had jurisdiction to rule only on the damage caused to the victim's reputation in the United Kingdom.[37] The solution adopted by the Court was derived from that advocated by Professor Paul Lagarde as long ago as 1974[38] and championed by Advocate General Darmon.[39] The Court's judgment can be criticised for tending to lead to multiplicity of proceedings. However, the Court's general policy against this was confirmed in a subsequent case concerning Article 5(3) when the Court refused to extend jurisdiction to the place where a victim of a tort suffers economic loss consequential upon initial damage arising and suffered by the victim in another contracting State.[40] In doing so the Court went beyond its *Dumez* judgment,[41] which prevented indirect victims of a tort committed elsewhere from founding jurisdiction based on Article 5(3). Once again the Court's ruling can be traced to the views of an eminent French Professor of Private International Law, this time Hélène Gaudemet-Tallon,[42] supported by Advocate General Darmon.[43]

Finally, it is a matter of regret that the boundaries between Article 5(1) and 5(3) in the context of unjustified enrichment cases were not clarified by the Court in the *Kleinwort Benson* case.[44] The Court decided that it did not have jurisdiction under the 1971 Protocol to the Brussels Convention because the referring court was concerned with an intra-United Kingdom dispute under Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 and any ruling given by the Court of Justice would not be binding on the referring court.

PAUL BEAUMONT*

## III. EXTERNAL RELATIONS

DEVELOPMENTS in the external relations policy and law of the European Union are too numerous to describe comprehensively in this note. We have therefore identified and described what we consider to be some of the more significant issues. These are: recent moves towards enlargement, in particular the Union's pre-accession strategy; expansion of the Union's regional co-operation policies; the mid-term review of the Lomé Convention; and progress in the 1996

37. It would seem that the English courts are competent to rule on the damage caused throughout the UK and not just in England and Wales because the Court's ruling explicitly refers to the harm caused in the "State of the court seised" rather than the "place" of the court seised. The wording used by the Court contrasts with that proposed by Advocate General Darmon, *idem*, p.438, who referred to the "places where the newspaper is distributed" having jurisdiction solely in respect of the damage arising within their "judicial district".

38. (1974) R.C.D.I.P. 700.

39. *Supra* n.36, at pp.429–434.

40. Case C–364/93 *Marinari* v. *Lloyds Bank and Another* [1995] E.C.R. I–2719.

41. Case C–220/88 *Dumez France and Tracoba* v. *Hessische Landesbank (Helaba) and Others* [1990] E.C.R. I–49.

42. (1990) R.C.D.I.P. 367, 375.

43. *Supra* n.40, at pp.2728–2730.

44. Case C–346/93 *Kleinwort Benson Ltd* v. *City of Glasgow District Council* [1995] E.C.R. I–615. For a critical note on the case see Paul Beaumont, "Civil Jurisdiction: Anglo-Scottish Conflicts" (1995) 63 Scottish L.Gaz. 111.

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Intergovernmental Conference (IGC). Finally, we summarise four cases decided by the European Court of Justice with important implications for external relations law and policy.

## *A. Enlargement*

### *1. Pre-accession strategy*

Following enlargement to 15 member States in January 1995,[1] the Union embarked on a programme to prepare for the accession, after completion of the 1996 IGC, of those European countries with which Europe Association Agreements have been concluded. A pre-accession strategy was defined by the European Council at Essen on 9 and 10 December 1994.[2] The essential element of the strategy is a progressive preparation for integration of these countries into the internal market of the Union through the phased adoption of the Union's *acquis*. This is to be supported by the implementation of policies to promote their integration through the development of infrastructure and the promotion of inter-regional co-operation together with co-operation in the framework of trans-European networks and in the field of the common foreign and security policy (CFSP), judicial and home affairs, environment, culture, education and training. These integration policies are supported financially by the Community's PHARE programme[3] and complemented at a political level by the establishment of a "structured relationship" between the associated countries and the Union intended to provide a framework for developing practical co-operation and addressing topics of mutual interest. The relationship involves a dialogue consisting of periodic meetings between the Council of the European Union on the one hand and the associated countries on the other. There are biannual meetings of Foreign Ministers to discuss the full scope of relations with the associated countries, including in particular the progress of the integration process and an annual meeting at Head of State or Government level (in the margins of the European Council). Ministers responsible for internal market development, transport, telecommunications, research and the environment, justice and home affairs, culture and education meet once or twice a year. There are also meetings between representatives of national parliaments and the European Parliament.

