OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 15 March 2007 [1]

I — Introduction

1. By judgment of 13 September 2005, handed down in Case T-72/04 *Hosman-Chevalier* v *Commission* [2] ('the judgment under appeal'), the Court of First Instance upheld in part the application made by Ms Hosman-Chevalier, and annulled the decisions of 8 April 2003 and 29 October 2003 whereby the Commission of the European Communities had refused to pay Ms Hosman-Chevalier the expatriation allowance and the installation allowance provided for in Article 4(1)(a) and the first subparagraph of Article 5(1) of Annex VII to the Staff Regulations of Officials of the European Communities, in the version applicable at the time of the material facts ('the Staff Regulations').

2. In this case, the Court of Justice is being asked to rule on the Commission's appeal against the abovementioned judgment.

1 — Original language: Italian.

2 — [2005] ECR II-3265.

II — Legislative background

3. Under Article 69 of the Staff Regulations, the expatriation allowance is to be equal to 16% of the total of the basic salary, household allowance and dependent child allowance to which the official is entitled.

4. Pursuant to Article 4(1)(a) of Annex VII to the Staff Regulations, that allowance is to be paid:

'(a) to officials:

— who are not and never have been nationals of the State in whose territory the place where they are employed is situated, and

— who, during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account'.

III — Facts

5. According to the facts established by the Court of First Instance, Ms Hosman-Chevalier ('the respondent'), an Austrian national, studied and worked in Austria until 14 May 1995. From 15 May 1995 to 17 March 1996, she worked in Belgium for the Verbindungsbüro des Landes Tirol (Liaison Office for the *Land* Tyrol), located in Brussels.

6. From 18 March 1996 to 15 November 2002, the respondent was a member of staff of the Permanent Representation of the Republic of Austria to the European Union in Brussels ('the PRA'). During that period, she worked, first for the Verbindungsstelle der Bundesländer (*Länder* Liaison Office; 'the VB') and, then, for the Österreichischer Gewerkschaftsbund (Austrian Federation of Trade Unions; 'the OGB').

7. On 16 November 2002, the respondent entered the service of the Commission as an official. The five years referred to in the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations for the purposes of payment of the expatriation allowance, known as the 'reference period', were fixed between 16 May 1997 and 15 May 2002.

8. By memorandum of 8 April 2003, the respondent was informed by the Directorate-General for Personnel and Administration of the Commission that she could not be granted payment of the expatriation allowance, on the ground that the requirements for awarding it were not met.

By decision of 29 October 2003, the appointing authority rejected the respondent's complaint concerning the decision contained in the memorandum of 8 April 2003. Its rejection was based on the ground that the work which the respondent had done in Brussels during the reference period could not be treated as 'work done for another State' within the meaning of Article 4(1)(a) of Annex VII to the Staff Regulations.

IV — Procedure before the Court of First Instance and the judgment under appeal

9. By an application lodged at the Registry of the Court of First Instance on 20 February 2004, the respondent brought an action against the decision of 29 October 2003 rejecting her complaint, asking the Court of First Instance to annul the decision and order the Commission to pay the costs.

10. By judgment of 13 September 2005, the Court of First Instance upheld the application in part and annulled the contested decision and the decision of 8 April 2003, in so far as the forms of order sought by the respondent had also to be construed as seeking the annulment of that decision. [3]

11. The judgment was based on upholding the second plea alleging an infringement of Article 4(1)(a) of Annex VII to the Staff Regulations [4] and was set out as follows.

12. By way of preliminary, having first drawn attention to the fundamental purpose of the rules laid down in Article 4(1)(a) of Annex VII to the Staff Regulations, [5] the Court of First Instance stated that the term 'State' which is relevant for the purposes of applying the rule contained in the last sentence of the second indent of Article 4(1)(a) 'relates only to the State as a legal person and unitary subject of international law and its government bodies'. [6]

13. The Court of First Instance then went on to consider whether the work which the respondent had done for the PRA during the reference period ought to be regarded as work done for a State within the meaning of that provision.

14. At paragraph 30 of the judgment, the Court of First Instance noted that '[i]t is not disputed that work done for bodies such as the permanent representation of a Member State to the European Union or the embassies of a State is considered to be work done for a State within the meaning of Article 4 [(1)(a)] of Annex VII to the Staff Regulations'.

15. At paragraphs 31 to 36, the Court of First Instance established, on the basis of the documents before it, that, for the entire reference period, the respondent had worked for the PRA, had been subject to the

3 — Judgment under appeal, paragraph 1 of the operative part.

4 — The Court of First Instance considered it unnecessary to rule on the other two pleas put forward by the respondent, concerning an error in the assessment of the facts and an infringement of the principle of equal treatment.

5 — Judgment under appeal, paragraphs 27 and 28.

6 — Judgment under appeal, paragraph 29.

supervisory authority of the Permanent Representative of the Republic of Austria and had had the same status as that of other officials assigned to the PRA. On the basis of that evidence, the Court of First Instance concluded that the work done by the respondent for the PRA throughout the reference period had to be considered to be work done for the Republic of Austria.

