RESTORER, *supra* note 246, at 258-59. Karamanlis felt strongly about Greece's entry into the EC, as exhibited by the following quote: "My wish is to identify the fate of my country with that of Europe. Because I believe that a united Europe has a great future and, under certain conditions, can affect the economic, social, cultural, and defensive future of the whole world, if not the destiny of mankind." Mario Modaino, *Constantine Karamanlis: Changing the Way Greeks Think*, TIMES [London], July 25, 1977, at 8.

248. Evrigenis, *supra* note 246, at 8.

249. See RICHARD CLOGG, *A CONCISE HISTORY OF GREECE* 177 (1992).

250. See *id.*

251. See A.A. Fatouros, *Greece Joins the Communities*, 6 EUR. L. REV. 495, 495 (1981); see *supra* text accompanying note 244.

252. See Fatouros, *supra* note 251, at 495.

253. *Id.*

254. See C.M. WOODHOUSE, *MODERN GREECE: A SHORT HISTORY* 319 (3d ed. 1984).

the EU was somewhat hostile and very protective of Greece: "We shall exhaust the escape clauses and every margin provided for in the Treaty of Rome [EEC Treaty] or the Accession Treaty, but we shall not hesitate to take measures which are indispensable for the protection of the workers and producers and for our country's development, independently of Community obligations."<sup>255</sup> Papandreou did say that he was satisfied that the consciousness within the EU was increased concerning the inequalities among members which he considered a threat to the EU's cohesion.<sup>256</sup>

Since that time, Greece has obviously remained within the EU despite Papandreou's pronounced dislike of the EU. Papandreou was defeated in the 1990 election by Constantine Mitsotakis, the New Democracy<sup>257</sup> candidate,<sup>258</sup> but Papandreou won elections again in October 1993 and only recently resigned as Prime Minister of Greece.<sup>259</sup>

#### *b. The People*

At the same time the Greek people elected Papandreou as Prime Minister in 1981, they also elected members for the European Parliament.<sup>260</sup> The European Parliamentary election results compared to the Greek national election results are as follows:<sup>261</sup>

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255. Fatouros, *supra* note 251, at 495-96.

256. *Id.* at 496.

257. Constantine Karamanlis founded this party. WOODHOUSE, RESTORER, *supra* note 246, at 223-24.

258. See Greece: Editorial—That Ancient Greek Woe, Xenophobia, INDEPENDENT, Sept. 20, 1993, at 19, available in WESTLAW, INT-NEWS-C Database, at \*1 [hereinafter *Xenophobia*].

259. See Costas Paris, Greece: Champagne Flows in Athens After Socialist Win, Reuter, Oct. 11, 1993, at \*1, available in WESTLAW, INT-NEWS-C Database; see *infra* notes 481-484 and accompanying text.

260. Fatouros, *supra* note 251, at 502.

261. *Id.* at 503.

Party	% of Votes Nationally	% of Votes for Eur. Parl.	Seats held Nationally	# of Seats in Eur. Parl.
PASOK	48%	40.3%	Yes	10
New Democracy	36%	31.5%	Yes	8
Communist (KKE)	10.9%	12.7%	Yes	3
Communists (Interior)	1.35%	5.1%	No	1
KODISO (Centrist)	0.7%	4.15%	No	1
Progressives	1.5%	1.95%	No	1

PASOK and the KKE were against entry to the EU,<sup>262</sup> and the support of the Communist Party of the Interior, KODISO, and New Democracy was essential for entry into the EU.<sup>263</sup> In addition to differing systems of election and voters' personal preferences towards individual candidates, the parties' stands on the EU issue also influenced the election.<sup>264</sup> "It would seem, at any rate, that this peculiar result shows a remarkable sensitivity of the Greek voters to the existence and possibilities of the European Parliament."<sup>265</sup>

## B. *The Macedonia Problem*

### 1. *Its History*

Since the breakup of Yugoslavia, Greece has found itself at odds with its fellow members of the EU.<sup>266</sup> One of the new republics just north of Greece chose to include the word "Macedonia" in its name, an action to which Greece is opposed because Greece's northern province is named Macedonia.<sup>267</sup> The new republic, the Former Yugoslavian Republic of Macedonia (FYROM), became part of the UN in April 1993 under that name as part of a compromise with Greece.<sup>268</sup> Furthermore, Greece's support of Serbia in the Bosnian conflict further

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. See *Xenophobia*, *supra* note 258, at \*1.

267. See *Political Background: Introduction*, COUNTRY PROFILE, Jan. 1, 1994, available in WESTLAW, BUS-INTL-C Database [hereinafter *Political Background*]. The Greek province of Macedonia is located partially in the area that formed the ancient kingdom of Macedonia. *Id.*

268. *Id.*

alienated Greece from its EU partners who wish to have the common external policy promoting the cessation to the hostilities.<sup>269</sup>

United Nations attempts to mediate the situation between Greece and FYROM failed.<sup>270</sup> Neither Prime Minister Mitsotakis or later Prime Minister Papandreou chose to accept the proposed UN compromise.<sup>271</sup> Greece eventually set out preconditions to further negotiations with FYROM which included FYROM's dropping "Macedonia" from its name, removing the Vergina Star (or Sun)<sup>272</sup> from its emblem, and either removing provisions from FYROM's Constitution which Greece considers a threat to Greece's territorial integrity or amending the Constitution to guarantee Greece's territorial integrity.<sup>273</sup> FYROM's

269. See *Xenophobia*, *supra* note 258, at \*1; *The Political Scene: Greece Upset by EU Recognition of FYROM*, COUNTRY REP., Feb. 16, 1994, available in WESTLAW, BUS-INTL-C Database [hereinafter *Greece Upset*]; Jeremy Gaunt, *Greece Widely Criticized for Macedonia Decision*, Reuter Eur. Community Rep., Feb. 17, 1994, available in LEXIS, World Library, REUEC File, at \*2.

270. See *The Political Scene: Compromise Deal Had Been Adumbrated*, COUNTRY REP., Feb. 16, 1994, available in WESTLAW, BUS-INTL-C Database [hereinafter *Compromise Adumbrated*].

271. *Id.*

272. The Vergina Star is the symbol of Philip of Macedon and his son Alexander the Great which was unearthed in Vergina. *Political Background*, *supra* note 267; *Compromise Adumbrated*, *supra* note 270.

273. Case C-120/94 R, Commission v. Hellenic Republic, 1994 E.C.R. I-3037, I-3045; *Compromise Adumbrated*, *supra* note 270. The provisions of the Former Yugoslavian Republic of Macedonia's (FYROM) Constitution that were listed by the Advocate General in the ECJ's denial of interim measures are as follows:

*Article 3*

The Territory of the Republic of Macedonia is indivisible and inalienable.

The existing borders of the Republic of Macedonia are inviolable.

They may only be altered in accordance with the Constitution.

*Article 49*

The Republic shall safeguard the status and rights of citizens of neighbouring countries who are of Macedonian origin and of Macedonian expatriots, shall assist their cultural development and shall promote relations with them.

The Republic shall safeguard the cultural, economic and social rights of the citizens of the Republic abroad.

*Amendment I*

1. The Republic of Macedonia has no territorial ambitions with regard to neighboring countries.

2. The borders of the Republic of Macedonia may only be altered in accordance with the Constitution, and with the principle of goodwill and generally recognized international norms.

3. Point 1 of this amendment complements Article 3; point 2 replaces the third paragraph of Article 3 of the Constitution of the Republic of Macedonia.

President Gligorov responded to Papandreou's preconditions to resuming talks by replying that because Gligorov's party did not have enough votes to change the flag or the constitution, talks should resume without FYROM meeting those conditions.<sup>274</sup>

The EU wants the Balkans to be stable, and Greece's actions did not lend themselves to this goal.<sup>275</sup> By the end of 1993, nine EU nations had recognized FYROM, adding to Greece's frustration.<sup>276</sup> In addition, NATO was threatening to conduct air strikes against Serbian positions if hostilities in Sarajavo did not cease.<sup>277</sup> Greece abstained from the NATO vote, and Serbia was bombed.<sup>278</sup> Then, adding insult to injury, the United States extended recognition to FYROM on the same date that NATO voted to bomb Serbia.<sup>279</sup> Some authorities thought that Greece would retreat from its demands and start talking with FYROM again,<sup>280</sup> but things simply got worse.

## 2. *The Unilateral Trade Embargo*

On February 16, 1994, Greece closed its consulate in Skopje, FYROM's capital, and instituted a unilateral blockade of FYROM by closing its northern port of Thessaloniki to any goods going into FYROM, with the exception of humanitarian aid.<sup>281</sup> Greece did not inform any EU members before taking

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### *Amendment II*

1. In so doing the Republic shall not interfere with the sovereign rights of other States nor in their internal affairs.

2. This amendment complements the first paragraph of Article 49 of the Constitution of the Republic of Macedonia.

*Hellenic Republic*, 1994 E.C.R. at I-3043-44. To be fair, Greece also claimed that FYROM printed maps, school books, and other material indicating what was or should be part of FYROM. *See id.* at I-3044.

274. Kerin Hope, *Fears Grow over Action Against Macedonia*, FIN. TIMES, Feb. 18, 1994, at 1.

275. *See Xenophobia*, *supra* note 258, at \*1.

276. *EU/Macedonia: Nine EU States Have Opened Diplomatic Relations with Skopje*, EUR. REP., Jan. 8, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*1.

277. *Greece Upset*, *supra* note 269.

278. *Id.*

279. *Id.*

280. *See EU/Macedonia: Burying the Hatchet with Skopje*, EUR. REP., Feb. 16, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*1; *Greece Update: International Affairs*, Country Risk Serv., Feb. 1, 1994, available in WESTLAW, BUS-INTL-C Database.