### *2. Possible future members*

*(a) Central European States.* Europe Agreements with Bulgaria, Romania, the Czech Republic and Slovakia entered into force on 1 February 1995,[4] supplementing those which entered into force for Hungary and Poland in 1994. The structured dialogue with these six countries commenced early in 1995.

1. The Accession Treaty with Austria, Finland and Sweden entered into force on 1 Jan. 1995. Following a referendum on 29 Nov. 1994, in which 52.2% voted against joining the EU, Norway did not ratify the Accession Treaty.

2. See Essen European Council, Conclusions of the Presidency, EU Bull. 12–1994, p.8.

3. Council Reg. (EEC) No.3906/89 on economic aid to certain countries of Central and Eastern Europe (1989) O.J. L375 (23 Dec.) as last amended by Reg. (EC) No.1366/95 (1995) O.J. L133 (17 June).

4. (1994) O.J. L357, L358, L359 and L360 (31 Dec.).

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*(b) Baltic States.* Negotiations for Europe Agreements with Estonia, Latvia and Lithuania opened in late 1994 and agreements were signed in June 1995 bringing the Baltic States formally within the pre-accession strategy and enabling them to participate in the structured dialogue.[5]

*(c) Cyprus and Malta.* The Corfu European Council in June 1994 had concluded that the next stage of enlargement would include Cyprus and Malta. In March 1995 the Council agreed the general policy framework for the development of relations with Cyprus, including the implementation of a structured dialogue with a view to opening accession negotiations six months after the conclusion of the 1996 IGC.[6] Similarly, in relation to Malta's application for accession, the Council adopted conclusions in April 1995 estimating that negotiations would commence six months after the IGC, taking into account the results of that Conference.[7] In both cases, arrangements for the establishment of a structured dialogue of a quality equivalent to that offered to the associated countries of Central and Eastern Europe were agreed at the EU–Cyprus and EU–Malta Association Councils in June 1995.[8]

*(d) Slovenia.* Slovenia was integrated into the pre-accession strategy and began to participate in the structured dialogue following the signing of a Europe Agreement on 10 June 1996.[9]

### *3. Formal requests for accession*

Applications for accession have been received from the following countries: Romania, Slovakia, Latvia, Estonia, Lithuania, Bulgaria and the Czech Republic. (These add to the applications received from Poland and Hungary in 1994 and Cyprus and Malta in 1990.) The Council decided, on 17 July 1995 for Romania and Slovakia, on 30 October 1995 for Latvia, on 4 December 1995 for Estonia and on 29 January 1996 for Lithuania, Bulgaria and the Czech Republic, to commence the accession procedures in Article O of the Treaty on European Union.

## *B. Regional Co-operation*

There have ben significant developments in the Union's relations with two other regional groupings: the countries of the Mediterranean and the four member countries of Mercosur (Argentina, Brazil, Paraguay and Uruguay). In addition, the Union has expanded its partnership arrangements with Russia and the other independent States of the former Soviet Union.

### *1. Euro–Mediterranean partnership*

The Mediterranean region has been identified as a priority area of strategic importance for the Union. The concept of a Euro–Mediterranean partnership was

5. See Council conclusions on EU policy towards the Baltic Sea region, 29 May 1995, EU Bull. 5–1995, p.65.
6. EU Bull. 3–1995, p.71.
7. EU Bull. 4–1995, p.66.
8. EU Bull. 6–1995, p.115.
9. EU Bull. 6–1996, p.132.

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endorsed by the European Council at Essen and led to the convening in November 1995 of a Euro–Mediterranean Conference in Barcelona, which was intended to lay the foundations for future co-operation. The Conference was attended by ministerial representatives of the EU member States and their Mediterranean partners: Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia, Turkey and the Palestinian Authority. It resulted in the adoption of the "Barcelona Declaration" and an associated work programme.[10] The participants agreed to establish a comprehensive Euro–Mediterranean partnership comprising three strands: a political and security partnership involving strengthened political dialogue at regular intervals and possibly leading to the conclusion of a Euro–Med stability pact; an economic and financial partnership with a view to the creation of a Euro–Med free trade area; and a partnership with a social, cultural and human dimension to promote understanding between cultures and exchanges between civil societies.

The free trade area is to be established through the conclusion of Euro–Mediterranean Association Agreements. Such agreements have been signed with Israel,[11] Morocco[12] and Tunisia.[13] Negotiations are under way with Egypt, Jordan and the Lebanon.

### 2. *Mercosur*

An Inter-regional Framework Cooperation Agreement between the Union and its member States and the Southern Cone Common Market (Mercosur) and its member countries was signed on 15 December 1995.[14] The Agreement, the first of its type to be concluded by the Union, provides for trade, economic and development co-operation. Its ultimate objective is the establishment of an inter-regional association involving greater political co-operation and reciprocal trade liberalisation.