16. At paragraphs 37 to 41, the Court of First Instance rejected the Commission's arguments to the contrary, which were based on the consideration that, within the PRA, the respondent had worked for bodies responsible for defending interests other than those of the Austrian State. In particular, the Court of First Instance pointed out that the requirement of a uniform application of Community law and the principle of equality precluded the possibility of referring to the domestic law of a Member State in order to interpret a provision of Community law, save in a situation where that reference is expressly provided for by the provision in question or where an independent interpretation is not possible. According to the Court of First Instance, in the present case, a reference of that nature was not necessary, since it could not be disputed that a permanent representation of a Member State to the European Union was amongst those State bodies falling within the scope of Article 4(1)(a) of Annex VII to the Staff Regulations. [7]

17. At paragraph 42, the Court of First Instance held that '[i]t is therefore sufficient that a person works for a body which is part of the State in the sense referred to, such as a permanent representation, in order to fall fully within the exception laid down in Article 4(1)(a) of Annex VII to the Staff Regulations regardless of the particular and specific functions carried out by that person within that body'. The Court of First Instance further held that, if that were not the case, 'it would be necessary to carry out a detailed analysis of the tasks and functions carried out from the point of view of national law, which would be contrary to the requirements mentioned above', bearing in mind, in particular, that 'it is the exclusive role of every Member State to organise its services as it deems most appropriate and to thus determine the objectives and functions it assigns to its officials and employees'.

18. For those reasons, the Court of First Instance concluded that the Commission had incorrectly refused to disregard the period during which the respondent had worked for the PRA, thereby unlawfully excluding her from receiving the expatriation allowance under Article 4(1)(a) of Annex VII to the Staff Regulations, as well as the installation allowance linked to the expatriation allowance and provided for under Article 5(1) of that annex. The Court of First Instance accordingly annulled the contested decisions in so far as they refused the respondent those allowances. [8]

7 — Judgment under appeal, paragraph 40.

8 — Judgment under appeal, paragraphs 42 to 47 and 51 and paragraph 1 of the operative part. The application was, however, dismissed as regards the failure to grant the daily subsistence allowance, which was also contested by the respondent (see paragraph 52 and paragraph 2 of the operative part).

V — Procedure before the Court of Justice and forms of order sought by the parties

19. By an application lodged at the Registry of the Court of Justice on 29 November 2005, the Commission lodged an appeal against the abovementioned judgment.

20. The Commission claims that the Court should:

— set aside the judgment under appeal and refer the case back to the Court of First Instance;

— order the respondent to pay the costs.

21. The respondent claims that the Court should:

— dismiss the appeal as manifestly inadmissible or, in the alternative, as unfounded;

— order the Commission to pay the costs.

VI — Legal analysis

A — *Admissibility*

22. The respondent is, primarily, challenging the admissibility of the appeal, arguing that it seeks, ultimately, to secure a re-evaluation by the Court of Justice of facts which have already been assessed by the Court of First Instance in the judgment under appeal.

23. In my view, the plea of inadmissibility must be rejected. Contrary to the respondent's submissions, the appeal is based on a point of law alleging that the Court of First Instance erred in its interpretation and application of Article 4(1)(a) of Annex VII to the Staff Regulations.

B — *Substance*

1. Arguments of the parties

24. In support of its appeal, the Commission cites a single ground alleging an error in law in the interpretation of the condition con-

cerning 'circumstances arising from work done for another State', within the terms of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations.

25. According to the Commission, in order for that condition to be fulfilled, the Court of First Instance incorrectly considered it sufficient that the person responsible for doing the work should have a function in or be a member of staff of a State body, such as a permanent representation to the European Union. That, it argues, is the implied but inevitable conclusion to be drawn from paragraphs 31 to 36 of the judgment under appeal and is confirmed by paragraph 42.

26. The Commission, however, takes the view that the condition at issue requires proof of the existence of a direct legal link between the official and the State, and that this cannot consist solely in the fact that the person concerned has a function in or is a member of staff of a body of that State.

27. In support of its argument, the Commission, first of all, claims that the very purpose of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations, as clarified by the Community Courts, presupposes that, during the reference period, the official whose situation is to be assessed for the purposes of that provision has been directly linked to the State in question by virtue of a statutory or contractual relationship.

28. Secondly, the Commission points out that the provision at issue constitutes an exception to the conditions for the grant of the expatriation allowance and must, as such, be interpreted strictly.

29. Thirdly, the Commission submits that the interpretation of the provision at issue which was upheld in the judgment under appeal moves away from both the case-law of the Court of First Instance concerning the condition relating to 'work done for another State' and from the case-law applying the alternative condition concerning 'work done ... for an international organisation'. Among the judgments handed down in the latter context, the Commission cites, in particular, the decisions in *Nevin* v *Commission* [9] and *Lo Giudice* v *Parliament*, [10] in which the Court of First Instance held, with reference to work done for an international organisation, that the requirements governing application of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations were not met if there was no contractual relationship, consisting in a direct legal link, between the official and the body for which the work was done. The Commission contends that in assessing

9 — Case T-127/00 [2002] ECR-SC I-A-149 and II-781, paragraph 51.

10 — Case T-43/93 [1995] ECR-SC I-A-57 and II-189, paragraph 36.

whether one or other of the situations in relation to which the rules contained in the provision in question have been laid down (work done for another State or work done for an international organisation) exists, uniform interpretative criteria must be applied, as the system will otherwise be inconsistent.

30. The Commission concludes that, in breach of Community law, the Court of First Instance failed in the judgment under appeal to establish the existence of a direct legal link between the respondent and the Republic of Austria, a condition which has not been met in this case because, during the reference period, the respondent was employed first by the VB and then by the OGB.

31. The respondent contests all of the Commission's arguments, claiming that they are totally unfounded and that the judgment under appeal is free of the defects the Commission alleges.

2. Assessment

(a) Preliminary observations

32. For the purpose of properly defining the subject-matter of this case, it is necessary to make the preliminary point that, even though the judgment under appeal contains a definition of the term 'State' within the meaning of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations, [11] the reasoning which led the Court of First Instance to annul the decisions in issue, as is clear from paragraphs 31 to 36 and 42 of the grounds in particular, did not require the Court of First Instance to adopt a position on whether that term encompasses the bodies by which the respondent was directly employed during the reference period.

