Excerpts from

UN Charter
Åklagaren v Percy Mickelsson and Joakim Roos Advocate Kokott, European Court of Justice 2006
TV Vest As & Rogaland Pensjonistparti v. Norway, The European Court of Human Rights 2008
U.S.-Rwanda Bilateral Investment Treaty 2008
Maritime Delimitation in the Black Sea (Romania v. Ukraine) International Court of Justice (only press release with quotations from judgment here)

The Charter of the United Nations signed on 26 June 1945

CHAPTER V: THE SECURITY COUNCIL

Article 23

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.
2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.
3. Each member of the Security Council shall have one representative.

Article 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

EC Treaty 1957

CHAPTER 2

PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 28

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited

between Member States.

Court of Justice of the European Communities

OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 14 December 2006

Case C-142/05 Åklagaren v Percy Mickelsson and Joakim Roos

B – *Interpretation of Articles 28 EC and 30 EC*

1. Article 28 EC – Measure having equivalent effect

38. Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States.

39. In the view of the Commission, restrictions on use as contained in the Swedish regulations constitute measures having equivalent effect.

a) Dassonville formula

40. According to the definition developed by the Court in *Dassonville* all measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. (18)

41. According to the arguments put forward by the defendants in the main proceedings – which are, however, disputed by the Swedish Government – the restriction on the use of personal watercraft introduced by the new Swedish regulations would lead to a fall in personal watercraft sales of more than 90 per cent. Accordingly, the Swedish regulations would impair trade between Member States directly and*actually*. In any case, however, according to the *Dassonville* formula a *potential* impairment would be sufficient for classification as a measure having equivalent effect. At any rate it is not inconceivable that national rules restricting the number of waters on which personal watercraft may be used have a bearing on purchasers' interest in that product and thus lead to a decline in sales and therefore also to a decline in sales of products from other Member States. Such national rules are therefore at least potentially capable of impairing trade between Member States. Accordingly, the Swedish regulations would constitute a measure having equivalent effect.

b) Application of the *Keck* criteria to arrangements for use

42. However, because the *Dassonville* formula is so broad, ultimately any national rules restricting the use of a product may be classified as a measure having equivalent effect and need to be justified.

43. The question therefore arises which the Court also raised – albeit in another connection – in its judgment in *Keck*, which is whether any measure which potentially also affects the volume of sales of products from other Member States can be characterised as a measure having equivalent effect. (19)

44. It becomes clear that this question regarding arrangements for use, that is to say national rules governing how and where products may be used, is particularly pressing when we consider a few examples.

45. For example, a prohibition on driving cross-country vehicles off-road in forests or speed limits on motorways would also constitute a measure having equivalent effect. In the case of these restrictions on use too, it could be argued that they possibly deter people from purchasing a cross-country vehicle or a particularly fast car because they could not use them as they wish and the restriction on use thus constitutes a potential hindrance for intra-Community trade.

46. With regard to the delimitation of the broad scope of Article 28 EC when the *Dassonville* formula is applied, the Court has attempted from time to time to exclude national measures whose effects on trade are too uncertain and too indirect from the scope of Article 28 EC. (20) However, an argument against these criteria is that they are difficult to clarify and thus do not contribute to legal certainty.

47. Instead I suggest excluding arrangements for use in principle from the scope of Article 28 EC, in the same way as selling arrangements, where the requirement set out by the Court in *Keck and Mithouard* is met.

48. In its judgment in *Keck and Mithouard* the Court found that there is an increasing tendency of traders to invoke Article 28 EC as a means of challenging any rules whose effect is to limit their *commercial freedom* even where such rules are not aimed at products from other Member States. (21) In the context of arrangements for use, ultimately individuals may even invoke Article 28 EC as a means of challenging national rules whose effect is merely to limit their *general freedom of action*.

49. With regard to *selling arrangements* the Court ruled in *Keck and Mithouard* that the application to products from other Member States of such national provisions is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. (22) The '*Keck*exception' does not cover *product-related rules*, which relate to the characteristics of products. (23) The judgment in *Keck and Mithouard*concerned the prohibition on selling goods below the purchase price. Following that judgment the Court has for example classified prohibitions on Sunday trading and the prohibition on anyone other than specially authorised retailers selling tobacco as provisions on selling arrangements. (24)

50. The consequence of this case-law is that national rules which satisfy the selling arrangement criterion do not fall within the scope of Article 28 EC with the result that they are permissible under Community law without the need for the Member State to justify them.

51. Against this background the present case now gives grounds to consider whether arrangements for use should not, by analogy with the Court's ruling in *Keck*, be excluded from the scope of Article 28 EC.

52. If we consider the characteristics of arrangements for use and selling arrangements, it is clear that they are comparable in terms of the nature and the intensity of their effects on trade in goods.

53. Selling arrangements apply in principle only after a product has been imported. Furthermore, they indirectly affect the marketing of a product through consumers, for example because they cannot buy the product on certain days of the week or advertising for a product is subject to restrictions. Arrangements for use also affect the marketing of a product only indirectly through their effects on the purchasing behaviour of consumers.

54. National legislation which governs selling arrangements is not normally designed to regulate trade in goods between Member States. (25) A national legislature does not in general seek to regulate trade between Member States with arrangements for use either.

55. Against this background, it therefore appears logical to extend the Court's *Keck* case-law to arrangements for use and thus to exclude such arrangements from the scope of Article 28 EC.

56. Consequently, a national provision restricting or prohibiting certain arrangements for use does not come under the prohibition laid down by Article 28 EC, so long as it is not product-related, so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

c) Application of the *Keck* criteria to the present case

57. The Swedish regulations are not product-related since they do not make use dependent in particular on personal watercraft meeting technical requirements other than those harmonised in the Recreational Craft Directive. The restriction on use does not therefore require any modifications to the personal watercraft themselves.

58. The Swedish regulations also apply to all relevant traders operating within the national territory, since they do not discriminate according to the origin of the products in question.

59. However, it is uncertain whether the Swedish regulations affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. At first sight, this requirement is also met. A restriction on use may make a product less attractive to consumers and thus impair the marketing of the product. However, as a rule domestic products and foreign products are affected in the same manner by that consequence.

60. Nevertheless, it became apparent in the oral procedure that Sweden does not produce personal watercraft domestically. It must therefore be considered how the fact that there is no domestic production affects the examination of the *Keck* criterion, according to which products from other Member States and domestic products must be affected in the same manner by the national rules.