281. *See Outlook: Economic Sobriety*, COUNTRY REP., Feb. 16, 1994, available

this action<sup>282</sup> which resulted in suspending approximately eighty percent of the trade and ninety to one hundred percent of the fuel oil going into FYROM.<sup>283</sup> Because of great domestic pressure, Greece banned the importation of products from FYROM and extended the blockade to all Greek customs points a few days later.<sup>284</sup>

The other members of the EU reacted with shock and outrage.<sup>285</sup> The EU provided humanitarian aid to FYROM,<sup>286</sup> and Britain in particular approved additional aid money.<sup>287</sup> The Greek blockade had the potential to effectively cripple this young nation<sup>288</sup> and further destabilize the Balkans.<sup>289</sup>

### C. Greece's Justification and the Commission's Actions

Greece claimed that it initiated the blockade because FYROM refused to guarantee Greece's borders.<sup>290</sup> The Greek government also claimed that this embargo was a political issue, not a legal one, and "hoped the matter could be resolved without action to condemn Greece in the European Court of Justice."<sup>291</sup> Greece cited EC Treaty Article 224,<sup>292</sup> "Member

in WESTLAW, BUS-INTL-C Database, at \*2.

282. *EU/Macedonia: Greek Embargo Against Skopje Unanimously Rejected*, EUR. REP., Feb. 19, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*2.

283. See *Commission Awaits Justification of Greece's Embargo Against Macedonia*, 11 Int'l Trade Rep. (BNA) No. 8, at 292 (Feb. 23, 1994) (noting that 80% of Macedonia's trade comes through Thessaloniki); *EU/Macedonia: Commission to Play Honest Broker*, EUR. REP., Feb. 23, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*1 [hereinafter *Honest Broker*] (remarking on the fact that 90% of Macedonia's fuel passes through Thessaloniki); and *EU/Macedonia: Greece Refuses to Budge*, EUR. REP., Feb. 26, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*2 [hereinafter *Greece Refuses*].

284. *The Political Scene: The Greek Embargo Was Triggered by Recognition*, COUNTRY REP., Mar. 16, 1994, available in WESTLAW, BUS-INTL-C Database.

285. See Gaunt, *supra* note 269, at \*1.

286. Hope, *supra* note 274.

287. Gaunt, *supra* note 269, at \*2.

288. Stephen Weeks, *Greece Tightens Trade Embargo on Macedonia Despite Criticism*, Reuter, Feb. 18, 1994 (on file with the author).

289. See Hope, *supra* note 274; Gaunt, *supra* note 269, at \*2.

290. Brian Love, *Greece Says Macedonia Embargo Prompted by Risk of Violence*, Reuter Eur. Community Rep., Feb. 23, 1994, available in LEXIS, World Library, REUEC File, at \*1.

291. *Id.*

292. *Honest Broker*, *supra* note 283, at \*1.

state consultation in emergencies," which states:

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 disturbances affecting the maintenance of law and order, in the event of war, 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 international security.<sup>293</sup>

However, Greece did not contact other member nations to consult with them, claiming technical difficulties prevented them from doing so.<sup>294</sup>

In a letter dated February 22, 1994, the Commission asked Greece to justify its actions.<sup>295</sup> At the same time the Commission also began mentioning invoking Article 169 as a possible course of action against Greece.<sup>296</sup> The Council condemned Greece's measure as "legally unjustified and politically unwise," while the Commission decided to send an official to both Skopje and Athens in an attempt to get both parties to settle their differences.<sup>297</sup> This effort was unsuccessful.<sup>298</sup> The Commission did receive two letters from Greece, one on February 25, 1994 from Papandreou blaming FYROM's intransigence as the reason for the embargo,<sup>299</sup> and one on February 26, 1994 declaring Greece's legal position on the embargo.<sup>300</sup>

In March, the Commission examined Greece's justifications and decided to try to affect negotiations between Skopje and Athens.<sup>301</sup> Meanwhile, in an effort to lessen the effects of the embargo, Turkey and Bulgaria, along with Albania and Italy,

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293. EC TREATY art. 224.

294. *Honest Broker*, *supra* note 283, at \*1.

295. *Greece Refuses*, *supra* note 283, at \*2.

296. *Id.*; see *supra* part IV.B.1.

297. *Honest Broker*, *supra* note 283, at \*1.

298. See *Greece Refuses*, *supra* note 283, at \*1.

299. *Commission v. Greece*, Case No. C-120/94, slip op. at I-5 (Opinion of Advocate General Jacobs, delivered on April 6, 1995) (on file with the author).

300. *Id.*

301. *EU/Macedonia: Commission Postpones Action Against Greek Embargo*, EUR. ENERGY, Mar. 4, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*1.

agreed to build a road and railway corridor through the first two countries.<sup>302</sup> Parliament also asked the Council and the Commission to "increase EU economic, financial and technical aid to the FYROM so as to prevent extremist political movement[s] [from] gaining positions of power. This would be the 'inevitable result', if living conditions were to deteriorate."<sup>303</sup>

During March, Greece's Foreign Minister Carolos Papoulias and UN negotiator Cyrus Vance met in Geneva under UN auspices.<sup>304</sup> However, the Greek position was resolute in that Skopje must make a gesture to show its willingness to negotiate in a manner that considered Greek demands.<sup>305</sup> The European Parliament also adopted a resolution denouncing the blockade and urging the Greek government to end this activity.<sup>306</sup>

#### D. *The Case Referred to the European Court of Justice*

On April 6, 1994, the Commission resolved that it would refer the issue of Greece's blockade to the ECJ on April 13, and at the same time it appealed to both Greece and FYROM to renew discussions to resolve their conflict.<sup>307</sup> As Commissioner van den Broek stated in a press conference, "The Commission's decision is based on Article 225 of the EC Treaty which applies to cases in which Article 224 has been cited unjustifiably by a Member State in support of unilateral measures which would otherwise be in violation of Community law."<sup>308</sup> Article 225 concerning "minimizing distortion of competition in emergencies" states,

[1] If measures taken in the circumstances referred to in articles 223 and 224 have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the state concerned, examine how these measures can be adjusted to the rules laid down in this treaty.

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302. *Id.* at \*2.

303. *EU/Macedonia: European Parliament Censures Greek Embargo*, EUR. REP., Mar. 12, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*2.

304. *Id.* at \*1.

305. *Id.*

306. *Id.*

307. *Commission Refers*, *supra* note 4.

308. Press Conference of Mr. van den Broek on the Problem Greece/FYROM, Ref. No. BIO/94/96, Apr. 6, 1994 (on file with the author).

[2] By way of derogation from the procedure laid down in articles 169 and 170, the Commission or any member state may bring the matter directly before the Court of Justice if it considers that another member state is making improper use of the powers provided for in articles 223 and 224. The Court of Justice shall give its ruling in camera.<sup>309</sup>

This is the first case that the ECJ has considered under Article 225,<sup>310</sup> so it is definitely uncharted territory. The Commission also asked the ECJ for an injunction to be granted under Article 186,<sup>311</sup> which states that “[t]he Court of Justice may in any case before it prescribe any necessary interim measures.”<sup>312</sup> Article 225 authorizes the court to proceed in camera in case the accused member nation wants to use top secret information in its defense.<sup>313</sup> On April 13, the Commission confirmed that the referral to the ECJ was taking place.<sup>314</sup>

Greece claimed that the lawsuit was “unfounded” and that there was ‘no excuse for taking such measures.’<sup>315</sup> On May 24, Greece presented the ECJ with a hundred page document

309. EC TREATY art. 225. This article allows the Commission to skip the nonjudicial proceedings required by Article 169 and refer the case directly to the ECJ. *A Policy for the Balkans*, EUR. INSIGHT, Apr. 8, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*1.

310. *Injunction*, *supra* note 7.

311. *Id.*

312. EC TREATY art. 186.

313. *Id.* art. 225.

314. *EU/Greece: Commission Seeks Preliminary Injunction Suspending Embargo on FYROM*, EUR. REP., Apr. 16, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*1. One summary of cases before the ECJ describes the case as follows:

Case C-120/94 EC Commission v. Hellenic Republic: Application for a declaration that the Hellenic Republic has misused the powers provided for in art. 224 of the treaty in order to justify the unilateral measures adopted on 16 February 1994 and aimed at prohibiting trade, especially via the port of Thessaloniki, in products originating in, coming from or destined for the former Yugoslav Republic of Macedonia, as well as the importation into Greece of products originating in or coming from that republic, and in doing so, has failed to fulfil its obligations under art. 113 of the treaty and under the common rules for exports established by Regulations 2603/69, 288/82, 3698/93, and 2726/90; together with related issues.

Action brought . . . . . 25 April 1994.

Cases before the Court of Justice, *supra* note 239, at 16, 201-02.

315. *EU/Macedonia Athens Rejects European Commission's Arguments*, EUR. REP., May 28, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*1.

which attacked the Commission's position and argued that Greece's actions were "legally' and 'politically' justified."<sup>316</sup> The UN did make further attempts to promote a settlement of the conflict, but these efforts were not productive.<sup>317</sup>

On June 29, 1994, the ECJ refused to grant the interim measures requested by the Commission.<sup>318</sup> The ECJ rarely grants interim measures because the Commission must prove that the matter is urgent and that the matter affects the EU itself.<sup>319</sup> Thus, Greece won the first round.