33. It follows that the concept of 'State' upheld in the judgment under appeal is the subject of neither the plea which the Commission has submitted in support of its appeal, challenging the validity of the grounds which led the Court of First Instance to take the view that the link between the respondent and the Republic of Austria, required in order for the provision at issue to apply, was established — leaving aside the nature of the bodies concerned — nor of the arguments put forward by the respondent, which merely contest the Commission's claims.

34. Consequently, the question of whether or not that definition is correct falls outside

11 — At paragraph 29 of the judgment under appeal, the Court of First Instance notes that '[t]he term "State" used in that article relates only to the State as a legal person and unitary body of international law and its government bodies'. Subsequently, at paragraph 40, the Court of First Instance points out that this term must, as far as possible, be given an interpretation that is independent of the laws of the Member States.

the subject-matter of the dispute, and, for the purposes of simply verifying the validity of the judgment under appeal, at least, [12] the current proceedings do not require the Court to give a ruling on that point.

35. Although it relates to the same provision of the Staff Regulations, the present case, therefore, raises a question of interpretation which differs from that which forms the subject-matter of Case C-7/06 P *Salvador Garćia* v *Commission*, Case C-8/06 P *Herrero Romeu* v *Commission*, Case C-9/06 P *Salazar Brier* v *Commission*, Case C-10/06 P *De Bustamante Tello* v *Council* and Case C-211/06 P *Adam* v *Commission*, which are currently pending before the Court.

36. In those cases, before entering the service of the Commission, the applicants — officials who have been refused the expatriation allowance — had worked in Brussels in the offices of bodies responsible for protecting the interests of infra-State territorial entities. [13] In none of those cases had the applicants had a relationship with the permanent representation of the State to which the entities in question belonged, which could be regarded as comparable to the respondent's relationship with the PRA in this case. In the abovementioned cases, the Court is, therefore, being asked to give a ruling on the term 'State' within the meaning of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations, in order to establish whether that term embraces such entities.

37. The present case, however, concerns the different issue of the conditions which must be met in order to establish that the work done by the official, whose entitlement to the expatriation allowance has to be determined, constitutes 'circumstances arising from work done for another State', making it possible to 'disregard' the relevant periods, as provided for by the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations. More particularly, the Court will have to establish whether the mere fact that the work is done by a person who has a function in or is a member of staff of a State body is sufficient for that purpose, regardless of whether the term 'State', within the meaning of the provision at issue, can embrace the bodies which have been the direct recipients of that work.

38. Following clarification of that point, it is now necessary rapidly to review the main contributions of case-law to the interpret-

12 — For the reasons which I shall set out below, I do not consider that the present appeal should be upheld, and that the Court will, therefore, have the opportunity of giving a final ruling on the merits of the case.

13 — The bodies concerned were a number of Spanish autonomous communities and, in the case of the applicant in *Adam* v *Commission*, a *Land*.

ation of the concept of 'circumstances arising from work done for another State or for an international organisation'.

39. Although judgments of the Court of Justice in this area are few and far between, there is a wealth of — albeit not always unequivocal — judgments of the Court of First Instance, which I consider it none the less useful to cite, bearing in mind also the Commission's criticism that, by adopting the judgment under appeal, the Court of First Instance has demonstrated a lack of consistency. The judgments to which I will refer below provide elements useful for identifying the nature and fundamental purpose of the rule contained in the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations (i), as well as for defining the conditions governing its application (ii).

(b) Analysis of the case-law

(i) The nature and fundamental purpose of the rule contained in the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations

40. I have already alluded to the fact that, in interpreting the provision at issue, decisions of the Court of First Instance have adopted solutions which are not always consistent. That applies in particular to identifying the nature of the rule which it contains.

41. In its judgment in *Vardakas* v *Commission*, [14] the Court of First Instance applied an interpretation of Article 4(1)(a) of Annex VII to the Staff Regulations, which, in my view, is not actually confirmed by the text, and held that the rule contained in the last sentence of the second indent was an *exception to an exception* and, as such, had to be interpreted *broadly*. [15] In the same judgment, comparing the rules contained in Article 4(1)(a) and (b) of Annex VII, [16] the Court of First Instance concluded that the expression 'circumstances arising from work done for ... another State', which appears in Article 4(1)(a), 'has a much wider scope' than the expression 'the performance of duties in the service of ... an international organisation', which appears in Article 4(1)(b) and that, consequently, 'the Staff Regulations have been framed in broad

14 — Case T-4/92 [1993] ECR II-357.

15 — See paragraph 34 of the judgment; emphasis added. The Court of First Instance reached that conclusion after pointing out that the provision at issue is contained in an article comprising three parts: the *rule*, according to which the expatriation allowance is payable to officials who are not and have never been nationals of the State in whose territory the place of employment is situated (first indent); the *exception*, whereby that allowance is not payable to an official who habitually resided or carried on his main occupation within the territory of that State during the reference period (second indent); and the *derogation from that exception*, allowing circumstances arising from work done for another State or an international organisation to be disregarded (second indent, last sentence).