### 3. *Russia and the independent States of the former Soviet Union*

During 1995 the Commission produced three communications setting out strategies for the future relations of the Union with Russia, the Central Asian Republics and the Transcaucasian Republics,[15] based on the conclusion of partnership and co-operation agreements (PCAs). Such agreements provide for trade liberalisation in industrial products, economic co-operation and political dialogue. PCAs have been signed with Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan,

10. EU Bull. 11–1995, p.136.
11. 20 Nov. 1995.
12. 26 Feb. 1996.
13. 17 July 1996.
14. EU Bull. 12–1995, p.137.
15. COM(95)223 Final, COM(95)205 Final, COM(95)206 Final.

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Kyrgystan, Moldova, Russia, the Ukraine and Uzbekistan. Interim agreements (which bring into effect the trade-related aspects of the PCA pending entry into force of the full agreement) have now entered into force with Russia, the Ukraine, Kazakhstan and Moldova.

### *C. Mid-Term Review of the Lomé Convention*

The decision taken at the Cannes European Council in June 1966 on the amount and financing of the eighth European Development Fund (EDF)[16] enabled the member States and the African, Caribbean and Pacific (ACP) States to reach final agreement on the provisions of the mid-term review provided for by Article 366(2) of the Fourth ACP–EEC Convention. An agreement amending the Convention to give effect to the review was signed on 4 November 1995.[17] Among the principal elements of the amending agreement are:

(1) provisions strengthening the political and institutional aspects of the Convention, in particular by making respect for human rights, democratic principles and the rule of law an "essential element" of the Convention, breach of which by one party would entitle the other to suspend application of the Convention;
(2) a recognition that the development of trade is at the centre of ACP–EC co-operation, together with improvements in the preferential trading arrangements for the ACP;
(3) improvements to the procedures for implementing financial and technical co-operation to ensure a more efficient use of EDF resources;
(4) special provisions to allow for the accession of South Africa and Somalia.

The amending agreement will enter into force following ratification by the member States, the EC and ECSC and two-thirds of the ACP States. Until then, however, certain of its provisions have effect on a transitional basis.[18]

### *D. 1996 Intergovernmental Conference*

The IGC envisaged by Article N of the Treaty on European Union (TEU) was officially opened in Turin on 29 March 1996. Prior to the formal opening of the Conference, the Reflection Group set up to pave the way for it had identified the preparation for enlargement and giving the Union greater capacity for external action as two of the three main areas in which results should be achieved.[19] Institutional questions will be the focus of treaty amendments designed to prepare the Union for future enlargement, in particular the scope and weighting of qualified majority voting in the Council, the composition of the Commission and the legislative role of the European Parliament. Issues which have to be addressed with a

16. EU Bull. 6–1995. p.115.
17. EU Bull. 11–1995, p.91.
18. Decision No.6/95 of the ACP–EC Council of Ministers on the transitional measures to be applied from 1 Jan. 1996 (1995) O.J. L327/32.
19. See Final Report of the Reflection Group, Annex 15 to the Conclusions of the Presidency, Madrid European Council, EU Bull. 12–1995, p.46.

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view to strengthening the external action of the Union include decision-making procedures and the use of qualified majority voting under Title V of the TEU; the interplay of the various actors in implementing the Union's external action including the possible creation of a CFSP Analysis and Planning Unit; and coherence between the CFSP and external economic action. A first draft treaty text has been commissioned from the Irish Presidency in time for the Dublin European Council in December 1996.

### *E. Case Law (European Court)*

The European Court of Justice has given rulings in four cases which have important implications for the competence of the Community to enter into international agreements.

#### *1.* Opinion 1/94 *(re the Uruguay Round Treaties)*

On 15 November 1994 the Court gave its opinion on three questions submitted by the Commission concerning the competence of the Community and the member States in respect of the Uruguay Round Treaties establishing the World Trade Organization, including in particular those parts concerning trade in services (GATS) and trade-related aspects of intellectual property rights, including trade in counterfeit goods (TRIPS).[20] The questions asked whether:

(1) the Community had competence to conclude all parts of the WTO Agreement concerning GATS and TRIPS;
(2) the Community alone had competence to conclude those parts of the WTO Agreement concerning products or services falling exclusively within the scope of the ECSC and EAEC Treaties; and
(3) if the answer to these questions was affirmative whether it affected the ability of member States to conclude the WTO Agreement in light of the agreement reached that they would be original members of the WTO.