## E. *The Refusal to Issue Interim Measures*

### 1. *The Court's Judgment*

The Court in its ruling stated that the ECJ has the power to prescribe interim measures under Article 186, but the Court could consider the fact that Article 225 provides for an accelerated proceeding, not requiring the administrative proceeding as does Article 169.<sup>320</sup> Under the ECJ's rules of procedure, an interim measure may be prescribed only when there are "circumstances giving rise to urgency and on the basis of pleas of fact and law establishing a *prima facie* case for the interim measures applied for."<sup>321</sup> Furthermore, "an order [prescribing interim measures] may in no way prejudice the decision of the Court on the substance of the case."<sup>322</sup>

316. *Id.*

317. See *Greece Update: FYROM Issue*, Country Risk Serv., June 1, 1994, available in WESTLAW, BUS-INTL-C Database; *The Political Scene: Negotiations with Greece are Stalled*, COUNTRY REP., June 15, 1994, available in WESTLAW, BUS-INTL-C Database.

318. Case C-120/94 R, Commission v. Hellenic Republic, 1994 E.C.R. I-3037, I-3068. The ECJ held a closed door hearing on June 14, 1994, on this case. *Greece/FYROM: Court of Justice Order Tentatively Expected in Mid-July*, EUR. REP., June 22, 1994, available in LEXIS, Eurcom Library, ECNEWS File, at \*1 [hereinafter *Order Tentatively Expected*]. Greece was confident of its position which it presented to the ECJ in a 300-page document. *Id.* "The document recalls the precautions taken by the Greek authorities before taking action against FYROM, including prior notification of their eleven EU partners and diplomatic overtures to President Gligorov, and stresses that the tensions and 'danger' on Greece's northern border show no signs of abating." *Id.*

319. *Macedonia; Euro Court Request over Lifting of Trade Embargo*, EUROWATCH, July 11, 1994, available in LEXIS, Eurcom Library, ECNEWS File.

320. *Hellenic Republic*, 1994 E.C.R. at I-3054.

321. *Id.*

322. *Id.* at I-3055.

Though the Commission appeared to present a *prima facie* case, the court refused the request for interim measures for four reasons.<sup>323</sup> First, at the interim relief stage it is impossible to be sure that the member state violated EU law unless the ECJ goes into a detailed examination of a case where the member nation relied on Article 224.<sup>324</sup> Secondly,

even if the Court were competent to make the political judgments which would be indispensable in order to assess the existence of harm and, above all, of a link between that harm and the conduct of the Greek Government, it could not, in any event, form an opinion at this stage of the procedure for interim measures.<sup>325</sup>

Such a judgment would prejudice the ECJ's substantive decision on the case.<sup>326</sup> Third, the Community failed to establish that EU traders suffered "irreparable harm."<sup>327</sup> Fourth, because Article 225 designates the Commission's duty to be that of protecting EU interests, the ECJ cannot consider harm to a nonmember nation when addressing a request for interim measures when the accused member nation uses Article 224 as a justification for its actions.<sup>328</sup>

## 2. *The Advocate General's Opinion on Interim Measures*

Even though the interim measures were denied, the Advocate General's discussion of the case presented for the first time the cohesive arguments of the parties. The Advocate General discussed the history of the problem including Greece's demands on FYROM,<sup>329</sup> the process by which FYROM sought to be

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323. *See id.* at I-3066-67.

324. *Id.*

325. *Id.* at I-3066.

326. *Id.* at I-3067.

327. *Id.*

328. *Id.* at I-3068.

329. *Id.* at I-3042-45; *see supra* text accompanying and in notes 272-273.

recognized by the EU member nations,<sup>330</sup> and the arguments for and against the blockade.<sup>331</sup>

*a. The Commission's Arguments*

The Commission claimed the following: (1) the situation did not merit Article 224 action by Greece because Greece could not establish that it acted within one of the situations referred to in Article 224;<sup>332</sup> (2) the adopted measures exceeded what was minimally necessary;<sup>333</sup> and (3) the consultations provided for in Articles 224 and 225 must occur to minimize the effect of the actions on the EU.<sup>334</sup> The Commission believed that Greece did not establish the necessity of Article 224 action in that it did not prove "the existence of either 'serious internal disturbances affecting the maintenance of law and order' in Greece or 'serious international tension constituting a threat of war' at the time of the adoption of the measures."<sup>335</sup> The Commission looked to the ECJ's case law, developed under Article 36<sup>336</sup> dealing with this article's scope, which provides that "the threat to law and order must consist in prejudice to the fundamental interests of the State . . . with which it cannot deal using the means at its disposal . . . ."<sup>337</sup> The Commission claims that the situation as described in Article 224 is more restrictive than that of Article 36,<sup>338</sup> and Greece has not established that the situation so seriously threatened Greece's internal security and

330. *Hellenic Republic*, 1994 E.C.R. at I-3045-46. This portion of the case details the Council's conditions for recognition of countries which were created after the breakup of Yugoslavia. *Id.* The case discusses the various reports and Council meetings which led to the provision of aid for FYROM and to some member nations' recognition of FYROM. *See id.* at 3047-48.

331. *Id.* at I-3050-52.

332. *See id.* at I-3055; *see also supra* text accompanying note 293.

333. *Hellenic Republic*, 1994 E.C.R. at I-3055.

334. *Id.* at I-3056.

335. *Id.*

336. Article 36 provides that a member nation can restrict or prohibit imports or exports on the "grounds of public morality, public policy or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property." EC TREATY art. 36. These restrictions cannot be arbitrary or be used as a cover for curtailing trade between member nations. *Id.*

337. *Hellenic Republic*, 1994 E.C.R. at I-3056.

338. *Id.*

interests so that the only way to control the situation was to initiate the blockade against FYROM.<sup>339</sup>

While [the Commission] does not deny that there is a war in the Balkans which may spread, it does not accept that the conduct of the FYROM complained of by the Hellenic Republic, taken as a whole, can reasonably be regarded as a threat of war. There is a political conflict between the Hellenic Republic and FYROM of which the Commission denies neither the existence nor even the gravity. The Commission also notes that conflict arouses deep emotions in Greece, the strength of which can be explained by the history of the Hellenic nation. It was in the context of that political conflict that the Hellenic Republic had recourse to economic sanctions *as a means of imposing its views and obtaining the concessions it wished from the FYROM.*<sup>340</sup>

In other words, Greece was not responding to a threat of war but was trying to browbeat a weak FYROM into accepting its demands.<sup>341</sup> FYROM is in economic crisis, has no reserves, and has an extremely small military compared to that of Greece, a member of NATO.<sup>342</sup> Thus, Greece is using Article 224 to accomplish objectives not within the contemplation of that treaty article.<sup>343</sup>

#### *b. Greece's Arguments*

Greece argued that this controversy was a matter of external security, and, as such, not appropriate for ECJ consideration.<sup>344</sup> Greece contended that the threat of war was confirmed by a UN report that in "the view of the mediator, Mr. Vance, that 'if a mutually agreeable settlement could not be reached by the parties, peace in the region might be put at risk.'"<sup>345</sup> It also considered the Commission's view of the rela-

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339. *Id.*

340. *Id.* at I-3057 (emphasis added).

341. *See id.*

342. *Id.*

343. *Id.*

344. *Id.* at I-3058.

345. *Id.* at I-3058-59. The Secretary-General's opinion does not elaborate on the meaning of Mr. Vance's comment nor its context, leaving it open to several interpretations. *See id.* Does it mean that peace is at risk due to the possibility

tionship between Articles 36 and 224 as unacceptable.<sup>346</sup> Alternatively, Greece claimed that instituting a blockade was the only peaceful way to preserve its cultural identity and heritage and to protect itself from FYROM's propaganda.<sup>347</sup> The other means of achieving these ends was the withholding of recognition by other member nations; however, the members gave their recognition by the end of December 1993.<sup>348</sup> As to the relationship between a common foreign policy and Article 224, Greece argued that if such a relationship existed, the ECJ could not review the case because it would be covered by Title V of the Union Treaty.<sup>349</sup>

As for the use of Article 224<sup>350</sup> referred to in Article 225's second paragraph,<sup>351</sup> Greece contended that this could occur "where Article 224 has manifestly been relied upon not in order to achieve the political aims of that provision but in order to protect economic interests."<sup>352</sup> Greece also maintained that improper use of Article 224 powers might occur if an EU member were to generally ignore its obligations to the EU, "but not where selective and moderate retaliatory measures" like the ones then in place are used.<sup>353</sup> Greece further argued "that the common commercial policy allows the Member States a certain latitude for adopting economic sanctions, since foreign policy does not yet appear to have been integrated into the Community and the European Union."<sup>354</sup> Thus, when both foreign policy

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of armed conflict between Greece and FYROM, or is it at risk due to the possibility of a civil war within FYROM with the nationalists attempting to take power?

346. *Id.* at I-3059; see *supra* text accompanying notes 337-339.

347. *Hellenic Republic*, 1994 E.C.R. at I-3059.

348. *Id.*

349. *Id.* "Title V . . . builds on the ideas of the [SEA] by regulating the procedures for a common foreign and security policy to be discussed within the European Council and the Council." Kirschner, *supra* note 17, at 243. The Commission and the European Parliament are also involved in this area. *Id.* "However, no jurisdiction is transferred to the Court of Justice." *Id.*

350. See *supra* text accompanying note 293.

351. Article 225 states that the Commission may file a case against any member nation when that nation improperly uses the powers provided for in Article 224 that permit unilateral action. EC TREATY arts. 224, 225; see *supra* text accompanying note 309.

352. *Hellenic Republic*, 1994 E.C.R. at I-3060; see *supra* text accompanying notes 293 & 309.

353. *Hellenic Republic*, 1994 E.C.R. at I-3060.