16 — Under Article 4(1)(b) of Annex VII to the Staff Regulations, the expatriation allowance is to be paid 'to officials who are or have been nationals of the State in whose territory the place where they are employed is situated but who during the 10 years ending at the date of their entering the service habitually resided outside the European territory of that State for reasons other than the performance of duties in the service of a State or an international organisation'.

terms where the intention was to grant officials the expatriation allowance and in restrictive terms where the opposite effect was desired'. [17] On that basis, the Court of First Instance concluded that 'the legislature's intention was to confer a broad entitlement to the expatriation allowance'. [18]

42. By contrast, in its judgment in *Olesen* v *Commission*, [19] the Court of First Instance took the view that, 'as an exception to the conditions for grant of the expatriation allowance', [20] the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations had to be given a *restrictive* interpretation. [21] In that judgment, the Court of First Instance also stated that the provision had to be interpreted strictly because it conferred financial benefits. [22]

43. I have to say that I find neither of those two approaches entirely convincing.

44. I do not agree with the interpretation provided in the judgment in *Vardakas* v *Commission*, which, in my view, is at odds with the actual wording of Article 4(1)(a) of Annex VII to the Staff Regulations, from which it is apparent that the first and second indents of Article 4(1)(a) contain rules stipulating conditions (both negative) which must be met cumulatively in order to establish entitlement to the expatriation allowance under that article, while there is nothing to suggest that the relationship between those rules is that of a rule and the exception to it. [23]

45. However, the approach adopted in *Olesen* v *Commission* does not seem to me to be persuasive either.

46. In point of fact, I wonder whether the rule the interpretation of which is at issue may in fact be considered to be 'an exception to the conditions for grant of the expatriation allowance'. First of all, it is clear both from its position in the text and from the expression '[f]or the purposes of this provision', which introduces it, that the rule refers *exclusively* to the condition set out in the second indent of Article 4(1)(a), that is to say, that relating to officials 'who ... before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State'

17 — Paragraph 36.

18 — Paragraph 37.

19 — Case T-190/03 [2005] ECR-SC I-A-181 and II-805.

20 — Paragraph 47; emphasis added.

21 — Advocate General Darmon had already expressed that view in his Opinion in Case 246/83 *De Angelis* v *Commission* [1985] ECR 1253. The Court's case-law frequently defines the provision at issue as a 'derogation'.

22 — Paragraph 48.

23 — In other words, in my view, the condition governing the grant of the expatriation allowance is not the fact that the official is not a national of the State in which the place of employment is situated but the circumstance of de facto 'expatriation' in which the official finds himself on entering the service. That interpretation appears to be confirmed by Article 4(1)(b) which provides that, in certain circumstances, even an official who is a national of the State in which the place of employment is situated may receive an expatriation allowance.

during the reference period. Secondly, it seems to me that it lays down a *criterion applying* the rule which precedes it rather than introducing an exception or derogation to that rule. [24] In any event, if it can be described as a derogation, that derogation solely concerns the methods of calculating the reference period for the purposes of applying that rule and not the condition which it sets out, since that condition must, in any event, also be fulfilled by those persons who, having worked for a State or an international organisation, are entitled to have the relevant periods of work disregarded. [25]

47. On the other hand — without entering into the merits of transposing to the sphere of the public service the principle, developed by the Court in a different area, [26] according to which the provisions of Community law which confer entitlement to financial benefits using Community resources must be strictly interpreted [27] — it must, in my view, be made clear that the Court of First Instance's reference to a strict interpretation of the provision at issue must, at most, be construed as excluding the application of an interpretation by analogy and cannot in any way justify an interpretation of that rule which alters its scope by contradicting the provision it contains or limiting its 'natural' scope.

48. However, as regards the fundamental purpose of the rule contained in the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations and, more generally, the institution of the expatriation allowance, the case-law provides clear guidance.

49. It is settled case-law of both the Court of Justice and the Court of First Instance that

24 — If the pairing 'standard provision — exceptional provision' or 'derogated provision — derogating provision' is to be regarded as established, it is necessary that the exceptional provision or derogating provision should attach to specific situations which, if those provisions did not exist, would be governed by the standard provision or derogated provision, effects different from the effects which the standard provision or derogated provision would attach to those same situations. In this case, what is deemed to be the standard or derogated provision stipulates that an official who has habitually resided or carried on his main occupation within the territory of the State where the place of employment is situated during the reference period (description of the circumstances) is not entitled to the expatriation allowance (effect). What is deemed to be the exceptional or derogating provision stipulates that circumstances arising from work done for another State (definition of the situation) will not be taken into consideration (effect). The effect of the latter provision is not to remove from the scope of the former any situation which would be encompassed by it, regulating it differently: an official who has worked for another State during the reference period is not *automatically* entitled to the expatriation allowance (which would be the outcome were the exceptional or derogating provision to remove that situation from the scope of the standard or derogating provision) but is only entitled to have *disregarded*, for the purposes of calculating the reference period, the time taken up in the pursuit of that work. It follows, in my view, that the provision at issue does not introduce an exception or derogation to the condition laid down in the second indent of Article 4(1)(a), but merely provides for a *criterion implementing* that condition.

25 — See, to that effect, Case 211/87 *Nuñez* v *Commission* [1988] ECR 2791.

26 — Financial contributions accorded in the context of the common agricultural policy.

27 — An approach which the Court of First Instance has consistently adopted with effect from its judgment in Case T-41/89 *Schwedler* v *Parliament* [1990] ECR II-79; see, for example, the case-law cited at paragraph 48 of the judgment in *Olesen* v *Commission*. In his Opinion on the appeal against the judgment in *Schwedler* v *Parliament*, Advocate General Tesauro criticised the grounds of the Court of First Instance's judgment on that point: see the Opinion of the Advocate General in Case C-132/90 P *Schwedler* v *Parliament* [1991] ECR I-5745.