61. In connection with a *selling arrangement*, the Court has ruled that the existence of domestic production cannot be relevant. (26) As grounds the Court states that such a purely fortuitous factual circumstance may, moreover, change with the passage of time; if it were the relevant factor, this would have the illogical consequence that the same legislation would fall under Article 28 EC in certain Member States but not in other Member States, depending on whether or not there was domestic production. The situation would be different only if the national rules at issue protected domestic products which were similar to products covered by the contested rule or which were in competition with those products. (27)

62. Those principles can be applied by analogy to arrangements for use. It must therefore be examined whether the national measure*protects* domestic products which are in competition in the sense that it affects products from other Member States more than competing domestic products.

63. Motorboats are possibly products which are in competition with personal watercraft. In the absence of sufficient factual information it is not possible to assess in the present case whether motorboats are in competition with personal watercraft and whether personal watercraft are more affected by the Swedish rules than the comparable domestic products; this is a question for the national court. If the referring court answers these questions in the negative, the Swedish rules would not fall within the scope of Article 28 EC for that reason. If, on the other hand, the questions are to be answered in the affirmative, the referring court would then be required to examine whether the unequal treatment could be justified on grounds of protection of the environment. (28) However, there could be no justification under the second sentence of Article 30 EC if the Swedish rules proved to be a protectionist measure or arbitrary discrimination. (29)

64. However, it is possibly not actually necessary, for the purposes of assessing the present case, to examine whether there are domestic products which are in competition with personal watercraft and whether those comparable products are less affected by the Swedish rules.

65. In its judgment in *Keck* the Court held that national selling arrangements which satisfy the *Keck* criteria are not by nature such as to*prevent* their access to the market or to impede access any more than they impede the access of domestic products and therefore fall outside the scope of Article 28 EC. (30)

66. It may be concluded from this finding that, conversely, a national measure restricting or prohibiting an arrangement for use is not excluded from the scope of Article 28 EC if it prevents access to the market for the product in question. (31)

67. In this respect it is not only rules which result in complete exclusion, such as a general prohibition on using a certain product, that are to be regarded as preventing access to the market. A situation where only a marginal possibility for using a product remains because of a particularly restrictive rule on use is to be regarded as preventing access to the market.

68. It is for the national court to decide whether national rules prevent access to the market. In the present case there are

several reasons to suggest that the Swedish rules prevent access to the market for personal watercraft. The provisions of the Swedish regulations lay down a prohibition on the use of personal watercraft with the sole exception of use on general navigable waterways – at least for the period until the county administrative boards have designated other waters for the use of personal watercraft.

69. In determining whether the Swedish rules amount to general prohibition on use in the transitional period until other waters have been designated by the county administrative boards the crucial question is whether permission to use personal watercraft on general navigable waterways is given more than a merely marginal importance which does not affect the character of the Swedish regulations as a general prohibition on use.

70. The Swedish Government has argued that there are roughly 300 such general navigable waterways, although it was not able to indicate the surface covered by the general navigable waterways. On the other hand, the statement by the defendants in the main proceedings during the oral procedure gave the impression that despite their number general navigable waterways offer only marginal possibilities for using personal watercraft. They claimed that such waterways simply do not exist in much of the country, they are not interconnected, are difficult to reach and, moreover, are often not suitable for the use of personal watercraft on safety grounds, since they are, for example, frequently used by heavy tankers or are a long way from the coast. The Commission also takes the view that the rules amount to a complete prohibition on use. The exclusion of general navigable waterways from the prohibition on using personal watercraft does not therefore appear to affect the character of the Swedish regulations as a fundamental prohibition on use during the transitional period until other waters have been designated by the county administrative boards. It is irrelevant that the prevention of access to the market would be only temporary since access would be prevented not only for a negligibly short period.

71. For the purposes of the examination it will therefore be assumed hereinafter that the Swedish rules constitute a barrier to access to the market and that they should not therefore be excluded from the scope of Article 28 EC. In order to be compatible with Community law they must therefore be justified under Article 30 EC or by imperative requirements in the general interest.

72. If the referring court finds that the Swedish regulations are not to be classified as a barrier to access to the market, it would have to undertake the examination described above, but put aside, that is to say it would have to investigate whether there are domestic

products which are in competition with personal watercraft which are less affected in law or in fact. (32)

2. Justification

73. According to the *Cassis-de-Dijon* case-law, national measures having equivalent effect which apply without distinction may be justified where they are necessary in order to satisfy imperative requirements. (33) Since the Swedish rules do not discriminate according to the origin of the product, they are applicable without distinction to domestic products and to products from other Member States. (34) The Swedish Government relies on protection of the environment in order to justify its regulations on the use of personal watercraft. This is recognised as an imperative requirement in case-law. (35) The Court has also repeatedly stressed that protection of the environment constitutes one of the essential objectives of the Community. (36)

74. The national rules must also comply with the principle of proportionality, that is to say they must be appropriate, necessary and suitable for the purpose of attaining the desired objective. (37) This means in particular that if a Member State has a choice between equally appropriate measures it should choose the means which least restricts the free movement of goods. (38)

75. On account of their exhaust and noise emissions and because they can be ridden in areas where there are breeding and spawning grounds, personal watercraft can cause damage to the environment. Against the background of the various negative effects of personal watercraft on the environment, to which all the governments which have made submission in the proceedings have referred, national rules which limit the use of personal watercraft are undoubtedly appropriate for the purpose of protecting the environment.

76. However, it must still be considered whether national rules like the Swedish regulations are *necessary*, i.e. whether there is no equally appropriate but less onerous means of protecting the environment.

77. As far as necessity is concerned, the question arises first of all whether rules which differentiate according to the way in which the personal watercraft in question is used would constitute a less drastic, but equally appropriate, means. The defendants in the main proceedings have argued that personal watercraft have different effects on the environment depending on the way they are used. Thus, only the use of personal watercraft as sports vehicles or toys, with the characteristic circuit driving and fast acceleration, is detrimental to the environment, whereas the use of personal

watercraft as a means of transport would not have any greater effects on the environment in terms of noise and exhaust emissions than small motor boats – indeed it would even have lesser effects as a result of lower fuel consumption.

78. Even assuming that these statements are correct, (39) however, the Swedish rules could not be classified as disproportionate for that reason, since compliance with rules that differentiate according to the driving method would, as the Swedish Government has rightly pointed out, be more difficult to monitor and to implement than rules which prohibit use on certain waters in principle, and are not therefore equally appropriate.