354. *Id.*

and commercial policy are involved, the foreign policy element turns the commercial policy element into a tool of foreign policy.<sup>355</sup> As a result, Greece's actions in relation to FYROM were not within the scope of Article 113, which deals with a common trade policy.<sup>356</sup>

#### F. Events Following the Refusal

Since the ECJ refused to grant the injunction, FYROM continued its struggle to survive the blockade.<sup>357</sup> Furthermore, FYROM elections came and went with Gligorov's party gaining a two-thirds majority in Parliament.<sup>358</sup> The Greek Parliament elected Costis Stephanopoulos, a conservative, as President in March 1995 to replace Karamanlis at the expiration of his term,<sup>359</sup> and Stephanopoulos was sworn in on March 10, 1995.<sup>360</sup> Papandreou had to maneuver carefully to muster the

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355. *Id.*

356. *See id.*

357. *See generally The Former Yugoslav Republics: Macedonia*, Country Risk Serv., June 1, 1994, available in WESTLAW, BUS-INTL-C Database (noting that industrial production is down and retail prices are up but Romania has opened a special corridor for transportation of food to Macedonia though plans for a Bulgarian rail link are on hold); *The Economy: Financial Arrangements are Making Progress*, COUNTRY REP., June 15, 1994, available in WESTLAW, BUS-INTL-C Database (explaining that the embargo has shut down most of the metallurgical industry and the Skopje oil refinery so that petroleum products have to be trucked in from Bulgaria and Albania); *Outlook: Links with Albania & Bulgaria Have Increased in Importance*, COUNTRY REP., Sept. 2, 1994, available in WESTLAW, BUS-INTL-C Database (revealing that the embargo has forced Macedonia to improve its transportation links with Albania and Bulgaria as well as to improve its strained political relations with them); *EU: ECU 23 Million Aid for Macedonia to Ease Repercussions of International Sanctions*, Agence Eur., Dec. 2, 1994, available in WESTLAW, INT-NEWS Database (describing the distribution of humanitarian aid totaling 23 million ECU to FYROM through the EU's PHARE programme); *Less Bad Than it Looks in Macedonia*, BUS. E. EUR., Feb. 6, 1995, available in WESTLAW, BUS-INTL-C Database (discussing Macedonia's stabilization program and the effect of the embargo as a whole); *FYR Macedonia: No Respite*, BUS. E. EUR., Feb. 27, 1995, available in WESTLAW, BUS-INTL-C Database (placing the cost of the embargo at \$500 million).

358. Jovan Kovacic, *Macedonia: Macedonia's President Faces Hard Tasks Ahead*, Reuter, Oct. 31, 1994, available in WESTLAW, INT-NEWS Database, at \*1.

359. *See, e.g., Greece: Government List*, Reuter, Mar. 8, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1.

360. *Greece: Government List*, Reuter, Mar. 29, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1.

necessary votes to elect a President so that new elections would not be called—elections that probably would have ousted PASOK from power.<sup>361</sup> Numerous efforts by the United States and the UN failed to find a solution to the impasse between Greece and FYROM<sup>362</sup> though in March 1995 Greece did re-

361. See *End of Term for Papandreou*, ECONOMIST, Mar. 25, 1995, at 60.

362. See generally *Political Outlook: Foreign Relations*, COUNTRY FORECASTS, June 22, 1994, available in WESTLAW, BUS-INTL-C Database, at \*1 (declaring that U.N. brokered talks between the two parties probably will not make any progress until after Greek local elections in October or Macedonian national elections in November); *EU/Macedonia: Greece Dismisses a Solution Proposed by Bonn*, EUR. INSIGHT, Sept. 9, 1994, available in LEXIS, Eurcom Library, ECNEWS File (describing the deadlocked situation between the two parties and their rejection of a proposed German solution); *Greece: Spokesman Denies Papandreou Shift on Macedonia Name*, BBC Monitoring Serv., Oct. 6, 1994, available in WESTLAW, INT-NEWS Database (reaffirming Greece's stance on Macedonia's name); *Macedonia: Interview with President Gligorov on Relations with Neighbours, Rest of Europe*, BBC Monitoring Serv., Oct. 17, 1994, available in WESTLAW, INT-NEWS Database, at \*3-\*4 (inferring that Macedonia will not change its name); *Switzerland: UN Says No Progress in Macedonia Name Talks*, Reuter, Nov. 7, 1994, available in WESTLAW, INT-NEWS Database (noting that U.N. chief Boutros Boutros-Ghali spent six hours with FYROM President Gligorov and made no progress towards a solution); *Macedonia: President Gligorov Blames Greece for Failure of Geneva Talks*, BBC Monitoring Serv., Nov. 9, 1994, available in WESTLAW, INT-NEWS Database (reporting that no progress was made at talks and blaming Greece for this); Michael Shields, *Hungary: Greece Blocks Macedonia's Admission to CSCE*, Reuter, Nov. 18, 1994, available in WESTLAW, INT-NEWS Database, at \*1 (describing Greece's blocking of FYROM's admission to the Conference on Security and Cooperation in Europe); *Greece: Greece Asks EU to Put Pressure on Macedonia*, Reuter, Nov. 25, 1994, available in WESTLAW, INT-NEWS Database (describing Greece's request for the EU to pressure FYROM into solving its problems with Greece); *Macedonia: President Gligorov Tells EU Officials No Negotiations on Republic's Name*, BBC Monitoring Serv., Dec. 5, 1994, available in WESTLAW, INT-NEWS Database (stating that FYROM is willing to negotiate with Greece concerning all of their differences, excluding FYROM's name); *Greece: U.S. Envoy Meets Papandreou on Macedonia*, Reuter, Dec. 15, 1994, available in WESTLAW, INT-NEWS Database (explaining that the Clinton-appointed U.S. envoy Matthew Nimetz met with various Greek officials and will be meeting with FYROM President Gligorov); *Macedonia: Greek Party Leader in Macedonia to Discuss Balkan "Mini-CSCE"*, BBC Monitoring Serv., Dec. 21, 1994, available in WESTLAW, INT-NEWS Database (noting that a Greek political figure will visit FYROM and meet with government officials even though his party holds no Greek Parliamentary seats, only seats in the European Parliament); *Macedonia: Foreign Minister Says No Negotiations with Greece on National Identity*, BBC Monitoring Serv., Dec. 29, 1994, available in WESTLAW, INT-NEWS Database (containing the Macedonian view that negotiations are at a complete standstill); *Macedonia: Senior U.S. Official Meets Macedonian President*, BBC Monitoring Serv., Jan. 10, 1995, available in WESTLAW, INT-NEWS-C Database (stating

lease to FYROM some oil derivatives that it had been holding in Thessaloniki since the beginning of the embargo.<sup>363</sup>

G. *The Advocate General's Opinion on the Merits*<sup>364</sup>

1. *The Opinion Itself*

The ECJ heard the arguments on the merits of this case in camera on February 1, 1995.<sup>365</sup> On April 6, 1995, the Advocate General released his nonbinding opinion against the Commission, shocking FYROM<sup>366</sup> and thrilling Greece.<sup>367</sup>

As with the Advocate General's Opinion on the request for interim measures,<sup>368</sup> the opinion begins with a historical overview of the conflict between Greece and FYROM,<sup>369</sup> and subsequent institution of the blockade.<sup>370</sup> It then discusses the com-

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that Assistant U.S. Secretary of State Richard Holbrooke met with President Gligorov which Holbrooke hopes will help him aid U.S. mediator Matthew Nimetz in finding a solution to this conflict); *Greece: Foreign Ministry Says Greek Position on Macedonia is Firm and Unchanged*, BBC Monitoring Serv., Feb. 18, 1995, available in WESTLAW, INT-NEWS-C Database (reporting that talks are occurring under U.N. auspices but that Greece's position on direct talks was unchanged); *Greece: Greece Says Direct Talks with Macedonia Possible*, Reuter, Mar. 17, 1995 available in WESTLAW, INT-NEWS-C Database (revealing that Greece may now be willing to hold direct talks with FYROM); *Greece: Foreign Minister Optimistic About Talks with Macedonia in April*, BBC Monitoring Serv., Mar. 21, 1995, available in WESTLAW, INT-NEWS-C Database (noting that direct talks will occur in April in New York under U.N. auspices); *Macedonia: Macedonia Changing Stance to Reach Agreement*, BBC Monitoring Serv., Mar. 23, 1995, available in WESTLAW, INT-NEWS-C Database (stating that Greece believes that FYROM's position on its constitution and symbols may be changing).

363. *Macedonia: Greece Unexpectedly Releases Petrol from Thessaloniki for Macedonia*, BBC Monitoring Serv., Mar. 24, 1995, available in WESTLAW, INT-NEWS-C Database.

364. *Commission v. Greece*, Case No. C-120/94, slip op. (Opinion of Advocate General Jacobs, delivered on April 6, 1995) (on file with the author).

365. *E.g.*, Nigel Lowry, *EU: Greece Stands by Ban*, LLOYDS LIST, Feb. 2, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1.

366. *E.g.*, *Macedonia: Macedonia Shocked at Legal View on Greek Blockade*, Reuter, Apr. 6, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1 [hereinafter *Macedonia Shocked*].

367. *EU: Greece Macedonia—Athens Satisfied with Conclusions of Advocate General*, Agence Eur., Apr. 8, 1995, available in WESTLAW, INT-NEWS-C Database.

368. *See supra* part VI.E.2.

369. *Commission v. Greece*, Case No. C-120/94, slip op. at I-1-5 (Opinion of Advocate General Jacobs, delivered on April 6, 1995) (on file with the author).