'the object of the expatriation allowance is to compensate officials for the extra expense and inconvenience of taking up permanent employment in a country with which the official has not established lasting ties before entering the service'. [28]

50. As regards the rule contained in the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations, it is settled case-law that the fundamental purpose of that rule is to avoid penalising, through the loss of the expatriation allowance, those officials who have taken up residence in the country of their place of work in order to engage in activities for another State or for an international organisation, [29] since they cannot be considered to have 'established a lasting tie with the country in which [they are] employed due to the temporary nature of the secondment in that country'. [30]

51. The rule on disregarding the relevant periods contained in the provision at issue seems, therefore, to be based on the assumption that the fact of working for a State or for an international organisation is not of itself capable of creating lasting ties between the person concerned and the State in which that work is done. [31]

52. How can that assumption be justified?

53. Since the case-law is silent on this point, a number of possibilities may be put forward here.

54. An initial justification may be drawn from the consideration, based on experience, that working abroad for a State other than the State in which the work is carried out or for an international organisation is, generally, a temporary state of affairs: like the members of a State's diplomatic corps, the officials of an international organisation may easily be required to change their place of work and, therefore, have no interest in establishing lasting ties with the State in which their place of employment is located.

55. A second explanation for that assumption could be based on the special nature of the working environment within inter-

28 — See, among others, Case 21/74 *Airola* v *Commission* [1975] ECR 221, paragraph 8; Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, paragraph 8; *De Angelis* v *Commission* (cited in footnote 21 above), paragraph 13; Case 61/85 *von Neuhoff von der Ley* v *Commission* [1987] ECR 2853, paragraph 7; Case T-28/98 *J* v *Commission* [1999] ECR-SC I-A-185 and II-973, paragraph 32; Case T-18/98 *Reichert* v *Parliament* [2000] ECR-SC I-A-73 and II-309, paragraph 25; and *Olesen* v *Commission* (cited in footnote 19 above), paragraph 44.

29 — *Nuñez* v *Commission* (cited in footnote 25 above).

30 — Case 1322/79 *Vutera* v *Commission* [1981] ECR 127, paragraph 8; *De Angelis* v *Commission* (cited in footnote 21 above), paragraph 13; and *Nevin* v *Commission* (cited in footnote 9 above), paragraph 50.

31 — A similar assumption, albeit to the opposite effect, underlies the provision contained in Article 4(1)(b). See Case T-317/99 *Lemaître* v *Commission* [2000] ECR-SC I-A-191 and II-867, paragraph 59.

national organisations and State structures outside the national territory. Since working life often plays a fundamental part in integrating an individual into society, the fact that the working environment is largely made up of persons who, on the one hand, are not permanently established in the State in which the place of employment is situated and, on the other, are not nationals of that State may make it difficult to establish lasting social ties that will make it possible to become genuinely integrated within that State.

56. The need to maintain the Community institutions' ability to recruit and their capacity to attract citizens from States other than the State of the place of employment may also have influenced the objectives of the rule on disregarding the relevant periods. That is true, in particular, where that rule is applied to circumstances in which work is done for international organisations, both in order to avoid deterring individuals from taking up temporary posts with the Community institutions and, in addition, to avoid discouraging those individuals who have worked on a temporary basis from taking up permanent posts with the institutions.

57. Finally, I have to consider whether the above considerations adequately explain the presumption underlying the rule at issue, or whether its fundamental purpose is not, actually, to confer a kind of privilege for the benefit of States and international organisations, in so far as it provides for special arrangements (regarding the methods of calculating the reference period) for persons who have worked for the organs of States and international organisations, and is designed to eliminate disincentives to regional mobility for employees of the States and international organisations. In particular, it seems obvious that the justifications set out above are inadequate, bearing in mind that they tend to confirm the presumption of non-integration in the State of the place of employment, in relation both to the circumstances defined by the provision at issue and the circumstances arising from work done abroad for bodies other than the States and international organisations (however those terms are to be construed). [32]

(ii) Conditions governing the application of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations

— Presentation of the case-law

58. Since, in agreement with the points which the Commission has made, I consider

32 — From that perspective, it is worth pointing out that in Case T-251/02 *E* v *Commission* [2004] ECR-SC I-A-359 and II-1643 the Court of First Instance gave a ruling in which it rejected a plea alleging the illegality of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations, based specifically on the alleged incompatibility of that provision with the principle of equal treatment. The applicant claimed that the rule on disregarding the relevant periods should apply to her, arguing that she had been sent by the English legal practice with which she worked to pursue her professional activity for part of the reference period at its Brussels office and had not established lasting ties with Belgium on the basis of that experience.

that, in order to ensure consistency, the assessment of whether the conditions for applying the provision at issue are met must be based on the same criteria in relation to both the sets of circumstances to which it refers ('work done ... for another State' and 'work done for an international organisation'), the review that follows includes judgments relating to one or other of those situations, without distinction. [33]

59. As regards the conditions of application as they relate to the individual concerned, the Court made clear in its judgment in *De Angelis* v *Commission* [34] that the provision at issue applies only to 'circumstances arising from work done by the *actual official* [35] entering the service' and cannot be extended to cover an official who resided in the country of the place of work as a result of having followed to that country, by virtue of a legal obligation, a spouse who was transferred there in order to enter the service of the Communities.

60. As regards the material conditions, it is, first of all, necessary to call to mind the judgment in *Lo Giudice* v *Parliament*, [36] which the Commission cited several times in its observations. In that judgment, the Court of First Instance took the view, for the first time, that, for the provision at issue to apply, there had to be a direct legal link between the official and the international organisation in question. In the case which gave rise to that judgment, before being employed as an official of the European Parliament, the applicant had provided computer consultancy services for both the Commission and the European Parliament, under a contract concluded between those institutions and the companies for which he worked. The Court of First Instance noted that the applicant had not been 'directly recruited by a Community institution under a contract or in any other form, in accordance with the rules applicable to the other servants of the European Communities or under other Community rules', that, in that case, there was 'no direct working relationship with the institutions in question and that, consequently, the applicant was not subject to instructions from those institutions'. [37] In paragraph 36, the Court of First Instance held, more generally, that, in order to be able to benefit from the rule on disregarding the relevant periods, 'the person concerned must *at least* have had *direct legal links* with the institution in question'. [38]

61. In its judgment in *Diamantaras* v *Commission*, [39] the Court of First Instance

33 — It is also necessary to make clear that, in accordance with the clarification provided above regarding the subject-matter of this appeal, how case-law defines the terms 'State' and 'international organisation' for the purposes of applying the provision at issue lies outside the scope of the analysis that follows.