By way of preliminaries the Court rejected Spain's contention that the Commission's request was inadmissible (paragraph 10) and Council criticisms concerning the wording of the questions (paragraph 11). It ruled that the question of responsibilities for dependent territories to which the various Community treaties did not apply was not relevant to the merits (paragraphs 15–18). And it held that the division of international powers could not be altered by the internal rules of certain member States (e.g. Portugal) requiring approval of international treaties, and that the fact that an organisation such as the WTO had an operating budget (rather than a financial policy instrument) could not of itself justify the participation of member States in the WTO Agreement (paragraphs 19–21).

In relation to trade in goods the Court found that the Community had exclusive competence to conclude the Agreement pursuant to Article 113 of the EC Treaty (paragraphs 22–34), including in relation to EURATOM and ECSC products (paragraphs 24 and 27). In so holding the Court rejected the arguments that the

20. [1995] 1 C.M.L.R. 205.

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Agreements on Agriculture and on the Application of Sanitary and Phytosanitary Measures could not be adopted under Article 113, since they were covered by Article 43 for the purposes of internal measures (paragraphs 29 and 31). It also rejected the argument that aspects of the Agreement on Technical Barriers to Trade remained within member State competence (paragraph 33).

As regards GATS and TRIPS the Court was not persuaded by the Commission's contentions that both fell within exclusive Community competence under Article 113. For GATS only cross-frontier supplies fell within that provision, and international transport agreements were excluded from it (paragraphs 35–53). The Court rejected also the contention of various governments that trade in services should as a matter of principle be excluded from Article 113 (paragraph 41). It considered the definition of trade in services in GATS (comprising four modes of supply: cross-frontier services; consumption abroad; commercial presence; and presence of natural persons from WTO member countries) and found that only in relation to cross-frontier supplies was the situation analogous to trade in goods (the service was rendered by a supplier in one country to a consumer in another) and therefore covered by Article 113 (paragraph 44). The same could not be said of the other three modes, which were therefore not covered by the common commercial policy (paragraph 47). Citing earlier case law the Court found that transport, which was subject to a specific Treaty title, fell outside the common commercial policy (paragraphs 48–49), rejecting the Commission's argument that various embargoes adopted in relation to, *inter alia*, Iraq and Yugoslavia might affect this conclusion (paragraph 51).

As regards TRIPS the Court found that except for those provisions concerning the prohibition of the release into free circulation of counterfeit goods (on which the Community had adopted an internal regulation) TRIPS did not fall within the common commercial policy (paragraphs 54–71). Whilst there was a connection between intellectual property and trade in goods, the legal basis (as well as procedures and voting rules) for the adoption of harmonising measures on intellectual property (Articles 100, 100a and 235) differed from that of Article 113. To recognise exclusive competence in this domain would allow Community institutions to escape "internal constraints" on law-making (paragraph 61). This conclusion was not altered by prior practice.

Having rejected the Commission's main contentions concerning exclusive competence on the basis of Article 113, the Court went on to reject the arguments for exclusive competence under any implied powers (paragraphs 72–105). With regard to GATS the Court ruled that competence to conclude GATS was shared between the Community and the member States (paragraphs 73–98). It rejected the Commission's argument that exclusive external competence could arise merely from the existence of internal powers conferred on the Community, finding that the chapters on establishment and services "do not contain any provision expressly extending the competence of the Community to 'relationships arising from international law' ", and no "exclusive competence to conclude an agreement with non-member countries" could be inferred (paragraph 81). The Court rejected the Commission's second argument, concerning the need to achieve a Community objective (coherence of the internal market and to prevent inactivity on the international stage) (paragraph 83). *Opinion 1/76* was not relevant to GATS: "the attainment of freedom of establishment and freedom to provide

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services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community" (paragraph 86). Finally, Articles 100a and 235 could not be relied upon as the basis of exclusive external competence. For both provisions an internal competence could give rise to exclusive external competence if it has not been exercised (paragraphs 88–89). Where Community internal legislation includes provisions relating to the treatment of nationals of non-member countries or expressly confers on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the sphere covered by those acts (paragraph 95). The same applies in the absence of express provision where the Community has achieved complete harmonisation of rules governing access to self-employed activity (paragraph 96). However, this is not the case in all service sectors, and accordingly competence is shared (paragraphs 97–98).

Competence was also shared in relation to TRIPS (paragraphs 99–105). Unification or harmonisation of intellectual property rights in the Community context did not necessarily have to be accompanied by agreements with non-members to be effective (paragraph 100); Articles 100a and 235 could not confer exclusive competence (paragraph 101); and Community legislative acts would not be affected by the participation of member States in the conclusion of TRIPS since harmonisation is in certain areas only partial, and in others not envisaged (paragraphs 102–103).