370. *Id.* at I-5.

munications between Greece and the Commission concerning Greece's justifications for its actions against FYROM and the Commission's position on these actions.<sup>371</sup>

The Opinion systematically lays out three issues that must be dealt with in order to decide the case. They are as follows:

30. First, it is necessary to decide whether the action taken by Greece would, in the absence of the safeguard clause contained in Article 224, be contrary to Community law, in particular the provisions of Community law cited in the application.

31. Second, if the action taken by Greece is found to be contrary to the aforesaid provisions, it will be necessary to determine whether Greece could invoke Article 224 for the purpose of justifying its action on the ground that it was designed to counter 'serious internal disturbances affecting the maintenance of law and order' or 'serious international tension constituting a threat of war'.

32. Third, if Greece could invoke Article 224, it will be necessary to determine, in accordance with the second paragraph of Article 225, whether Greece has made improper use of the powers provided for under Article 224.<sup>372</sup>

#### *a. Actions Contrary to Community Law*

In determining whether Greece's blockade was contrary to EU law in the absence of Article 224,<sup>373</sup> the Advocate General first looked at the competency of the Community and the member states in the area of commercial policy.<sup>374</sup> The Commission explained that the Community has exclusive competency in the area of commercial policy under Article 113<sup>375</sup> and drew the

371. *Id.* at I-5-6.

372. *Id.* at I-7.

373. For the text of Article 224, see *supra* note 293.

374. *Greece*, slip op. at I-8.

375. *Id.*; EC TREATY art. 113 (as amended 1993). Article 113 reads as follows:

(1) The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

conclusion from ECJ case law that "exclusive Community competence deprives the Member States of any parallel competence in the field of commercial policy."<sup>376</sup> There were a number of regulations in effect at the time Greece instituted the embargo concerning quantitative restrictions on trade with the Community by non-Community states.<sup>377</sup> At least one of these regulations, Council Regulation No. 2603/69, provides safeguard measures in the event that there are shortages of essential goods and measures similar to those in EC Treaty Article 36.<sup>378</sup> However, another regulation, Regulation No. 2698/93, does not contain any such provision equal to Article 36.<sup>379</sup> Greece, however, has not used any of these regulation provisions,<sup>380</sup> and these provisions are not likely to apply.<sup>381</sup> Thus, the Advocate General concluded that Greece's embargo was "in principle incompatible with the provisions of Community law cited by the Commission, unless it can be regarded as falling within the scope of the safeguard clause contained in Article 224 of the Treaty."<sup>382</sup>

The Advocate General then addressed Greece's argument that the embargo was not within the scope of Article 113 since its purpose was to apply political pressure on FYROM, not to be used as a tool of commercial policy.<sup>383</sup> The Advocate Gener-

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(2) The Commission shall submit proposals to the Council for implementing the common commercial policy.

(3) Where agreements with one or more states or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations.

The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it.

The relevant provisions of article 228 shall apply.

(4) In exercising the powers conferred upon it by this article, the Council shall act by a qualified majority.

376. *Greece*, slip op. at I-8.

377. *See id.* at I-8-9. The Commission accused Greece of violating Council Regulation (EC) No. 2603/69, Council Regulation (EC) No. 288/82, Council Regulation (EC) No. 3698/93, and Council Regulation (EC) No. 2726/90. *Id.* at I-1.

378. *Id.* at I-9; *see supra* text in note 336.

379. *Greece*, slip op. at I-10.

380. *Id.*

381. *Id.*

382. *Id.* at I-9.

383. *Id.* at I-10.

al, in rejecting this argument, stated that the effect of the embargo was the “decisive element,” not its purpose.<sup>384</sup> “A measure which has the effect of directly preventing or restricting trade with a non-member country comes within the scope of Article 113, regardless of its purpose.”<sup>385</sup> Furthermore, the Commission has based several regulations which “impos[e] economic sanctions on non-member States for reasons of foreign policy rather than commercial policy” on Article 113.<sup>386</sup>

*b. The Threat Under Article 224*

Because the Advocate General determined that the embargo was illegal under EU law, he also discussed whether the threat to Greece rose to a level to satisfy Article 224.<sup>387</sup> He began with an analysis of Article 224 and how it covers “three exceptional situations in which a Member State may take measures that are capable of affecting the functioning of the common market.”<sup>388</sup> The two situations that may apply to Greece’s actions are: (1) the occurrence of internal disorder which affects the government’s ability to maintain law and order; or (2) the occurrence of war or great international tensions which constitute a threat of war.<sup>389</sup> Greece used both of these as justification for its actions.<sup>390</sup>

The Advocate General first examined the internal disturbance question. The Commission’s contention was that Article 36’s provisions concerning public security and Article 224’s reference to internal disturbances affecting law and order were analogous and thus that ECJ’s case law concerning “the restrictive interpretation of Article 36 [was] . . . applicable to Article 224.”<sup>391</sup> The Advocate General, however, believed that this interpretation should be limited in that while both provisions

384. *Id.*

385. *Id.*

386. *Id.* These regulations include those preventing trade between Iraq and Kuwait, preventing trade in certain goods to Libya, and preventing trade between the EU and Serbia and Montenegro. *Id.* at I-10 n.17.

387. *Id.* at I-11-16.

388. *Id.* at I-11; see *supra* text accompanying note 293.

389. *Greece*, slip op. at I-11. For the Commission’s argument concerning interim measures as explained in the Advocate General’s Opinion, see *supra* notes 335-342 and accompanying text.

390. *Greece*, slip op. at I-11.

391. *Id.*

should be strictly construed, they do have important differences.<sup>392</sup> The most important difference concerns the breadth of coverage of the two articles—while Article 36 permits member nations to derogate “from one aspect of the common market (admittedly a fundamental one); Article 224, on the other hand, permits derogations from the rules of the common market in general.”<sup>393</sup>

Article 224, according to the Advocate General, should be interpreted to cover a massive disintegration of internal order, much larger than the unrest that could justify action under Article 36.<sup>394</sup> “What seems to be envisaged is a situation verging on a total collapse of internal security, for otherwise it would be difficult to justify recourse to a sweeping derogation which is capable of authorizing the suspension of all of the ordinary rules governing the common market.”<sup>395</sup>

The Advocate General concluded that Greece failed to prove that such a breakdown of internal order occurred.<sup>396</sup> Greece did claim that virtually its entire population was angry at what was interpreted as FYROM’s “attempt to subvert Greece’s national identity”<sup>397</sup> and that the demonstrations, calls for border closure, and fears of a possible war, created a risk of internal disturbance as envisioned by Article 224.<sup>398</sup> However, the information provided to the ECJ was “vague and unsubstantiated,”<sup>399</sup> and in the eyes of the Advocate General did not come close to establishing the type of breakdown of internal order necessary to invoke Article 224.<sup>400</sup>

Next, the Advocate General turned his attention to the question of whether there was a threat of war or international tension such as to invoke Article 224.<sup>401</sup> Evidently, Greece did not argue that the matter was nonjusticiable.<sup>402</sup> As the Advo-

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392. *Id.* at I-12.

393. *Id.*

394. *Id.*

395. *Id.*

396. *See id.* at I-12-13.

397. *Id.* at I-12.

398. *Id.*

399. *Id.* at I-13.

400. *Id.*

401. *Id.*

402. *Id.* Greece did argue this issue in the hearing concerning interim measures. *See supra* note 349 and accompanying text.

cate General so succinctly put it, it is clear from Article 225's terms that the ECJ can review the legality of measures taken by member nations invoking Article 224 as a justification for such measures.<sup>403</sup> The problem is the standard by which the ECJ should judge these measures since there is very little applicable judicial criteria to determine if such a threat does indeed exist.<sup>404</sup> The Advocate General pointed out that war is inherently unpredictable and by nature unforeseeable.<sup>405</sup>

The Advocate General decided that the court must look at the threat of war from the subjective viewpoint of the member nation: in this case, Greece.<sup>406</sup> Each member nation has a different history and geography which influences its views, and as such, each individual nation is in a better position than the EU institutions to judge a threat from a third nation.<sup>407</sup> "Security is . . . a matter of perception rather than hard fact. What one Member State perceives as an immediate threat to its external security may strike another Member State as relatively harmless."<sup>408</sup> After considering the history of the Balkans—the general instability, ethnic strife, border disputes, and current armed conflict—along with the geopolitical environment, the Advocate General concluded that Greece's fear of war with FYROM, though possibly remote and indeterminate, was not completely unreasonable.<sup>409</sup>

Greece regarded FYROM's attempt to capture the history of Philip and Alexander of Macedon and use of it to mold its national consciousness as a threat to Greece's national identity.<sup>410</sup> Greece noted that textbooks in FYROM include maps showing Macedonia as including not only FYROM's territory, but also part of Bulgaria and Greece;<sup>411</sup> and Greece believed this was engendering feelings of aggressiveness in the younger generation which presumably would be used as an attempt to reconstitute ancient Macedonia.<sup>412</sup> While the Advocate General

403. *Greece*, slip op. at I-13.

404. *Id.*

405. *See id.*

406. *See id.* at I-14.

407. *Id.*

408. *Id.*

409. *Id.* at I-15.

410. *Id.*

411. *Id.*

412. *See id.*

admitted that these fears may have been entirely unfounded, considering FYROM's Constitution in its amended form,<sup>413</sup> he considered whether or not the fears were indeed held by the Greek government and people, and concluded that they were.<sup>414</sup> The Advocate General pointed out that if it were left to outside observers to determine what is reasonable behavior, wars might not occur; "[i]t is . . . the subjective assessment of the parties to the dispute which is decisive."<sup>415</sup>

The Advocate General goes on to conclude that whether or not the Commission's claim that Greece's action will probably increase internal tension and affect security, internally or externally, is a political determination.<sup>416</sup> There are no judicial tools that allow the court to analyze such problems and to determine that a dispute such as the instant one is more likely to be resolved by "dialogue and friendly persuasion than by economic sanctions."<sup>417</sup> Thus, Greece's use of Article 224 was justified.