34 — Cited in footnote 21 above, paragraph 14.

35 — Emphasis added.

36 — Cited in footnote 10 above.

37 — Paragraph 34. Unofficial translation of the French text of the judgment.

38 — Unofficial translation of the French text of the judgment; emphasis added. According to the Court of First Instance, 'an interpretation of that nature is, moreover, consistent with the autonomy which the institutions enjoy in regard to the internal organisation of their services, which permits them, using public tendering procedures, to invite third parties which do not fall within their supervisory structure to offer their services in order to guarantee the implementation of specific tasks'.

39 — Case T-72/94 [1995] ECR-SC I-A-285 and II-865, paragraph 52.

was asked to rule on the applicant's eligibility to have disregarded the period during which he had worked as a self-employed consultant for the Commission, and held that the provision at issue did not relate only to the *officials* of a State or persons who had *been staff members* of an international organisation. According to the Court of First Instance, since the status of independent consultant for the Commission involved a direct legal link between that institution and the applicant, it gave rise to circumstances in which the work had been done for an international organisation within the meaning of that provision.

62. In the judgment in *Liaskou* v *Council*, [40] the latter contended that there had been no employment relationship, of either a contractual or a statutory nature, between the applicant and the Commission, with which the applicant had spent a period as a trainee, the classification of which was a matter of dispute. The Court of First Instance noted that, during her traineeship, the applicant had done work for the Commission in return for remuneration and that *the legal nature of her relationship* with that institution could not be excluded solely because no *contract* had been entered into. According to the Court of First Instance, it followed that the applicant's traineeship had to be treated as a circumstance resulting from work done for an international organisation within the meaning of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations.

63. In its judgment in *Nevin* v *Commission*, delivered on 11 September 2002, [41] the Court of First Instance returned to the concept of the direct legal link and the importance to be attached, in determining whether that link existed, to ascertaining whether the official was subject to the supervisory authority of the international organisation. In that case, before being employed by the Commission, the applicant had worked for that institution, on, inter alia, an interim basis. After having established that there had been no employment relationship between the applicant and the Commission [42] and, consequently, that there was no direct legal link in the sense already defined at paragraph 34 of the judgment in *Lo Giudice* v *Parliament*, [43] the Court of First Instance went on to assess whether the evidence relied on by the applicant could constitute a direct legal link, even in the absence of an employment relationship. [44] Among the evidence which

40 — Case T-60/00 [2001] ECR-SC I-A-107 and II-489, paragraph 49.

41 — Cited in footnote 9 above.

42 — The Court of First Instance reached that conclusion after evaluating the relationships which existed between the interim employment agency, the interim employee and the recipient of the work under Belgian law (see paragraphs 53 to 57).

43 — See point 60 above.

44 — As well as the condition of being subject to supervisory authority, referred to later in the text, the applicant cited by way of evidence establishing that he had a direct relationship with the Commission, in particular: the legal obligation to the interim employee incumbent on the recipient of the work; a number of formal aspects concerning both the contract between the applicant and the interim employment agency and the documentation with which the latter issued the applicant; a certain number of employee benefits which the Commission was required to provide pursuant to the general conditions attached to the contract between the Commission and the interim employment agency; and the fact that the Commission had approved the applicant's appointment.

the Court of First Instance considered was the fact that, in pursuing his activity, the applicant received instructions from the Commission alone. That circumstance was considered by the Court of First Instance to be entirely compatible with the nature of interim work in which the employment relationship and, therefore, the supervisory relationship is established solely with the interim employment agency; in complying with the instructions given by the Commission, the applicant was performing the obligations entered into in relation to the interim employment agency, his employer, while the failure to comply with those instructions produced legal consequences solely in the context of his contractual relationship with that agency. The Court of First Instance concluded that, 'while the fact that the applicant was legally subject to the instructions given by the Commission constituted a difference compared with the situation forming the subject of the judgment in *Lo Giudice* v *Parliament* ..., the fact remains that, as in the latter case, there were no direct legal links between the parties capable of permitting the application of the exception contained in the last sentence of [the second indent of Article 4(1)(a)] of Annex VII to the Staff Regulations'. [45]

64. The existence of a direct legal link within the meaning of the case-law cited above appears to be required even where the exception under the last sentence of the [second] indent of Article 4(1)(a) of Annex VII to the Staff Regulations is to be applied to circumstances of 'work done for another State'.

65. In *Olesen* v *Commission*, cited at point 42 above, the Court of First Instance referred to the judgments in *Lo Giudice* v *Parliament*, *Diamantaras* v *Commission* and *Nevin* v *Commission* in order to justify a strict interpretation of the provision at issue, even where the case involved circumstances of work done for a State. Without specifically stating that it was necessary to apply the criterion of the direct legal link established in the earlier judgments in those circumstances also, the Court of First Instance held that 'it would be inconsistent to allow two contrary approaches to coexist within the same provision, that is to say, a strict interpretation of "work done for an international organisation" and a broad interpretation of "work done for another State"'. [46]

66. By contrast, the Court of First Instance specifically applied the criterion of the direct legal link in its judgment in *Recalde Langarica* v *Commission*, [47] finally ruling out, in that case, the existence of direct legal links between the applicant, who was employed by a public limited company under Spanish law, and the Spanish State. The Court of First Instance basically cited the *absence of contractual relations* between the Spanish State and the applicant, considering the fact that the Autonomous Basque Community was the sole shareholder in that company to be capable of proving only that *indirect* legal

45 — Paragraph 65. Unofficial translation of the French text of the judgment.