79. However, the principle of proportionality could possibly require national rules on the use of personal watercraft to distinguish between different types of personal watercraft. The defendants in the main proceedings have argued that a distinction should be drawn between different kinds of personal watercraft. Only jet-skis would be used for play and sport and are characterised by driving methods which are harmful to the environment. Personal watercraft, on the other hand, would merely be used as a means of transport and are even less damaging to the environment than motorboats, which are also to be taken into consideration. The Court does not have all the information on the properties and effects of different kinds of personal watercraft to give a definitive answer to the question of proportionality from this point of view. Nor was it possible to infer from the statements made by the other parties to the proceedings before the Court that such a differentiation could be made with regard to effects on the environment; rather, they took the view that all personal watercraft had identical characteristics. If, however, the referring court is able to confirm that different kinds of personal watercraft also have different effects on the environment in terms of intensity, it would have to take into account, when examining the question of proportionality, the extent to which a proportionate measure on the use of personal watercraft can include such a differentiation on grounds of protection of the environment.

80. In a situation like the present case, nor does the principle of proportionality preclude the criminalisation of a prohibition which may be necessary in order to reinforce the prohibition, in particular because the penalty is only a fine.

81. The Swedish regulations, aside from general navigable waterways, chose the form of a fundamental prohibition subject to authorisation and not the less drastic form of authorisation subject to prohibition. General authorisation subject to prohibition as a rule constitutes the less drastic measure. Nevertheless, the principle of proportionality does not automatically require that approach to be

taken. Authorisation subject to prohibition would have to be equally appropriate for the purpose of protecting the environment. In assessing this question, particular attention should be paid to the specific regional features of each Member State. In this regard, the Swedish Government has argued that Sweden is characterised by a very large number of lakes and a long coast with sensitive flora and fauna which require protection. Against this background, Sweden's argument that in view of the specific geographical features the approach of authorisation subject to prohibition is not practicable and as such not equally appropriate as the opposite model of prohibition subject to authorisation is persuasive.

82. However, problems appear to be raised by the proportionality of rules like the Swedish regulations in view of the fact that during the period until a decision is taken by the county administrative boards the use of personal watercraft is generally prohibited other than on general navigable waterways.

83. This means that until a decision is taken by the county administrative boards riding is also prohibited on waters in respect of which the protection of the environment may not actually require this. The Swedish rules themselves assume that aside from general navigable waterways there are waters on which protection of the environment would permit personal watercraft to be used.

84. However, if it were required that until other waters are designated by the county administrative boards personal watercraft may be ridden, this could mean that the flora and fauna of many waters which are sensitive to encroachments by personal watercraft would be destroyed irretrievably. Such rules would not therefore be as appropriate for the protection of the environment as the approach chosen.

85. In order to satisfy the principle of proportionality, however, as the Commission has rightly pointed out, rules like the contested regulations must include a deadline by which the county administrative boards must have complied with their obligation to designate other waters. As Norway has rightly stated, the length of the deadline must take account of the fact that the county administrative boards require a certain time to obtain the information that they require in order to decide on which waters the use of personal watercraft has no detrimental effect. On the other hand, the legal certainty of traders, such as importers of personal watercraft, requires that the date by which the county administrative boards must have taken their decisions be fixed in order to allow those traders, amongst other things, to plan their business. As the Swedish Government acknowledged in the oral procedure, by the time of the oral procedure only 15 of 21 counties had adopted relevant

provisions. National rules which do not provide by which date a very far-reaching prohibition of personal watercraft remains therefore breach the principle of proportionality.

86. If use of a certain category of personal watercraft were permissible without any great restriction before the Swedish regulations were adopted – according to the submissions made by the defendants in the main proceedings this seems to have been the case for personal watercraft –, the principle of proportionality could also require that a transitional period should have been introduced for them. (40)

3. Interim conclusion

87. Thus, to summarise:

National legislation which lays down arrangements for use for products does not constitute a measure having equivalent effect within the meaning of Article 28 EC so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, and is not product-related. However, prohibitions on use or national legislation which permit only a marginal use for a product, in so far as they (virtually) prevent access to the market for the product, constitute measures having equivalent effect which are prohibited under Article 28 EC, unless they are justified under Article 30 EC or by an imperative requirement.

National rules which also lay down a prohibition on using personal watercraft in waters in respect of which the county administrative boards have not yet taken any decision on whether protection of the environment requires a prohibition on use there are disproportionate and therefore not justified unless they include a reasonable deadline by which the county administrative boards must have taken the relevant decisions.

Kongeriget Norges Grundlov, given i Rigsforsamlingen paa Eidsvold den 17de Mai 1814

§ 110c.

Det paaligger Statens Myndigheder at respektere og sikre Menneskerettighederne.

Nærmere Bestemmelser om Gjennemførelsen af Traktater herom fastsættes ved Lov.

Tilføyd ved grlbest. 15 juli 1994 nr. 675.

LOV 1999-05-21 nr 30: Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven)

§ 1. Lovens formål er å styrke menneskerettighetenes stilling i norsk rett.

§ 2. Følgende konvensjoner skal gjelde som norsk lov i den utstrekning de er bindende for Norge:

1. Europarådets konvensjon 4. november 1950 om beskyttelse av menneskerettighetene og de grunnleggende friheter som endret ved ellevte protokoll 11. mai 1994, med følgende tilleggsprotokoller:

a) Protokoll 20. mars 1952,

b) Fjerde protokoll 16. september 1963 om beskyttelse av visse rettigheter og friheter som ikke allerede omfattes av konvensjonen og av første tilleggsprotokoll til konvensjonen,

c) Sjette protokoll 28. april 1983 om opphevelse av dødsstraff,

d) Syvende protokoll 22. november 1984,

e. Trettende protokoll 21. februar 2002 om avskaffelse av dødsstraff under enhver omstendighet,

2. De forente nasjoners internasjonale konvensjon 16. desember 1966 om økonomiske, sosiale og kulturelle rettigheter,

3. De forente nasjoners internasjonale konvensjon 16. desember 1966 om sivile og politiske rettigheter med følgende tilleggsprotokoller:

a) Valgfri protokoll 16. desember 1966,

b) Annen valgfri protokoll 15. desember 1989 om avskaffelse av dødsstraff.

4. De forente nasjoners internasjonale konvensjon 20. november 1989 om barnets rettigheter med følgende tilleggsprotokoller:

a) Valgfri protokoll 25. mai 2000 om salg av barn, barneprostitusjon og barnepornografi,

b) Valgfri protokoll 25. mai 2000 om barn i væpnet konflikt

5. De forente nasjoners internasjonale konvensjon 18. desember 1979 om avskaffelse av alle former for diskriminering av kvinner med tilleggsprotokoll 6. oktober 1999.