### *c. Improper Use of Powers*

The last issue that the Advocate General examined was whether Greece improperly used the powers allowed by Article 224.<sup>418</sup> First, he examined the ECJ's scope of review under Article 225, which is limited because of the terminology of both Article 224 and 225, and the "nature of the subject-matter" involved.<sup>419</sup> Even after the SEA and the Union Treaty, it is still up to each member nation to decide if it wants to recognize a third party nation and how it wants to establish a relationship with that nation.<sup>420</sup> If a member nation decides that a third party nation presents a threat to it, then the threatened nation must decide how to respond.<sup>421</sup> It is not up to the ECJ to judge the propriety or likely success of this action.<sup>422</sup> As with the previous issue, there is no judicial criteria to evaluate

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413. See *supra* note 273.

414. *Greece*, slip op. at I-15-16.

415. *Id.* at I-16.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.* at I-17; see *supra* text accompanying notes 293 & 309.

420. *Greece*, slip op. at I-17.

421. *Id.*

422. *Id.*

such a matter and no legal test to determine if the means used are suitable for pursuing a political end because these are essentially political decisions.<sup>423</sup> Articles 224 and 225 make an "attempt to define the outer limits of the autonomy left to Member States in the field of foreign policy, bearing in mind that autonomy may 'affect the functioning of the common market' (Article 224) and may 'distort the conditions of competition in the common market' (Article 225)."<sup>424</sup> The limitation on this autonomy is that member states may not use this power improperly.<sup>425</sup> The Advocate General said that if a member nation instituted an embargo to protect domestic economic interests instead of in reaction to a political conflict, then such an embargo would be improper.<sup>426</sup> In fact, such an embargo was the only instance of which the Advocate General was aware which would constitute an improper use of power.<sup>427</sup> Importantly, there was no indication that Greece was using its embargo for such a purpose.<sup>428</sup>

The Advocate General then turned to the Commission's accusation that Greece's action violated the Community principles of proportionality and equal treatment which could make an otherwise lawful measure under Article 224 unlawful.<sup>429</sup> No one argued that the embargo against FYROM was discriminatory, so equal treatment was not involved. As for the proportionality argument, the Commission claimed that Greece's response to the perceived threat was excessive because it threatened FYROM's existence.<sup>430</sup> The Commission continued by stating that it would be sufficient if Greece instituted a limited embargo on military goods and strategic supplies while Greece claimed its action was appropriate because its embargo did not cover food and medical supplies.<sup>431</sup> The Advocate General added, "Doubtless many informed commentators would agree with the Commission that Greece's conduct constitutes an over-

423. *Id.*

424. *Id.* at I-18.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.* For Greece's argument during the hearing concerning interim measures, see *supra* text accompanying notes 347-348 and 352-353.

430. *Greece*, slip op. at I-18-19.

431. *Id.* at I-19.

reaction and that Greece could better protect its interests by diplomatic methods. But that view rests on a political analysis which the Court is ill equipped to carry out.<sup>432</sup> Still, he applied the balancing test implied in the proportionality examination.<sup>433</sup> Community interests are those that must be taken into account in this determination.<sup>434</sup> Ultimately, the effect of the embargo on Community trade was slight,<sup>435</sup> and the embargo probably would not have any noticeable effect on the Community's competitive situation.<sup>436</sup> Thus, Greece had not improperly used the power provided in Article 224.<sup>437</sup>

## 2. Analysis

The Advocate General's determination that Greece's embargo was a violation of EU law, particularly the various regulations, is arguably correct. His determination that the embargo was in violation of Article 113 is also consistent with prior ECJ case law concerning the definition of a "common trade policy" under this article.<sup>438</sup> In fact, the Advocate General noted that while Greece claimed its actions did not fall within the scope of Article 113, Greece, from the beginning of this matter, had relied on Article 224 to say that the embargo was in compliance with EU law.<sup>439</sup>

Once the Advocate General determined that Greece's action violated EU law, he discussed whether or not Article 224 applied to this situation.<sup>440</sup> His decision that Article 224 required an internal disorder of a much larger magnitude than Article 36—bordering on complete disintegration of internal securi-

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432. *Id.*

433. *Id.*

434. *Id.* Article 225 provides that the action taken in accordance with Article 224 must "have the effect of distorting the conditions of competition in the common market . . ." EC TREATY art. 225 (emphasis added).

435. *Greece*, slip op. at I-19.

436. *Id.*

437. *Id.*

438. See Joan Redleaf, *The Division of Foreign Policy Authority Between the European Community and the Member States: A Survey of Economic Sanctions Against South Africa*, 12 B.C. THIRD WORLD L.J. 97, 116 (1992) (stating that "[i]f the sanctions are actually restrictions on trade with a non-Member State, they would appear to fall within the realm of common commercial policy under current Court opinions").

439. *Greece*, slip op. at I-11.

440. See *supra* part VI.G.1.b.

ty—appears to be reasonable.<sup>441</sup> Even if the requirement for both articles is the same, Greece did not appear to have met its burden of proof on either account. The Advocate General referred to the proof submitted as “vague and unsubstantiated.”<sup>442</sup> Even considering various press reports, the situation did not seem that it was beyond control of the law enforcement authorities.<sup>443</sup>

While the Advocate General’s analysis concerning the threat of war or international tension under Article 224 is probably correct, it is perhaps the most troubling. It essentially says that since there is no standard by which the court can judge such things, the court must look at the matter from the subjective viewpoint of the member nation involved.<sup>444</sup> If this is the case, the Greek public probably does have a fear, unfounded though it may be, that this conflict with FYROM could turn into war.<sup>445</sup> Former Greek Prime Minister and former President, Constantine Karamanlis, made a statement which may help explain the origin of this fear when he spoke to the Greek Parliament in 1975 after his return to Greece.<sup>446</sup> He stated,

‘History shows . . . that what the Greeks win in war, they proceed to lose in the peace . . . . We lose because we have the bad habit of putting political antagonism first and our national interest second.’ Foreign enemies could take advantage of these weaknesses, because ‘we

441. See *supra* text accompanying notes 391–395.

442. *Greece*, slip op. at I-13.

443. One article did state that there was a mass demonstration in Thessaloniki on March 31, 1994, composed of one million people, or 10% of Greece’s population, who wanted the government to take a tougher stance. *The Political Scene: Greece Claims its Security Is Threatened*, COUNTRY REP., May 18, 1994, available in WESTLAW, BUS-INTL-C Database, at \*1 [hereinafter *Political Scene*]. While this particular rally occurred after the initiation of the blockade, this was the third demonstration in 18 months. *Id.* The Greek European Affairs Minister, Theodore Pangalos, in speaking to the European Parliament’s foreign affairs committee, stated, “We thought it preferable for us now to apply (. . . ) [sic] the safeguards clause rather than waiting until people started burning trucks in Skopje.” Love, *supra* note 290, at \*1. Afterwards, Pangalos told reporters that “there had been incidents of stone-throwing at the border and that Greece was worried about tension in the area,” and it was in this sense that he referred to burning trucks. *Id.*

444. See *supra* text accompanying notes 406–408.

445. See *supra* note 406–415 and accompanying text.

446. See WOODHOUSE, RESTORER, *supra* note 244, at 222.

are incapable of accurately assessing international circumstances.' The Greeks imagined that Greece was the centre of the world's political interest—'the navel of the earth'—which led to the delusion that 'we can dictate our own policy to others, both friends and enemies, great and small.'<sup>447</sup>

In the instant case, Greece is certainly "inaccurately assessing international circumstances"<sup>448</sup> from an objective point of view. FYROM is a small country fighting for its economic existence and has only a small military.<sup>449</sup> Greece, on the other hand, is a member of both the EU and NATO and is well equipped militarily.<sup>450</sup> While the Advocate General is correct that if it were left to outside observers to assess what is reasonable, wars might not ever occur,<sup>451</sup> a more accurate assessment of the situation should be expected from a country of Greece's international stature. Even Greece's evidence concerning the threat to its national identity is very weak from an objective point of view. FYROM, in fact, could make some of the same allegations. The area of Ancient Macedonia covered territory that is now within the territory of both Greece and FYROM.<sup>452</sup> As for the textbooks used in FYROM including maps which show Macedonia as including FYROM as well as parts of Greece and Bulgaria, there is no mention as to the time period covered by these maps.<sup>453</sup> Any accurate classical text concerning Ancient Greek Civilization will have Macedonian territory varying depending on the time referenced.<sup>454</sup> Presumably, Greek textbooks would also have Macedonia including these various territories based on the time period depicted. As for this causing aggressive feeling that will be expressed by future genera-

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447. *Id.*

448. *Id.*

449. Case C-120/94 R, Commission v. Hellenic Republic, 1994 E.C.R. I-3037, I-3057.

450. *See id.*

451. *See supra* note 415 and accompanying text.

452. *See, e.g.,* PETER GREEN, ALEXANDER TO ACTIUM 16, 141, 364, 416 (1990) (mapping the territory of Macedonia, among others, at various degrees of accuracy, at various times during the Hellenistic Age); *Political Background, supra* note 267 (stating that the ancient kingdom of Macedonia is partly within the northern Greek province of Macedonia).

453. *See supra* note 411 and accompanying text.