46 — Paragraph 50. Unofficial translation of the French text of the judgment.

47 — Case T-283/03 [2005] ECR-SC I-A-235 and II-1075, paragraph 166.

links existed between that body and the applicant and, a fortiori, between the applicant and the Kingdom of Spain. [48]

— Analysis

67. It is clear from the considerations set out above that the concept of 'direct legal link', to which the Commission refers in its observations, is a concept which the Court of First Instance has developed in its case-law.

68. In support of its appeal, the Commission contends, inter alia, that, in the judgment under appeal, the Court of First Instance departed from its case-law because it failed to establish whether a direct legal link existed in the case in point. It also maintains that, on the basis of the case-law cited above, 'direct legal link' must be interpreted as meaning a link of a contractual or statutory nature. Finally, the Commission submits that the Court of First Instance has applied a criterion — the criterion of being subject to supervisory authority — the relevance of which in assessing whether a direct legal link exists is precluded as a result of the judgment in *Nevin* v *Commission*.

69. Before pursuing my own analysis, I consider it useful to set out the reasons which prevent me from accepting the analysis of the Court of First Instance's case-law which the Commission is putting forward.

70. First of all, it is necessary to point out that, in order for the direct legal link required for the purposes of applying the rule on disregarding the relevant periods to be applied, the case-law of the Court of First Instance does not require that the person doing the work should be *an employee of the State* or be on the staff of the international organisation. [49] In other words, the State or international organisation need not necessarily have acquired the status of employer in relation to the person concerned.

71. Secondly, it must be pointed out that the Court of First Instance has used the expression 'direct legal link' and not the expression 'direct contractual obligation'. I do not consider that this choice merely reflects a requirement of a terminological nature, dictated by the need to cover circumstances in which the relationship between the person concerned and the State or international organisation is not of a contractual but of a statutory nature; as a result, it seems to me possible to conclude that the link to which the case-law refers *need not necessarily result from a contract*. Furthermore, an interpretation whereby, in the absence of a direct contractual relationship, the condition of the direct legal link is fulfilled solely subject to the existence of a legal link which is closer

48 — See paragraphs 167 and 168. The criterion of the direct legal link is also referred to in the judgments against which appeals are currently pending in the cases cited at point 35 above.

49 — See *Diamantaras* v *Commission* and *Liaskou* v *Council* (cited in footnotes 39 and 40 above respectively).

than the link deriving from a contract does not seem to me to be tenable. In point of fact, on the one hand, in the above judgment in *Liaskou* v *Council*, the Court of First Instance took the view that a link of that nature existed in relation to a trainee. Furthermore, in the above judgment in *Lo Giudice* v *Parliament*, the Court of First Instance acknowledged that the link required was of a lesser nature than a contractual relationship since, after establishing in paragraph 34 of the judgment that the applicant was contractually linked to third-party companies only, it then went on to state, at paragraph 36, that the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations requires that 'the official concerned should have had *at least* direct legal links with the institution in question'.

72. Therefore, contrary to what the Commission claims, while it is true that ascertaining the existence of a contractual or statutory relationship between the person concerned and the State or international organisation is sufficient, according to the Court of First Instance's case-law, to justify the conclusion that a direct legal link exists, it is not permissible to conclude from that case-law that, where a relationship of that nature is absent, the existence of the above-mentioned link must be discounted on that ground alone.

73. Thirdly, I consider that, in referring to whether the person concerned is or is not subject to instructions from the State body or international organisation, [50] the judgments in *Lo Giudice* v *Parliament* and *Nevin* v *Commission* are actually alluding to a condition more specific than the mere condition of being subject to supervisory authority, namely a situation in which the person concerned is bound by a legal obligation under which he is subject to the managerial and supervisory authority of the recipient of the work as regards its performance. That said, I do not agree with the Commission's argument that the case-law has ruled out the relevance of that factor. On the contrary, in *Lo Giudice* v *Parliament*, it seems to be crucially important [51] in assessing whether a direct legal link exists between the applicant and the Community institution. While it is true that the significance of that factor was significantly reappraised in the later judgment in *Nevin* v *Commission*, it does not, however, seem to me to be possible to infer from that judgment that the Court of First Instance intended to rule out its relevance for the purposes of that assessment. [52]

74. Finally, it seems to me possible to conclude from the case-law cited thus far that, as the respondent has correctly pointed out — and contrary to the apparent implication of the Commission's argument — the existence of a direct legal link between the person concerned and the State or international organisation in question is to be assessed in the light of a *range of factors which are not predetermined*, with the

50 — See points 68 and 71 above.

51 — See paragraph 34 of the judgment.

52 — The Court of First Instance simply made it clear that, of itself, that factor is not sufficient to constitute (or, in the event that it is not present, to rule out) a direct legal link.

suitability of those factors to provide evidence of the existence of the requisite link evaluated, from time to time, in the light of the features of each individual case.

75. I shall now consider whether the criticism which the Commission has made in support of its appeal is well founded.

(c) The alleged infringement of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations

76. The Court has not yet had occasion to give a ruling on the concept of a direct legal link which the Court of First Instance has evolved.

77. In the present case, the Court will be able simply to review the appropriateness of the solution which the Court of First Instance has adopted with reference to the respondent's circumstances or to consider, in more general terms, the issue of interpretation submitted to it by the parties.