In the case of TV Vest As & Rogaland Pensjonistparti v. Norway,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Khanlar Hajiyev,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 26 June and 20 November 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21132/05) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by *TV Vest AS* (Ltd.), a television broadcasting company and the Rogaland Pensioners Party (*Rogaland Pensjonistparti*) ("the applicants"), on 12 May 2005.

2. The applicants were represented by Mr. K. Eggen, a lawyer practising in Oslo. The respondent Government were represented, as Agent, by Ms T. Steen, Attorney General's Office (Civil Matters).

3. The applicants alleged, in particular, that the imposition by the Media Authority of a fine on the first applicant for having breached a statutory prohibition on political advertising in respect of such broadcasts for the second applicant, gave rise to a violation of Article 10 of the Convention.

4. By a decision of 29 November 2007 the Court declared the application admissible.

5. Subsequently, third-party comments were received from the Governments of Ireland and the United Kingdom, which had been granted leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 26 June 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms T. STEEN, Attorney-General's Office, *Agent*,
Mr H. HARBORG, Advokat, *Counsel*,
Mr S. FAGERNÆS, Adviser, Ministry of Culture and Church Affairs,
Ms. I. CONRADI ANDERSEN, Norwegian Media Authority, *Advisers*;

(b) *for the applicants*
Mr K. EGGEN, *Advokat*, Counsel.

The Court heard addresses by Mr Eggen and Mr Harborg.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, *TV Vest AS* (Ltd.), is a television broadcasting company located in Stavanger in the County of Rogaland, on the west coast of Norway. The second applicant, Rogaland *pensjonistparti*, is the regional branch of the *Pensjonistpartiet* and which in the following will be referred to as "the Pensioners Party". This is a small political party which in the local and regional elections held on 15 September 2003 obtained 1.3% of the votes on a national basis, while the Rogaland branch obtained 2.3% of the votes in Rogaland,.

A. The disputed advertising of the Pensioners Party by *TV Vest* and administrative sanction

8. With a view to the above-mentioned elections the Party asked to purchase advertising time from *TV Vest* in order to broadcast political advertisements. In the Spring of 2003 the latter, considering that the broadcast would be lawful, agreed to broadcast 3 different advertisements, of a duration of 15 seconds each, seven times per day over eight days during the period from 14 August to 12 September 2003, and against the payment of a fee of NOK 30,000. The short commercials aimed to portray the values of the Pensioners Party and included an invitation to vote for the Party:

Advertising film 1:

Egil Willumsen, Pensioners Party: "We want this splendid property here to be given back to the people of Stavanger and Rogaland as a specialised hospital for the elderly and chronically ill. Vote for the Pensioners Party."

Picture with text:

"We need your vote on 15 September! Vote for the Pensioners Party."

Advertising film 2:

Åshild Bjørnevoll, Pensioners Party: "Young people are our future. Some of them live in difficult circumstances and need help and support. If they do not receive the assistance they require, it may have major consequences for us all. Vote for the Pensioners Party for a better future."

Picture with text:

"We need your vote on 15 September! Vote for the Pensioners Party."

Advertising film 3:

Tor Kristian Rønneberg, Pensioners Party: "A sufficient number of good nursing home places. Secure jobs, particularly for older workers, and decent pension schemes. If you are interested in any of this, vote for the Pensioners Party."

Picture with text:

"We need your vote on 15 September! Vote for the Pensioners Party."

9. On 12 August 2003 the first applicant notified the State Media Authority (*Statens medieforvaltning*- hereinafter the "Media Authority") of its intention to broadcast the political advertisements and argued that such broadcasting was protected by Article 10 of the Convention.

10. The first applicant broadcasted the political advertisements on 14, 15, 16, 18, 28, 29 and 30 August and 1, 3, 12 and 13 September 2003. According to a public statement by the second applicant dated 30 August 2003, although it had been made aware of the statutory prohibition of political advertising on television, it had nonetheless decided to advertise for the following reasons.

"The Pensioners Party in Rogaland has had difficulties in obtaining the attention of the media. We regard this as a 'golden opportunity' to highlight the party's values and political priorities.

The bigger parties are given very wide leeway both in connection with debates and with different initiatives in radio, television and news papers. In this regard, the Pensioners Party often feels excluded and has very limited possibilities for being heard.

In addition, the Party is never identified either in national or local opinion polls, but is included in the group 'Others'.

We in the Pensioners Party took responsibility for the content of the messages and chose three themes which best reflected the Party's values and basic attitudes at local level ...".

11. On 27 August 2003 the Media Authority warned *TV Vest* that they were considering issuing a fine against *TV Vest* for violating the prohibition on political advertising on television. *TV Vest* answered the letter on 4 September 2003.

12. On 10 September 2003 the Media Authority decided to impose a fine of NOK 35,000 on *TV Vest*, under section 10-3 of the Broadcasting Act 1992 and section 10-2 of the Broadcasting Regulation, for violation of the prohibition on political advertising applied to television broadcasts in section 3-1 (3) of the Act.

B. Extent of other coverage of the Pensioners Party in television broadcasts

13. The applicants provided the following information on the extent to which the Rogaland Pensioners Party had been the subject of editorial coverage during the period August/ September 2003 by the three broadcasters indicated below:

(i) The *TV2* (privately owned broadcasting company) had informed that in the course of 2003 the Pensioners Party as such had been given editorial coverage on three occasions: Once when *TV Vest* had brought an action against the Norwegian State to challenge the legality of the fine imposed for the broadcasting of the political advertisements at issue; a second time concerning the party's electoral list cooperation with three other small parties; and lastly in connection with the actual election results. In none of these instances had the local Rogaland Pensioners Party been specifically mentioned.

(ii) The *NRK* ("The Norwegian Broadcasting Corporation", national public broadcaster) had stated that there were two short items (studio comments) that had been broadcast during the election campaign period, respectively on 27 August and 10 September 2003, both of which had concerned the issue in the present case of political advertisement.

(iii) *TV Vest* had informed that the Rogaland Pensioners Party had been referred to three times: On 12 August 2003 when the decision to air the advertisement at issue had been taken, on 27 August 2003 in connection with notification of the State's reaction against these advertisements, and on 10 September 2003 regarding the actual fee. None of the said items had been full features and none of them had focused on the Rogaland Pensioners Party's politics.

C. Judicial appeal by *TV Vest*

14. *TV Vest* appealed against the decision of 10 September 2003 to Oslo City Court (*Oslo tingrett*). *TV Vest* did not dispute that the content was political advertising and thus fell foul of the above-mentioned prohibition in the Broadcasting Act but submitted that this provision was incompatible with the right to freedom of expression in Article 100 of the Constitution and Article 10 of the Convention.