Finally, in a significant concluding section the Court addressed the concern expressed by the Commission that the Community's unity of action *vis-à-vis* the rest of the world would be undermined and its negotiating power greatly weakened if competence were not exclusive and extensive co-operation were required between Community institutions and the member States in negotiations. Recognising the legitimacy of the concern, the Court ruled that problems of implementation could not modify its answer to the question of competence (paragraph 107). Nevertheless, the Court stressed the "obligation to co-operate" which "flows from the requirements of unity in the international representation of the Community" (paragraph 108), all the more imperative in the WTO context, indicating the adverse consequences of an absence of close co-operation (paragraph 109).

### 2. Opinion 2/92 *(Third Revised Decision on national treatment of the OECD Council)*

On 24 March 1995 the Court gave an opinion that the Community was competent to participate in the OECD Council's Third Revised Decision (on national treatment), but that such competence was shared jointly with the member States.[21] The request had come from Belgium, which argued that the Community had exclusive competence under Article 113 of the EEC Treaty. The Court rejected that view, essentially on the basis that the Third Decision affected internal trade as much as international trade, if not more so, and that it applied to transport, which fell outside Article 113. Following its approach in the Uruguay Round opinion, the Court rejected the Commission's argument that exclusive competence could also

21. *Opinion 2/92* [1995] E.C.R. I–525.

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be based on Articles 57 and 100a. Member States lost their right to enter into international obligations only as and when there were common rules which could be affected by such obligations. In this case some of the fields of activity envisaged by the Third Decision were not yet subject to internal rules. Where no internal rules had been adopted external competence could arise, but only where an international agreement was necessary to achieve Community objectives which could not be attained by the adoption of autonomous rules. This was not the case here. Finally, Article 235 could not itself vest exclusive external competence, and could not in any case be invoked except where no other provisions of the Treaty gave the Community institutions the necessary power.

### 3. Opinion 3/94 *(Re Framework Agreement on Bananas)*

On 13 December 1995 the Court declined to give an opinion, as requested by the Federal Republic of Germany, on the Framework Agreement on Bananas signed by the Commission and Colombia in March 1994, which fixed an import customs quota. The Framework Agreement had been incorporated in an Annex to Schedule LXXX to the Final Act of the Uruguay Round, which entered into force on 1 January 1995. The Court ruled that the request was devoid of purpose. Under Article 228(6) it would be inappropriate for the Court to rule on the compatibility with the EC Treaty of an agreement that had already been concluded, since a negative opinion would not have the legal effect prescribed by the Article. This approach did not undermine judicial protection, in particular because a State or institution remained free to bring an action for annulment and a request for interim relief.

### 4. Opinion 2/94 *(Re the Accession of the Community to the European Human Rights Convention)*

On 28 March 1996 the Court gave its opinion that as Community law now stood the Community had no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[22] The Court had been asked by the Council whether accession would be compatible with the EC Treaty. It declined to give an opinion on the compatibility of an abstract agreement, since it had insufficient information regarding arrangements for submission by the Community to present and future judicial control machinery under the Convention (paragraph 21). However, it was willing to give an opinion on Community competence, declining to accept the contention of four members (Ireland, the United Kingdom, Denmark, Sweden) that the opinion was inadmissible or premature (paragraph 18).

Eight members (Austria, Belgium, Denmark, Finland, Germany, Greece, Italy and Sweden), the Commission and the Parliament argued in favour of Community competence. Five (France, Portugal, Spain, Ireland and the United Kingdom) argued against. The Court found that in the absence of express or implied powers in the Treaty to enact human rights rules or to conclude international conventions in the field, and taking into account the provisions of Article 3b, the question fell to

22. [1996] 2 C.M.L.R. 265.

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be determined by reference to Article 235 (paragraph 27). That provision "cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that defined the tasks and activities of the Community" (paragraph 30). Article 235 could not be used to adopt provisions whose effect would be, in substance, to amend the Treaty without following amendment procedures (paragraph 31). The Court recalled declarations of member States and Community institutions on the importance of respect for human rights, various provisions of the Single European Act and the Treaty on European Union to that effect, and its own case law recognising the special significance of the Convention (paragraph 33). These indicated that respect for human rights was a condition of the lawfulness of Community acts (paragraph 34). However, accession to the Convention would entail "a substantial change in the present Community system for the protection of human rights" since it would entail the entry of the Community into "a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order". A modification with fundamental institutional implications and of constitutional significance could be brought about only by Treaty amendment (paragraph 35).

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