78. In the latter case, I consider that the concept of a 'direct legal link', as generally defined by the case-law of the Court of First Instance — leaving aside the question of whether it has been properly applied in individual cases, in which, in my view, an excessively formalistic approach has been taken — may provide a sound criterion on which to base the assessment of whether the activity pursued by an official before entering into the service of the Communities falls within the definition of '*work done for* another State or for an international organisation' within the meaning of the last sentence of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations.

79. In other words, I agree with the Court of First Instance that the condition for the application of that provision is the existence of a *legal* — and not merely a de facto — link which places the person doing the work for the State (or for the international organisation) in a *direct* relationship with the recipients of that work. I also take the view that that link need not necessarily be contingent on the existence of a contractual or statutory relationship between the two parties, but may also be derived from other factors characterising their relationship.

80. It is, therefore, necessary to assess whether the factors linking the respondent and the Republic of Austria, which have been identified by the Court of First Instance, are sufficient to constitute such a link.

81. In that connection, I should point out, by way of preliminary comment, that the Commission in no way disputes that the

permanent representations are subsumed within the concept of 'State'; this also cannot seriously be called into question.

82. In the same way as diplomatic missions, [53] the role of the permanent representations is to represent and protect national interests. Established on the basis of unilateral initiatives of the Member States, they act as bodies linking the Member States and the Community institutions, through the activity of Coreper, in particular. Over time, as a result of the need of the various administrations involved by Community activity to be represented, the permanent representations have become increasingly complex organisations reflecting the different structures of their home States. Although they perform the same functions and are based on largely the same model, the organisation and operation of the permanent representations vary from Member State to Member State, depending on their individual characteristics, practices and priorities. The number and origin of the officials and experts employed will, for example, depend on the differing operational requirements of the various national administrations.

83. Without it being necessary to dwell on the origin, nature and context in which the permanent representations operate, it is sufficient to point out, for the purposes of this case, that, for the application of the rule on disregarding periods under Article 4(1)(a) of Annex VII to the Staff Regulations, given the legal nature of the permanent representations, work done at their offices must, like work done within the embassies, be regarded as work done for the State to which they belong.

84. As I have already mentioned, the Commission does not criticise that conclusion, but it does dispute that the work done by the respondent within the PRA may be classed as work done 'for' the Republic of Austria. In particular, according to the Commission, in the judgment under appeal, the Court of First Instance — relying on the fact that the respondent had a function in and was a member of staff of the PRA — applied a purely formal criterion and failed to make a detailed analysis which should have led it to rule out the existence of the direct legal link which the case-law requires as a condition for applying the rule on disregarding periods.

85. I do not share the Commission's view.

86. I would point out, first of all, that, on the basis of the considerations set out above, the existence of the direct legal link cited by the Commission may be established on the basis

53 — For an example of the application of the rule on disregarding periods to work done for embassies, see Case 201/88 *Atala-Palmerini* v *Commission* [1989] ECR 3109 and *Nuñez* v *Commission* (cited in footnote 25 above). See also *Olesen* v *Commission* (cited in footnote 19 above), paragraph 40.

of a range of different factors, which have to be identified with reference to the individual case, as part of an overall assessment.

87. Secondly, contrary to the assumption which the Commission makes, for the purposes of applying the rule on disregarding periods, it is not necessary that the work in question should have been done in the context of a direct legal relationship of a contractual or statutory nature between the provider and recipient of that work.

88. Thirdly, I consider that the evidence cited at paragraph 36 of the judgment under appeal and, in particular, the fact that the respondent had been a member of staff of the PRA and that her status was the same as that of other officials working for that permanent representation entirely support the conclusion that, for the purposes of the application of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations, the work she did was performed for the Republic of Austria.

89. The fact that the respondent actually pursued her activity for non-State bodies, which operate within the PRA, does not affect the relevance, for the purposes of applying the provision at issue, of the legal link which she had with the Republic of Austria, in her status — confirmed by the Court of First Instance — as a member of the technical and administrative services of the Permanent Representation of that Member State.[54] In that connection, it should be borne in mind that the internal organisation of a permanent representation is a matter for the Member State to which it belongs. It is for that Member State to select the bodies which will form part of the permanent representation and to identify the public interests which the various bodies coexisting within the permanent representation must protect in relations with the Community institutions.

90. I also agree with the Court of First Instance that requiring the Community institutions, in situations similar to those of the present case, to undertake a complex analysis of the specific functions carried out by the official within a permanent representation would make excessively and unnecessarily costly the process of assessing, using objective and easily applied criteria, whether the conditions for the application of the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations exist.

91. It should, finally, be pointed out that, contrary to what the Commission appears to

54 — In my view, that status constitutes the main difference between the situation of the respondent and that of the applicant in *Nevin* v *Commission* (cited in footnote 25 above) and referred to several times by the Commission in its observations. Although subject to the managerial and supervisory authority of the institution for which he worked, Mr Nevin had never been officially a member of the staff of that institution and did not have the status of an official of that institution in accordance with the Staff Regulations or other rules governing employment relationships within the Community institutions.

claim, the solution which the Court of First Instance has adopted is not in any way incompatible with the fundamental purpose of the provision at issue, as it emerges from the considerations set out above, whether that fundamental purpose is considered basically to consist in avoiding penalising individuals who find themselves in the circumstances which the provision defines, or to constitute a kind of privilege benefiting the States and international organisations.

92. In the light of all of the above considerations, I therefore propose that the Court should dismiss the appeal.

VII — Costs

93. Pursuant to the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court makes a decision as to costs. Pursuant to Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

94. Since I am proposing that the Court should dismiss the appeal, and since the respondent has applied for the Commission to be ordered to pay the costs, I consider that the costs should be borne by the Commission.

VIII — Conclusion

95. In the light of the foregoing considerations, I propose that the Court should:

— dismiss the appeal;

— order the Commission to bear the costs.