15. By a judgment of 23 February 2004 the City Court upheld the Media Authority's decision.

16. *TV Vest* appealed against the City Court's judgment to the Supreme Court (*Høyesterett*), challenging its application of the law. The Supreme Court granted leave to appeal under Article 6 (2) of the Code of Civil Procedure. The second applicant acted as a third party intervener (*hjelpeintervenient*).

17. In a judgment of 12 November 2004 the Supreme Court, by four votes to one, upheld the Media Authority's decision.

18. In his opinion, to which three other members subscribed, Mr Justice Oftedal Broch disagreed with the first applicant's submission that the case raised an issue at the heart of freedom of expression. The most central aspect of the case was that the legislator had given certain ramifications for democratic processes concerning the limits on the use of television for paid communications made in the course of a political debate. Thus there was stronger reason to emphasise the legislator's view in this area than issues of protection of the content of expression. The political instances were better placed than the courts to assess what measures were suitable for heightening the level of political debate. The rationale for the prohibition against political advertising through television was the assumption that it was likely to lead to an inappropriate form of political debate. An advert containing a political message could easily give a distorted picture of complex issues. Opening the possibilities for such adverts would mean that financially powerful groups would get greater opportunities for marketing their opinions than less resourceful parties or interest organisations.

19. Thus, Mr Justice Oftedal Broch observed, concerns about quality and pluralism in political debate were central and formed the basis for the national courts' assessment. It was not the content but the form and medium of the expression that was being regulated and the Pensioners Party, like other parties, had many other means for addressing the electorate. There was hardly any reason for considering that the prohibition in section 3-1 (3) of the Broadcasting Act was incompatible with the freedom of expression as protected by Article 100 of the Constitution either in its version as applicable at the material time or in its amended version as of 30 September 2004.

20. As regards the issue of necessity under Article 10 § 2 of the Convention Mr Justice Oftedal Broch had particular regard to the Court's

judgments in *Vgt Verein gegen Tierfabriken v. Switzerland* (no. 24699/94, ECHR 2001-VI) and *Murphy v. Ireland* (no. 44179/98, ECHR 2003-IX (extracts)), concerning restrictions on broadcasting of political advertising relating respectively to animal protection and the rearing of animals (on television) and the promotion of religious gatherings (on radio). Mr Justice Oftedal Broch held, *inter alia*:

> "(60) In the light of these two judgments, how should we assess the Norwegian prohibition of political television advertising? Neither of the cases is completely parallel with the situation now at hand. The main difference from the *VgT* case is that the latter concerned a group – the Association against Animal Factories – which focused on a topic of current interest: the protection of animals in connection with the industrial production of meat. The association wished to participate in the debate on this issue by showing a film. In this respect, there is a greater parallel between the Pensioners' Party and the case of *Murphy v. Ireland* in terms of its wish to make its existence and programme known to a broad public. What distinguishes the present case from the *Murphy* case is the fact that religious issues in Ireland must be regarded as far more controversial and could presumably cause greater social unrest than political movements in Norway. Having said this, however, I find a considerable degree of parallelism between the Court's arguments in *Murphy* and my own views on the Norwegian prohibition in relation to Article 10.
>
> (61) A decisive difference in the Court's approach in the two cases is that in the *VgT* case the Court found that the State's margin of appreciation was narrow, whereas its margin of appreciation in the *Murphy* case was broad. A factor that was emphasised in the *Murphy* case, and that also applies in our case, is that there is no European consensus on political advertising. There are major differences in the rules currently in force in European countries. There is a group of countries, including Norway, Sweden, Denmark, France, Germany and Ireland, which have prohibited political advertising to varying degrees. Other countries, such as Hungary, Lithuania, Poland, Romania, Netherlands and Finland, basically have no such barrier. This difference has a further dimension in that the rules in many countries now appear to be undergoing revision. But the draft amendments point in different directions, thereby underscoring the diversity of views. In some countries, the rules are being liberalised, while other countries, like Denmark, are tightening the prohibitions that already exist. In Norway, the Government has announced its intention to present a Bill under which political advertising will be accepted within certain limits. At the same time, we have seen that the right to continue to impose a prohibition is being maintained through the amendment to Article 100 of the Constitution of Norway. In other words, the rules governing political advertising are subject to constant change, which should mean that States have considerable freedom to choose their own regulation.
>
> (62) The type of interference concerned in this case also suggests a broad margin of appreciation. The regulation of political advertising is less a question of the individual's freedom of expression and far more a question of how best to promote political debate and ensure good frameworks for the democratic electoral process. In the light of this, our political bodies have – hitherto – deemed that political television advertising promotes an unfavourable simplification of political issues, as well as giving financially powerful groups a greater opportunity to put forward their views. These considerations have a direct bearing on the desire to ensure the quality of the political process. In this area, it is essential that institutions vested with democratic legitimacy be given a broad margin of appreciation based on their assessment of

national conditions. Parliament's evaluation as regards expediency should be applied unless – as stated in the *Kjuus* case – it appears to be unfounded or otherwise objectively weak. On the other hand, this limitation is important, and particularly in the present case, which has to do with a majority of Parliament determining the general conditions for political debate. This means that the courts should give particularly close consideration to whether the solution has a discriminatory effect. In the present case, the grounds cited by Parliament in support of the prohibition of advertising cannot be said to be of a discriminatory nature. On the contrary, it is argued that political advertising will give large, affluent parties a further advantage to the detriment of small parties.

(63) In assessing the specific circumstances of the present case, questions can nevertheless be raised as regards the significance that should be attached to the fact that the Pensioners Party, far from having the financial strength to abuse the power of advertising, on the contrary and unlike the more established parties, believed that it needed the advertising precisely to be able to establish a channel to a broad public during the period prior to the municipal elections. Even if this point of view is accepted *per se*, in my opinion no importance can be placed on it in assessing the prohibition of advertising in relation to the Convention. The reason for this is that it is not democratically possible to differentiate between the various political parties – least of all just before an election. And if our basic premise is that all political parties must be treated alike with regard to paid television advertising, the possibility of small parties being overshadowed by large ones cannot be excluded.