454. *See, e.g.,* GREEN, *supra* note 452, at 16, 141, 364, 416.

tions,<sup>455</sup> FYROM could make the argument that by showing Greek students the same map, one day, these students would want to reconstitute Ancient Macedonia as the northern most Greek province. Ultimately, all of this speculation stems from Karamanlis' astute observation that Greeks tend to think of themselves as the center of the world and following that, they can dictate what they want to other countries.<sup>456</sup> FYROM has just as much right to the name Macedonia as Greece does. This claim to a shared history should be something that could bring these two countries together instead of keeping them apart.

If the ECJ accepts the Advocate General's subjective standard, then it could logically find that Greece was justified in using Article 224 as a basis for the embargo's legality. The Court could try to develop a standard by which this could be adjudged, but because this is also a politically sensitive area, it could very well leave the issue to the politicians to change this standard, if they so choose.

Furthermore, the Advocate General's assessment of the scope of review and a member state's autonomy is reasonable. The various EU treaties do not place any limitations on the ability of a member nation to recognize or not recognize a third party nation.<sup>457</sup> As for an improper use of power, if a nation is exercising this power for a reason not enunciated in Article 224 using one of the enunciated reasons as an excuse for the act, the act would be improper. Under the Advocate General's analysis, this is not the situation in the instant case.<sup>458</sup>

Concerning the proportionality argument, the Advocate General determined that the effect of the embargo on Community trade was minimal and that it would likely have an insignificant effect on EU competition.<sup>459</sup> Ultimately, figures and statistics support this assessment. For example, Greece provided statistics from one report which state that EU losses in exports to FYROM because of the blockade totaled 0.067% of total exports.<sup>460</sup> The Commission provided statistics stating that the "Union imported 258 million Ecus worth of goods from Macedo-

455. See *supra* notes 411-412 and accompanying text.

456. See *supra* note 447 and accompanying text.

457. See *supra* note 420 and accompanying text.

458. See *supra* notes 426-428 and accompanying text.

459. See *supra* notes 435-436 and accompanying text.

460. *Order Tentatively Expected*, *supra* note 318, at \*1.

nia in the first half of last year [1993] and exported 282 million Ecus worth of goods to Macedonia.<sup>461</sup>

The one issue that the Advocate General did not discuss was the fact that Greece, according to reports, did not abide by Article 225's consultation requirement regarding notice to the other member nations before it acted so that any effect on the member nations could be minimized.<sup>462</sup> If Greece gave no prior notification, then it technically violated Article 225. Evidently, the Commission did not take notice of this issue or mention it in its arguments on the merits, nor did the Advocate General consider it serious enough to discuss. Because the Article 225 violation was not emphasized, the ECJ probably would not consider it to be a serious matter or have reason enough to decide against Greece.

Ultimately, the Advocate General's Opinion is very persuasive and well grounded. If the ECJ adopted this Opinion's reasoning and decided not to define a judicial standard concerning the internal or external threats to security as mentioned in Article 224, then the Court, in all likelihood, would likewise find for Greece.

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461. *Greece Refuses*, *supra* note 283, at \*2.

462. Case C-120/94 R, *Commission v. Hellenic Republic*, 1994 E.C.R. I-3037, I-3049-50; *see supra* text accompanying note 282. There were reports that Greece had technical difficulties in contacting the other EU nations. *See supra* note 294 and accompanying text. However, Greece did present one document to the court to support a showing that it did notify the other nations prior to the embargo. *See supra* note 318 and accompanying text.

## H. The Diplomatic Solution

In September 1995, after much negotiation,<sup>463</sup> Greece and FYROM finally came to an agreement which was memorialized in an "Interim Accord" (Accord),<sup>464</sup> signed on September 13, 1995, in New York, at UN headquarters,<sup>465</sup> with the help of U.S. and UN negotiators.<sup>466</sup> FYROM agreed to change the emblem on its flag,<sup>467</sup> to interpret the "objectionable" constitutional provisions in a certain unobjectional manner,<sup>468</sup> and to hold

463. See *supra* note 362. The talks scheduled in New York for April 1995 never occurred. *Greece: Foreign Minister Pleased with EU Affirmation of Macedonia Embargo*, BBC Monitoring Serv., Apr. 10, 1995, available in WESTLAW, INT-NEWS-C Database. The Organization of Security and Cooperation (OSCE) announced its intention to mediate the dispute between Greece and FYROM. *Hungary: OSCE Plans to Mediate Between Greece, Macedonia*, Reuter, May 8, 1995, available in WESTLAW, INT-NEWS-C Database. Talks were held with UN mediator Cyrus Vance on the basis of changes to FYROM's constitution and flag. *Greece: Greece Will Not Recognize "Skopje with the Name of Macedonia"*, BBC Monitoring Serv., May 26, 1995, available in WESTLAW, INT-NEWS-C Database. UN Secretary General Boutros-Ghali made a three-day visit to Greece to discuss Greece's relationship with FYROM, among other issues. *Greece: Boutros-Ghali in Athens for Talks on Balkans*, Reuter, July 9, 1995, available in WESTLAW, INT-NEWS-C Database. Even Clinton Advisor George Stephanopoulos travelled to Greece, stating that he felt it would be in both parties' best interest to settle their differences even though Greece maintained that its position had not changed. *Greece: US Envoy Favours Ending Greek Embargo Against Macedonia*, BBC Monitoring Serv., Aug. 31, 1994, available in WESTLAW, INT-NEWS-C. Finally, Greece and FYROM agreed to have their foreign ministers meet in New York, at the urging of U.S. envoy Richard Holbrooke. *Greece: Greece and Macedonia to Start Talks*, Reuter, Sept. 4, 1995, available in WESTLAW, INT-NEWS-C Database. Shortly thereafter and before the New York meeting, the parties actually agreed to deal with the flag and constitutional issues. Sean Maguire, *Yugoslavia: Greece Macedonia Deal Good for Bosnia*, Reuter, Sept. 6, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1 [hereinafter *Deal Good*].

464. *Macedonia: Text of Greece-Macedonian Accord on Relations*, BBC Monitoring Serv., Sept. 18, 1995, available in WESTLAW, INT-NEWS-C Database [hereinafter *Accord*].

465. E.g., *United Nations: Greece, Macedonia Sign Accord at United Nations*, Reuter, Sept. 13, 1995, available in WESTLAW, INT-NEWS-C Database.

466. See *Deal Good*, *supra* note 463, at \*1 (emphasizing the U.S. role); *EU: Agreement Forthcoming Between Greece and FYROM*, Rapid, Sept. 8, 1995, available in WESTLAW, INT-NEWS-C Database (declaration by Mr. van den Broek on behalf of the European Commission) (stating that the agreement was reached under UN auspices).

467. *Accord*, *supra* note 464, at \*3.

468. *Id.*

further discussions on its name.<sup>469</sup> In return, Greece would lift the blockade when the Accord enters into effect at the expiration of a thirty day period, during which time Macedonia and Greece will implement the Accord.<sup>470</sup>

FYROM's Parliament approved the changes to its flag on October 5, 1995, by a vote of 110 for, 1 against, and 4 abstaining.<sup>471</sup> On October 9, the same Parliament approved the "Law on the Ratification of the Accord between the Republic of Macedonia and the Republic of Greece."<sup>472</sup> On October 13, "Greece and Macedonia signed a joint memorandum . . . aimed at normalising relations between [them]."<sup>473</sup> At midnight the same evening, Greece lifted the blockade.<sup>474</sup>

After signing the Accord, FYROM became a member of the Council of Europe<sup>475</sup> and the Organization for Security and Cooperation in Europe (OSCE).<sup>476</sup> Merchants in both Greece

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469. *Id.* at \*2.

470. *See id.* at \*7 (noting that the Accord will be effective 30 days from signing); Stephen Weeks, *Greece: FYROM Greece Accord Is Ray of Hope in the Balkans*, Reuter, Sept. 18, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1 (confirming that Greece will lift the blockade in exchange for the Macedonian changes).

471. *Macedonia: FYROM Will Alter Flag*, Agence Europe, Oct. 6, 1995, available in WESTLAW, INT-NEWS-C Database.

472. *Macedonia: Parliament Ratifies Accord with Greece*, BBC Monitoring Serv. Oct. 12, 1995, available in WESTLAW, INT-NEWS-C Database.

473. Gareth Jones, *Macedonia: Greece, Macedonia Sign Memorandum to Restore Ties*, Reuter, Oct. 13, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1.

474. *Greece: Athens Lifts Embargo on Macedonia*, Agence Europe, Oct. 17, 1995, available in WESTLAW, INT-NEWS-C; *Macedonia: Macedonia Welcomes Lifting of Greek Embargo*, BBC Monitoring Serv., Oct. 19, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1.

475. *E.g.*, *Greece: Government Satisfied with Macedonia's Accession to Council of Europe*, BBC Monitoring Serv., Sept. 30, 1995, available in WESTLAW, INT-NEWS-C Database. Until this time, Greece blocked FYROM's membership in this organization. *Macedonia: Speaker Welcomes Macedonia's Admission to Council of Europe*, BBC Monitoring Serv., Oct. 3, 1995, available in WESTLAW, INT-NEWS-C Database.