(64) I have mentioned that there currently appears to be a majority in Parliament in favour of relaxing the prohibition of advertising, that solutions in European countries vary and that in many countries the attitude towards political advertising is now being reassessed – with differing results. I have underscored this very situation as an argument in support of allowing States a broad margin of appreciation. Now one might ask whether the change in Parliament majority's political views on the prohibition of advertising entails that neither the will of the legislature nor the democratic roots of the statute can militate any longer in favour of maintaining the current statutory prohibition on the basis of a broad margin of appreciation. In my opinion, this cannot be the case. It would mean that the legislature had renounced its margin of appreciation despite clear statements to the effect that it did not wish to bind future developments to a specific solution.

(65) In sum, therefore, it is my view that a prohibition or regulation of political television advertising must primarily be seen as the establishment of limits for political debate. These are decisions that should be taken by a country's democratic institutions, and consequently an area in which a country's political bodies must be given great freedom of action in relation to Article 10. The fact that there is no European consensus, but on the contrary a wide range of national solutions in this field, strengthens this view.

(66) In view of all the channels that political parties can use to communicate their message to a broad public, the prohibition of political television advertising appears to be a limited interference that is not disproportionate to the purposes the interference aims to achieve. In the light of this, the grounds underlying the provision in section 3-1(3) of the Broadcasting Act are relevant and sufficient. If the special circumstances of the present case are examined more closely, this becomes even clearer. The prohibition of advertising was applied to a political party immediately prior to an election. At such a time, it is particularly important to ensure a 'fair climate of

debate', and some countries have limited their ban on advertising precisely to this period. The possibility that a broad interpretation of the prohibition of political television advertising may conflict with Article 10 of the Convention, as illustrated by the Court's *VgT* judgment, is, in my opinion, of no significance for the application of Article 10 to the facts of our case, which lies within the core area of the prohibition.

(67) In the light of this, it is my view that there has been no violation of Article 10 of the Convention."

21. The dissenting judge, Mr Justice Skoghøy, stated:

"(70) ...I have concluded that the Media Authority's administrative decision to impose a fee on *TV Vest* is an unlawful interference with the right of freedom of expression under Article 10 of the Convention, and that the appeal by *TV Vest* AS must therefore be allowed. ...

(75) In deciding whether there is a sufficiently pressing need for interference in the right to freedom of expression, the Court has granted national authorities and courts a certain margin of appreciation. The reason for this is that national authorities and courts will often be in a better position to assess the necessity of an interference and have greater insight into any special circumstances that might apply in the individual countries, and the fact that it is the States Parties to the Convention that have the primary responsibility for protecting and enforcing human rights (see Lorenzen et al.: *Den Europæiske Menneskerettighedskonvention med kommentarer* [The European Convention on Human Rights with comments], 2nd edition (2003), page 23, and Harris/O'Boyle/Warbrick: Law of the European Convention on Human Rights (1995), page 14). The part of the grounds that states that national authorities will often be in a better position to assess the necessity of an interference by and large also applies to the relationship between national courts of law and national legislatures, and against this background the principle has been adopted in Norwegian case-law that when Norwegian courts try the question whether Norwegian legislation breaches international human rights conventions, they should accord the Norwegian legislature a similar margin of appreciation, see for example *Norsk Retstidende* ("*Rt*" - Norwegian Supreme Court Reports) 1999-961. This is not necessary on account of the Convention; nor does the Convention preclude it. As mentioned earlier, however, freedom of expression is one of the fundamental pillars of democracy, and it is therefore important that small political groups are also able to make themselves heard. In the light of this, strong objections are raised against attaching too much importance to the opinion of the political majority at any given time as regards how far freedom of expression on political issues should go. The Court's case-law, too, is based on States' margin of appreciation being relatively narrow in cases regarding expressions of political opinion; see *VgT*, § 67, and *Murphy*, § 67. ....

(76) The main grounds for the Broadcasting Act's prohibition of political television advertising is that if such advertising were to be permitted, it could result in financially powerful groups having a greater possibility than others to market their views to the detriment of parties and special-interest organisations with fewer resources, thereby impairing democratic equality, and in the expression of political opinions through advertising easily becoming sloganised and manipulative and leading to an unfavourable form of debate. The prohibition has been limited to television because this medium is presumed to be particularly effective and to have a greater ability to influence the public than other media, see Proposition No. 58 (1998-1999) to the *Odelsting* [the larger division of Parliament], page 12.

(77) The reasons cited for not allowing political television advertising are legitimate in relation to Article 10 § 2 ('protect the rights ... of others'), but as the appellant has forcefully argued, there are also weighty arguments in favour of permitting political television advertising. Editorial television broadcasts can easily become dominated by the most influential political parties. Smaller parties do not have the same possibilities of making themselves seen and heard. Allowing advertising for political parties will also help to promote direct communication with the voters – without the filtering that takes place through the media's editorial staff. This is a consideration that is heavily emphasised by the Norwegian Government Commission on Freedom of Expression in *Norges Offentlige Utredninger* ("*NOU*" Official Norwegian Report) 1999:27, pages 140-141. It is pointed out in the report that complaints that the media to a certain extent 'set the agenda' appear to be justified, and that as a result of the filtering that takes place through the media's editorial processes, the political parties must adopt a strategic approach to the media to ensure that their message is communicated. This situation has been accentuated by the fact that television, which for many reasons must be more 'toughly edited' than newspapers, has become the dominant channel to the general public.

(78) With regard to the argument concerning the form of debate, the fact is that the medium of television has contributed towards making political debate more slogan-oriented and agitational, and as the Norwegian Commission on Freedom of Expression points out, it is doubtful whether allowing political television advertising will change the character of political communication to any appreciable degree, see Official Norwegian Report NOU 1999:27, page 140. The eventuality that financially powerful groups might dominate political debate on television, and that the latter might become overly characterised by slogans and banalised can be counteracted in other ways, for instance by limiting the extent of and broadcast time for political television advertising. As the Commission pointed out, in a democratic society it is not necessarily illegitimate to appeal to feelings.

(79) In my opinion, in the light of the above, there cannot be deemed to be a sufficiently pressing social need for a total prohibition of political television advertising. A total ban is not proportionate to the purposes sought to be achieved. Even if the reasons advanced in support of prohibiting political television advertising are legitimate, they are not sufficiently weighty to justify a total ban.

(80) The fact that a total prohibition on political television advertising is incompatible with Article 10 of the Convention is, in my opinion, also evident from the Court's judgment in the case of *VgT v. Switzerland*. In paragraph 75 of this judgment, the Court states that it cannot exclude that a ban on political advertising may be compatible with Article 10 in certain situations. However, the Court pointed out that in order for such a prohibition to be acceptable, it must be based on grounds that meet the requirements set out in paragraph 2 of Article 10. The case in question concerned a ban on political advertising on radio and television. In paragraph 74, the Court points out that a prohibition of political advertising that is limited to certain media does not appear to be of a particularly pressing nature.

(81) As the first voting judge has mentioned, the *VgT* case concerns a television advertising campaign presented by an animal protection organisation, and the State has asserted that the judgment must be deemed to be limited to idealistic advertising to counter commercial advertising, and that the scope of the judgment has in any event been narrowed down by the *Murphy* judgment. I disagree with these arguments. The grounds in paragraph 75 of the *VgT* judgment concern political advertising in

general, and there are no grounds for contending that it is limited to idealistic counter-advertising against commercial advertising. Nor are there any grounds in the Murphy judgment for arguing that it aims to deviate from or limit the scope of the *VgT* judgment. On the contrary, in paragraph 67 of the Murphy judgment, it is emphasised that as far as political speech or debate of questions of general interest are concerned, there is little scope for restrictions under paragraph 2 of Article 10. When the Court concluded in the *Murphy* judgment that there was no violation of Article 10, this was based on the explicit grounds that the *Murphy* case – contrary to the case of *VgT* – concerned the expression of religious beliefs, and that in such cases national States should have a greater margin of appreciation, see paragraph 67 of the *Murphy* judgment. Reference was made in the specific grounds to the extreme sensitivity of the question of broadcasting of religious advertising in Ireland (paragraph 73). Inasmuch as the Court in *Murphy* accentuates the difference between political and religious advertising, and underscores the special considerations that apply in the case of the expression of religious beliefs in Ireland, the *Murphy* judgment in my opinion serves not to weaken, but to strengthen and further underpin the view regarding political television advertising expressed by the Court in the *VgT* judgment.

(82) In paragraph 75 of *VgT*, the Court emphasised that the animal protection association that was the applicant in the case concerned was not a financially powerful group, and this argument has been invoked by the appellant in respect of the Pensioners Party. However, as I pointed out earlier, I do not believe that that the arguments justifying the legal basis for interference necessarily apply in full to the present case. In my opinion, it would be totally unacceptable if the right of political parties to use television advertising were to depend on the financial situation of the individual parties.

(83) On the other hand, when assessing whether there is a sufficiently pressing social need for a total prohibition of political television advertising, great importance must in my opinion be attached to the fact that, in connection with the amendment of Article 100 of the Constitution of Norway in 2004, the majority of Parliament's Standing Committee on Scrutiny and Constitutional Affairs was in favour of abolishing the current total prohibition and instead introducing regulating restrictions. [...]

(84) [...] *TV Vest* has argued that a total prohibition of political television advertising will be contrary to Article 100 of the Constitution as it reads following the constitutional amendment adopted on 30 September 2004. I see no reason to address this question, as it appears to be somewhat unclear whether the majority of the Standing Committee on Scrutiny and Constitutional Affairs considered that the right to political television advertising derives from the new Article 100, or whether such a right had to be enacted first. In relation to the question whether a total prohibition of political television advertising is compatible with Article 10 § 2 of the Convention, however, the position taken by the majority of the Standing Committee in connection with the constitutional amendment is of considerable interest in any event. Since the majority of the Standing Committee found the current total prohibition of political television advertising to be 'unfortunate from the point of view of freedom of expression' and in the underlying grounds overruled the main arguments that were adduced in support of the prohibition at the time it was adopted, I cannot see that it can be claimed with any particular degree of credibility that there is such a pressing social need for such a prohibition that it can be accepted as compatible with paragraph 2 of Article 10. In this connection, I find reason to emphasise that the change in Parliament majority's attitude was not caused by changes in society, but is solely due

to the fact that Parliament majority has realised that there is no sufficiently pressing social need for such an interference in the right to freedom of expression.

(85) The Media Authority's administrative decision of 10 September 2003 to impose a fine on *TV Vest* was taken pursuant to section 3-1(3), see. section 10-3, of the Broadcasting Act. The advertisements concerned in this case were aired during the election campaign for municipal and county elections in 2003. I see no reason to address the question of whether prohibiting political television advertising during election campaigns will be compatible with paragraph 2 of Article 10 of the Convention. The norm that constitutes the legal basis for the administrative decision of the Media Authority contains a total prohibition of political television advertising. As Lorentzen et al. (op. cit. page 51), points out, when examining the question of whether an interference in the exercise of a human right is compatible with the Convention, it is necessary to 'assess whether the national legal basis meets the human rights requirements as regards quality of law in relation to the powers of interference that derive from the Convention and the Court's case-law'. When trying the question of whether the national norm that provides legal authority for interference satisfies the requirements set out in the Convention, the question of whether the national legal authority for interference is sufficiently narrowly delimited as to satisfy the requirement of proportionality must also be tried. When the prohibition of political television advertising that constitutes the legal basis for the Media Authority's decisions is not sufficiently narrowly delimited to be able to satisfy the proportionality requirement set out in paragraph 2 of Article 10, the decision that was made pursuant to this provision must, in my opinion, conflict with the Convention, even though the Convention might authorise the prohibition of political television advertising during an election campaign. If the Norwegian legislature should wish to have such a prohibition, it would in such case have to be the subject of special consideration and relevant, sufficiently weighty and convincing grounds would have to be provided. The grounds adduced by the legislature for the existing total prohibition cannot justify a limited prohibition of this nature.

(86) On this basis it is my conclusion that the Norwegian Media Authority's administrative decision to impose a fine on *TV Vest* AS is invalid, see section 3, see section 2, of the Human Rights Act. ..."

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. Section 3-1 (3) of the Broadcasting Act 1992 read:

"Broadcasters cannot transmit advertisements for life philosophy or political opinions through television. This applies also to teletext."

23. The Government submitted that in 2005 the Media Authority had found that an advertisement transmitted by *TV2* for an anti-terrorism group named European Security Advocacy Group (ESAG) contained a political message which clearly fell within the meaning of the Broadcasting Act section 3-1(3). However, the Authority had concluded that the prohibition could not be enforced because doing so would violate Article 10 of the Convention. The Authority distinguished the facts from the Supreme Court's ruling in the *TV Vest* case. The ESAG-advertisement had to be considered as a contribution in a general public debate on how to fight

terrorism, it had been transmitted outside election period, and had not been connected to any political party or political organisation, but to a (social) interest group. Accordingly, the Authority found more similarities with the Court's judgment in the *VgT* case and, by applying a more narrow margin of appreciation, that the interference could not be said to be necessary for the purposes of Article 10 § 2.