476. *Macedonia: Macedonia Admitted into OSCE*, Reuter, Oct. 13, 1995, available in WESTLAW, INT-NEWS-C Database. Greece also blocked FYROM's admission to this body until after the signing of the Accord. *See* Shields, *supra* note 362, at \*1. Note that the Organization for Security and Cooperation in Europe (OSCE) originated as the Conference on Security and Cooperation in Europe (CSCE). Ian Black, *OSCE Faces Poll Peace Challenge*, GUARDIAN, Dec. 7, 1995, at 18. The name change occurred in 1994. *Id.*

and FYROM will benefit from this agreement.<sup>477</sup> FYROM also took steps to join NATO's Partnership for Peace program.<sup>478</sup>

On January 11, an Athens radio broadcast announced that talks concerning FYROM's name will occur in New York, although no date was announced.<sup>479</sup> There is some indication, at least in some political corners, that Greek resolve in terms of its demand for the change may be weakening.<sup>480</sup> It is surprising that talks are scheduled due to the fact that Greece has been concerned with a very ill Papandreou, who was hospitalized and reportedly near death after collapsing on November 20, 1995.<sup>481</sup> Finally, on January 15, 1996, Papandreou resigned.<sup>482</sup> On January 17, 1996, Greece and FYROM opened

477. Elisaveta Konstantinova, *Macedonia: Assassination Attempt Throws Macedonia into Uncertainty*, Reuter, Oct. 5, 1995, available in WESTLAW, INT-NEWS-C Database, at \*2 (concluding that investment in Macedonia should rise sharply, the Skopje refinery should re-open, and various firms will be saved from bankruptcy); Dina Kyriakidou, *Greece: Greek Businessmen Flock to Post-Embargo Macedonia*, Reuter, Nov. 6, 1995, available in WESTLAW, INT-NEWS-C, at \*1 (reporting that Greek businessmen are attempting, albeit through red tape, to take advantage of the market in FYROM which once took 70% of Greek exports to the Balkans, and that they are also encouraging politicians to completely solve the dispute).

478. Jeremy Lovell, *Belgium: FYROM Joins NATO's Partnership for Peace Programme*, Reuter, Nov. 15, 1995, available in WESTLAW, INT-NEWS-C.

479. *Greece: Greece and Macedonia to Attend New York Talks on Name Issue*, BBC Monitoring Serv., Jan. 13, 1996, available in WESTLAW, INT-NEWS-C Database.

480. See Stephen Weeks, *Greece: Mitsotakis Says Greece Has No Prime Minister*, Reuter, Nov. 2, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1. Former Greek Prime Minister, Constantine Mitsotakis of the New Democracy Party, stated that Greece must accept either a composite name including the word "Macedonia," or the current name of the "Republic of Macedonia." *Id.* He also stated that the rest of the world would not support Greece if it demanded that the name completely exclude "Macedonia." *Id.* Some businessmen are also pushing for a complete settlement of this dispute. Kyriakidou, *supra* note 477, at \*1-\*2.

481. Helena Smith, *Greece: Greek Tragedy Becomes Farce*, OBSERVER, Dec. 24, 1995, available in WESTLAW, INT-NEWS-C Database, at \*1. He purportedly has lung, heart, and kidney problems, as well as a fatal blood infection. *Id.*

482. See Andrew Gumbel, *Greece: New Greek Leader a Friend to EU*, INDEPENDENT, Jan. 19, 1996, at 13, available in WESTLAW, INT-NEWS-C Database, at \*2.

liaison offices in Athens and Skopje.<sup>483</sup> The next day, PASOK chose Costas Simitis as the new Prime Minister of Greece.<sup>484</sup>

### I. Commission Withdrawal of the Case

Greece made it clear that it would not ask the ECJ to drop the Commission's case against them, stating that the Commission should see the case through to its end because the country did not want the stigma of having violated EU law.<sup>485</sup> However, the Commission withdrew its complaint at the end of October 1995, explaining that the complaint's purpose was fulfilled once Greece lifted its embargo.<sup>486</sup>

## VII. CONCLUSION

The ECJ's effectiveness in enforcing EU law through Articles 169, 170, and 177 is beyond question. Even though Article 171 did not give the ECJ the capability to fine violators, member nations have abided by the majority of ECJ judgments.<sup>487</sup> With *Commission v. Hellenic Republic*, the ECJ had the chance to define its enforcement power under Article 225.<sup>488</sup>

Arguably, the reason the ECJ has not had many problems in its enforcement of EU law is that each member nation wants to make the EU work and be effective in accomplishing the common goals of the member nations. In the Greece-FYROM situation, the goals of Greece and the EU were not the same and, quite frankly, were not even close. While diplomacy was certainly the best way to solve the problems between Greece and FYROM, the ECJ and the Commission had it within their power to ensure that this situation had an even more instructional, fortifying impact on the EU in the long run.

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483. *Greece: Greece and Macedonia Open Liaison Offices*, BBC Monitoring Serv., Jan. 19, 1996, available in WESTLAW, INT-NEWS-C Database.

484. Gumbel, *supra* note 482, at \*1.

485. *Greece: Greece Wants European Court to Hear Case of Embargo Against Macedonia*, BBC Monitoring Serv., Oct. 21, 1995, available in WESTLAW, INT-NEWS-C Database.

486. *Belgium: EU Drops Legal Action Against Greece on Macedonia*, Reuter, Oct. 24, 1995, available in WESTLAW, INT-NEWS-C [hereinafter *EU Drops*].

487. See *supra* note 207 and accompanying text.

488. See Case C-120/94 R, *Commission v. Hellenic Republic*, 1994 E.C.R. I-3037; *Commission v. Greece*, Case No. C-120/94, slip op. (Opinion of Advocate General Jacobs, delivered on April 6, 1995) (on file with the author).

The Advocate General released his opinion at the beginning of April; normally, the Court's opinion follows a few months later<sup>489</sup> which means that the Court should have reached its conclusions by May or June of 1995. As of October 1995, when the Commission requested that the ECJ drop the case,<sup>490</sup> the ECJ had not yet released its decision. While one can only speculate at the reasons for this delay, the reasons may include: (1) a desire for a negotiated solution; (2) the wellfounded fear that Greece would not abide by a decision against it;<sup>491</sup> or (3) the fear that a decision against the Commission would embarrass that body or cause Greece to proverbially "dig in its heels" even further, endangering a negotiated solution. If the ECJ considered any of these reasons, it was inappropriate for this judicial body to do so. The ECJ's job is to decide whether a violation of EU law has occurred. Even if the ECJ felt that the chance for a negotiated settlement justified withholding a judgment, it did not excuse the Court from not releasing a judgment after the Accord had been reached and before the Commission requested that the Court drop the suit.

The Commission, while certainly supporting a diplomatic solution, should have insisted, as did Greece, that the ECJ release its decision in this case, even though the problem was technically solved. There is precedence for this. In at least one Article 169 case,<sup>492</sup> the ECJ made a ruling that Italy was in violation of EU law for not implementing certain restrictions imposed by regulations.<sup>493</sup> The Court reasoned that even though Italy did not implement certain restrictions that were to

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489. *Macedonia Shocked*, *supra* note 366, at \*1.

490. *See EU Drops*, *supra* note 486.

491. "Papandreou warned [FYROM] 'it would be a strategic mistake' to pin its hopes on a European Court ruling against Greece's trade embargo." *Greece: Greece Hangs Tough in Feuds with its Neighbors*, Reuter, Jan. 15, 1995, available in WESTLAW, INT-NEWS Database, at \*2.

[T]he ruling of the European Court in February on the issue of the Greek countermeasures against Skopje would only play a role if there was an indication that the Skopje side was responding through specific activities. Otherwise, the clear Greek position will not change, regardless of the ruling. Although several circles have urged it, the embargo against Skopje is not expected to be lifted.

*Greece: Intention to Ease Embargo Against Macedonia Denied*, BBC Monitoring Serv., Jan. 21, 1995, available in WESTLAW, INT-NEWS Database.

492. Case 39/72, *Commission v. Italian Republic*, 1973 E.C.R. 101.

493. *Id.* at 117.

be in effect for a limited time period, a time period that had expired,<sup>494</sup> Italy had still violated EU law and was subject to a judgment as such.<sup>495</sup> The Commission should have continued the instant suit to clarify the Court's position concerning Article 225's implementation and its relationship between Articles 113 and 224. It would benefit Greece, as well as the other member nations of the EU, to know whether or not Greece actually violated the treaty in this instance. Arguably, the Commission did not proceed in the light of the Advocate General's unfavorable opinion, even though valuable information certainly could have been gained by a decision in this case.

While any ECJ decision would have had less of an impact since Greece had already cured its alleged treaty violation, the decision would have resulted in meaningful information for the growth of the EU, in the least threatening way possible given that a diplomatic solution had already been reached and the embargo lifted. If the member nations did not like the result, they could amend the EC Treaty to get the desired result. Perhaps they would want to add to the EC Treaty a standard by which the court should judge matters falling under Article 224. Importantly, this situation, in which one member nation takes unilateral actions not in compliance with EU law which are arguably trade related but are based on that member nation's subjective beliefs, is capable of repetition. Various member countries, certainly have their own individual ideas about their role in the EU and they are also likely to have very strong nationalistic feelings. At least in the Greek situation and up to this point, Greece did not let a hubristic dispute over a name—a name that FYROM has just as much claim to as Greece—and fears of territorial threats ruin the gains Greece has made through EU membership. This time the matter was handled through effective diplomacy, even if the negotiations were protracted. The next time, perhaps with a different member state, the situation may not turn out as well.

Now, the ECJ, the Commission, and the EU as a whole will simply have to deal with this question when the next situation

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494. *Id.* at 110–12. The regulations specified certain action during December 1969 and other action between February 9 and May 31, 1970. *Id.* at 110. The Council revoked the regulations on June 21, 1971. *Id.* Italy did not take legislative action to implement the regulations until October 1971. *Id.* at 111.

495. *Id.* at 116–17.

occurs and hope that the Union is strong enough to handle that challenge when it arises.

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