III. COMPARATIVE LAW

24. The respondent Government produced a copy of survey performed by the Secretariat of the European Platform of Regulatory Authorities ("23rd EPRA Meeting, Elsinore, Denmark, 17-19 May 2006, Background paper - Plenary, Political advertising: cases studies and monitoring") on the basis of answers to a questionnaire, received from the authorities of 31 countries, i.e. Austria, Belgium (x2), Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Isle of Man, Israel (x2), Italy, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland (x2). The report included the following observations:

> "**• Countries with a ban on paid political advertising**
>
> Paid political advertising is statutorily forbidden in the vast majority of Western European countries such as Belgium, Denmark, France, Germany, Ireland, Malta, Norway, Portugal, Sweden, Switzerland, and the UK. Several countries from central and Eastern Europe such as the Czech Republic and Romania, also have a prohibition of paid political advertising.
>
> The most traditional justification for this prohibition is that rich or well-established parties would be able to afford significantly more advertising time than new or minority parties – thus amounting to a discriminatory practice. Another rationale invoked for the restriction or the ban is that it may lead to divisiveness in society and give rise to public concern. It has also been suggested, albeit less frequently, that a prohibition would preserve the quality of political debate.
>
> **• Countries allowing paid political advertising**
>
> Paid political advertising is allowed in many central and Eastern countries such as Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Macedonia, Poland, and the Baltic States: Estonia, Latvia and Lithuania. In a few countries such as in Bosnia-Herzegovina (60 days prior to Election Day), and Croatia, political advertising is only permitted during the election period.
>
> It is often overlooked that several countries in Western Europe, such as in Austria, Finland, Luxembourg (for the moment, this will change shortly) and the Netherlands also allow paid political advertising.

Text of Signed U.S.-Rwanda Bilateral Investment Treaty

February 19, 2008

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF RWANDA CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

SECTION A

Article 1: Definitions

For purposes of this Treaty:

5.

"investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;'

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;2

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; 3' 4 and I For greater certainty, where an enterprise does not have the characteristics of an investment, that enterprise is not an investment regardless of the form it may take. 2 Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are

immediately due and result from the sale of goods or services, are less likely to have such characteristics. 3 Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

"investment agreement" means a written agreements between a national authority 6 of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

"investment authorization" means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

"investor of a non-Party" means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party.

"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality. The term

"investment" does not include an order or judgment entered in a judicial or administrative action

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Press Release

Unofficial

No. 2008/44
23 December 2008

Germany institutes proceedings against Italy for failing to respect its jurisdictional immunity as a sovereign State

THE HAGUE, 23 December 2008. The Federal Republic of Germany today instituted proceedings before the International Court of Justice (ICJ) against the Italian Republic, alleging that "[t]hrough its judicial practice . . . Italy has infringed and continues to infringe its obligations towards Germany under international law".

In its Application, Germany contends: "In recent years, Italian judicial bodies have repeatedly disregarded the jurisdictional immunity of Germany as a sovereign State. The critical stage of that development was reached by the judgment of the Corte di Cassazione of 11 March 2004 in the *Ferrini* case, where [that court] declared that Italy held jurisdiction with regard to a claim . . . brought by a person who during World War II had been deported to Germany to perform forced labour in the armaments industry. After this judgment had been rendered, numerous other proceedings were instituted against Germany before Italian courts by persons who had also suffered injury as a consequence of the armed conflict." The *Ferrini* judgment having been recently confirmed "in a series of decisions delivered on 29 May 2008 and in a further judgment of 21 October 2008", Germany "is concerned that hundreds of additional cases may be brought against it".

The Applicant recalls that enforcement measures have already been taken against German assets in Italy: a "judicial mortgage" on Villa Vigoni, the German-Italian centre of cultural exchange, has been recorded in the land register. In addition to the claims brought against it by Italian nationals, Germany also cites "attempts by Greek nationals to enforce in Italy a judgment obtained in Greece on account of a . . . massacre committed by German military units during their withdrawal in 1944".

The Applicant requests the Court to adjudge and declare that Italy:

"(1) by allowing civil claims based on violations of international humanitarian law by the German Reich during World War II from September 1943 to May 1945 to be brought against the Federal Republic of Germany, committed violations of obligations under international law in that it has failed to respect the jurisdictional immunity which the Federal Republic of Germany enjoys under international law;

(2) by taking measures of constraint against 'Villa Vigoni' [the German-Italian centre for cultural exchange], German State property used for government non-commercial purposes, also committed violations of Germany's jurisdictional immunity;

(3) by declaring Greek judgments based on occurrences similar to those defined above in request No. 1 enforceable in Italy, committed a further breach of Germany's jurisdictional immunity.

Accordingly, the Federal Republic of Germany prays the Court to adjudge and declare that:

(4) the Italian Republic's international responsibility is engaged;

(5) the Italian Republic must, by means of its own choosing, take any and all steps to ensure that all the decisions of its courts and other judicial authorities infringing Germany's sovereign immunity become unenforceable;

(6) the Italian Republic must take any and all steps to ensure that in the future Italian courts do not entertain legal actions against Germany founded on the occurrences described in request No. 1 above."

Germany reserves the right to request the Court to indicate provisional measures in accordance with Article 41 of the Statute of the Court, "should measures of constraint be taken by Italian authorities against German State assets, in particular diplomatic and other premises that enjoy protection against such measures pursuant to general rules of international law".

As the basis for the jurisdiction of the Court, Germany invokes Article 1 of the European Convention for the Peaceful Settlement of Disputes adopted by members of the Council of Europe on 29 April 1957, ratified by Italy on 29 January 1960 and ratified by Germany on 18 April 1961. That Article states:

"The High Contracting Parties shall submit to the judgment of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation."

Germany asserts that, although the present case is between two Member States of the European Union, the Court of Justice of the European Communities in Luxembourg has no jurisdiction to entertain it, since the dispute is not governed by any of the jurisdictional clauses in the treaties on European integration. It adds that outside of that "specific framework" the Member States "continue to live with one another under the regime of general international law".

The Application was accompanied by a Joint Declaration adopted on the occasion of German-Italian Governmental Consultations in Trieste on 18 November 2008, whereby both Governments declared that they "share the ideals of reconciliation, solidarity and integration, which form the basis of the European construction". In this declaration Germany "fully acknowledges the untold suffering inflicted on Italian men and women" during World War II. Italy, for its part, "respects Germany's decision to apply to the International Court of Justice for a ruling on the principle of state immunity [and] is of the view that the ICJ's ruling on State immunity will help to clarify this complex issue".

The full text of the Federal Republic of Germany's Application will be available shortly on the Court's website (www.icj-cij.org).

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